

# The Activation of the Temporary Protection Directive for People Fleeing from Ukraine

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## Abstract

*The Temporary Protection Directive (Council Directive 2001/55/EC) and especially its lack of previous activation has been widely criticized, therefore this study intends to highlight the reasons why it was ideal to finally use this tool for providing protection for those fleeing the war in Ukraine. This paper details how the EU activated the Directive and how its Member States implement its provisions for the first time, addressing legal issues such as the personal scope of implementation and operational aspects of the activation, including the solidarity measures offered by EU institutions and Member States. Finally, the wider implications of this activation and the solidarity measures related to it and already visible in the context of the reform of the Common European Asylum System shall also be discussed.*

**Keywords:** Temporary Protection Directive, international protection, war in Ukraine, Common European Asylum System, solidarity.

## 1. Introduction

The Russian Federation launched a military offensive against Ukraine on 24 February 2022 that triggered the fastest growing refugee crisis since World War II. Following the invasion the European Council, in its conclusions of 24 February 2022,<sup>1</sup> condemned in the strongest possible terms Russia's unprovoked and unjustified military aggression against Ukraine, underlining the gross violation of international law and the principles of the UN Charter. The European Council demanded Russia's full respect for Ukraine's territorial integrity, sovereignty and independence within its internationally recognized borders, which includes Ukraine's right to choose its own destiny. The European Council also confirmed that the Russian government bears full responsibility for its act of aggression, causing human suffering and loss of lives, and that it will be held accountable for its actions. In solidarity with Ukraine, the European Council declared that the EU is united in its solidarity with Ukraine and will continue to

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1 European Council conclusions on Russia's unprovoked and unjustified military aggression against Ukraine, 24 February 2022, at <https://consilium.europa.eu/en/press/press-releases/2022/02/24/european-council-conclusions-24-february-2022/>.

support Ukraine and its people together with its international partners, including through additional political, financial, humanitarian and logistical support and an international donors' conference.

Based on the experience gained from the aftermath of the 2014 Russian illegal annexation of the Autonomous Republic of Crimea and the city of Sevastopol, and from war in East Ukraine, EU Member States' expectation<sup>2</sup> was that half of the Ukrainians coming to the EU, benefitting from visa-free travel for short-stays, will join family members or seek employment in the EU, while the other half will request international protection. Nevertheless, the estimated numbers<sup>3</sup> were below the figures of those actually fleeing Ukraine.

“The escalation of conflict in Ukraine has caused civilian casualties and destruction of civilian infrastructure, forcing people to flee their homes seeking safety, protection and assistance. In the first five weeks, more than four million refugees from Ukraine crossed borders into neighboring countries, and many more have been forced to move inside the country.”<sup>4</sup>

According to UNHCR data,<sup>5</sup> from the start of the invasion on 24 February to 1 May 2022 more than 5.5 million people have been displaced from Ukraine.<sup>6</sup> Based on provisional estimates of the EU Asylum Agency<sup>7</sup> about 2.3 million persons fleeing Ukraine have been registered for temporary protection in the EU+ from the beginning of the war to 24 April 2022. A further 7.7 million people have been displaced internally within Ukraine. Some 13 million people in Ukraine are estimated to be stranded in affected areas or unable to leave due to heightened security risks, destruction of bridges and roads, as well as lack of resources or information on where to find safety and accommodation.

- 2 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, ST/6846/2022/INIT, Recital (6).
- 3 According to Recital (6) of the Council Implementing Decision, depending on how the conflict evolves, based on current estimations, the EU is likely to be faced with a very large number of displaced persons, potentially between 2.5 million and 6.5 million as a consequence of the armed conflict, of whom it is anticipated that between 1.2 and 3.2 million would be persons seeking international protection. The UN High Commissioner for Refugees estimates that, under the worst-case scenario, up to 4 million people may potentially flee Ukraine. About the relevant case law of the CJEU, see e.g. Laura Gyeney, 'A családi élet tisztelben tartásának követelménye az Európai Bíróság migrációs tárgyú döntéseiben a strasbourgi joggyakorlat fényében', *Iustum Aequum Salutare*, Vol. 3, Issue 3, 2007, pp. 95-113.
- 4 UNHCR, *Operational Data Portal: Ukraine Refugee situation*, at <https://data2.unhcr.org/en/situations/ukraine>.
- 5 Id.
- 6 Arrival statistics are compiled by UNHCR from a variety of sources, mainly data provided by authorities from official border crossing, yet figures on some arrivals represent an estimate.
- 7 Analysis on Asylum and Temporary Protection in the EU+ in the Context of the Ukraine Crisis Week 16 (18-24 April) 2022, 27 April 2022, at <https://euaa.europa.eu/publications/analysis-asylum-and-temporary-protection-eu-context-ukraine-crisis-2>.

It seems more and more likely that the war and its consequences will not allow many Ukrainian nationals to return to their homeland for a longer time. Consequently, many of those fleeing Ukraine will eventually require a protection status from EU Member States, especially after the visa-free period that many of the Ukrainian nationals enjoy for 3 months in the Schengen area had lapsed. The specificities of the situation were recognized not only by individual EU Member States, but also by the whole of the EU and resulted in the first ever activation of Council Directive 2001/55/EC<sup>8</sup> (Temporary Protection Directive, Directive or TPD).

The Temporary Protection Directive and especially its lack of earlier activation has been widely criticized.<sup>9</sup> Therefore, this study intends to highlight the reasons why it was an ideal situation to finally use this tool for providing protection, how the EU had activated it and how the Member States implemented its provisions for the first time, both as regards legal issues such as the personal scope of implementation, as well as the operational aspects of activation, including the solidarity measures offered by EU institutions and the Member States. Finally, the wider implications of the activation and the solidarity measures related to it are already visible in the context of the reform of the Common European Asylum System (CEAS) that will also be discussed.

While the Temporary Protection Directive provides for a minimum harmonization of rights attached to the temporary protection status, the method and level of affording these rights differ in each Member State. Consequently, the study does not intend to provide an overview of these. Another specific aspect is the situation of those Ukrainian nationals, who also hold the citizenship of one of the EU Member States and therefore cannot be beneficiaries of temporary protection. They may also receive special help by the Member State of their nationality or other Member States, yet this is outside of the scope of the present study.

## 2. The Temporary Protection Directive

The asylum *acquis* of the EU was and still is based on the international obligations of its Member States and therefore the EU asylum policy “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”<sup>10</sup> Nevertheless, EU Member States gradually realized that apart from refugees

8 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.

9 See e.g. Meltem Ineli-Ciger, ‘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 Mediterranean’, in Celine Bauloz et al. (eds.), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, Brill, 2015, p. 234.

10 Article 78(1) TFEU.

fulfilling the criteria set out in the Geneva Convention, there are other groups of people that may require different forms of international protection based on different types of recognition. This alternative protection may differ from refugee status either by it being subsidiary in terms of criteria or by being temporary as regards the duration of protection. It was during the Balkan wars that the need to regulate temporary protection was recognized at EU level.

After adopting a Council resolution in 1995 and a decision in 1996 related to burden-sharing in the admission and residence of persons displaced by the conflict in the former Yugoslavia on a temporary basis,<sup>11</sup> the Member States and the Commission expressed the need for the rapid adoption of minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin, as well as measures promoting a balance of effort between the Member States in receiving, and bearing the consequences of receiving displaced persons.<sup>12</sup>

As a result, Council Directive 2001/55/EC was specifically conceived to promote a balance of efforts to jointly manage intra-European displacements, by giving immediate protection to persons fleeing war, to avoid overwhelming Member States' asylum systems. The Directive establishes an extraordinary procedure as the existence of a mass influx of displaced persons should be established by a Council Decision adopted by qualified majority based on the proposal of the European Commission. This Decision shall be binding in all Member States in relation to the displaced persons to whom it applies. Once the Council Decision is adopted, Member States shall provide persons to be admitted to their territory for the purposes of temporary protection with every facility for entering, with formalities reduced to a minimum because of the urgency of the situation. After entering the EU, anyone belonging to the personal scope of the Council Decision enjoys temporary protection and has the right to ask for its attestation by the issuance of a document. This way, the lengthy application procedure that one is subject to in case of applying for asylum, can be omitted.<sup>13</sup>

Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection offered should be of limited duration. Articles 12-16 TPD also set out a number rights in terms of which the Directive provides minimum harmonization. The Directive does not only set out obligations for Member States, but also facilitates their fulfillment by listing a number of solidarity measures in Chapter VI.

11 On 25 September 1995 the Council adopted a Resolution on burden-sharing, and, on 4 March 1996, adopted Decision 96/198/JHA on an alert and emergency procedure for the admission and residence of displaced persons on a temporary basis.

12 The Action Plan of the Council and the Commission of 3 December 1998; The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

13 Article 9 TPD.

It should be noted that the TPD has never been activated before. The two institutions responsible for its activation, namely the Commission and the Council have often been blamed for missing the opportunity, while experiencing massive influxes of asylum-seekers. Scholars argue that excuses for the lack of willingness to activate, such as the fear of generating pull factors or the low scale of influx, cannot be justified. Thielemann notes that it is rather push factors than pull factors that shape migration flows,<sup>14</sup> while Ineli-Ciger argues that persons fleeing from armed conflict or violence are not necessarily looking for the best conditions, only a secure place to go to.<sup>15</sup> I do not wish to question these statements, instead, I would just simply point to the fact that they are characteristics of those who are in genuine need of protection. The fear of Member States from generating further influx of asylum seekers is not primarily related to those eligible for international protection, but rather to the massive influx of mixed migratory flows, which would overburden their asylum systems. As for the scale of influx required for the TPD's activation, Ineli-Ciger observes that even the 55,298 persons that had reached Lampedusa in eight months should have been defined as a large scale influx,<sup>16</sup> which is obviously far from the volume of inflow presently experienced.

Finally, even the Commission found the TPD obsolete and suggested restructuring the EU's response for cases of mass influx through its Asylum and Migration Pact. In its Communication<sup>17</sup> the Commission arrives at the conclusion that the existing measures to grant quick access to protection do not seem to be fit for purpose any more since they no longer respond to Member States' current reality and must be repealed. This conclusion is based on a study<sup>18</sup> in which stakeholders agreed that it has been near impossible to attain Member State agreement on the possible activation of the TPD. Nevertheless, the Pact recognizes that certain groups of third country nationals at a high risk must be granted protection on a quick – immediate – basis and therefore the legislative proposal, still under negotiation, addressing situations of crisis and *force majeure* in the field of migration and asylum<sup>19</sup> aims to ensure that the persons who are granted immediate protection benefit from equivalent economic and social rights that beneficiaries of subsidiary protection enjoy.

14 Eiko R. Thielemann, 'How Effective are National and EU Policies in the Area of Forced Migration?', *Refugee Survey Quarterly*, Vol. 31, Issue 4, 2012, p. 22.

15 Ineli-Ciger 2015, p. 234.

16 Id. p. 241.

17 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.

18 Hanne Beirens *et al.*, *Study on the Temporary Protection Directive*, Final report, 2016, at [https://ec.europa.eu/home-affairs/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://ec.europa.eu/home-affairs/system/files/2020-09/final_report_evaluation_tpd_en.pdf).

19 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.

### 3. Activation of the Temporary Protection Directive

Following the start of the Russian invasion of Ukraine millions of people, mainly women and children, arrived in the EU in the first few months. The focus of the four Member States bordering Ukraine (Poland, Slovakia, Hungary and Romania) together with Moldova was rightly on meeting the immediate reception and protection needs of those fleeing the war. Therefore, they opened their Eastern borders and ensured an unconditional but at the same time controlled inflow to their territory. The Commission also acknowledged their efforts after seeing first-hand the very substantial support programs these countries provided.<sup>20</sup>

Many of those arriving enjoyed visa free travel within the Schengen area, and national immigration laws of the relevant EU Member States also provided for various processes for gaining residence permits, either based on humanitarian or legal migration (e.g. employment or family reunification) bases. At an extraordinary meeting of the Justice and Home Affairs Council on 27 February 2022, Home Affairs Ministers took stock of the response to the consequences of the war in Ukraine.<sup>21</sup> In order to monitor the situation, coordinate solidarity measures and involve all relevant actors, following this exchange, the Presidency decided to fully activate the EU Integrated Political Crisis Response (IPCR) arrangements. The more people arrived, the more Member States welcomed people fleeing from the war in Ukraine while the capacities of the countries welcoming most of the people, especially Poland, gradually became saturated. Ministers also discussed the possibility of establishing an appropriate temporary protection mechanism for the reception of these nationals, which received broad support.

This gave the Commission the momentum to propose the activation of the TPD mechanism for the first time on 2 March 2022.<sup>22</sup> Shortly after this, Home Affairs Ministers during their Council meeting on 3 March<sup>23</sup> agreed officially on the activation of the Temporary Protection Directive by adopting a Council Decision.<sup>24</sup> The main purpose was to enable the EU Member States to provide people fleeing the conflict in Ukraine with an appropriate response for their situation by offering a status harmonized at EU level while also supporting Member States under pressure. Furthermore, this move also had a symbolic nature, demonstrating that Europeans are responding in unity and solidarity faced with this crisis ongoing in the heart of our continent. Consequently, from

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European solidarity with refugees and those fleeing war in Ukraine, Strasbourg, 8 March 2022, COM(2022) 107 final, p. 4.

21 See at <https://consilium.europa.eu/en/meetings/jha/2022/02/27/>.

22 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 20 July 2001, and having the effect of introducing temporary protection, COM(2022) 91 final.

23 See at [https://consilium.europa.eu/en/meetings/jha/2022/03/03-04/?utm\\_source=dsm-auto&utm\\_medium=email&utm\\_campaign=Justice+and+Home+Affairs+Council](https://consilium.europa.eu/en/meetings/jha/2022/03/03-04/?utm_source=dsm-auto&utm_medium=email&utm_campaign=Justice+and+Home+Affairs+Council).

24 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, ST/6846/2022/INIT.



the first formulation of the idea on 27 February 2022 to its publication in the EU Official Journal on 4 March 2022 it only took five days to activate the TPD mechanism. This truly reflects the saying: if there is a will, there is a way. But it is also grounds for investigating what legal circumstances allowed for such a quick and unanimous activation of the Directive.

### 3.1. *Scope of Activation*

The Council decided to establish three different categories of eligibility for temporary protection. (i) There are categories to which the TPD shall be applied; (ii) in case of the second category the adequate level of protection may be ensured by either providing temporary protection set out in the TPD or under national law; and (iii) thirdly Member States may extend the application of the TPD to other categories. These categories shall be examined in comparison with the categories set out in the Commission's proposal in order to identify the justification behind their distinction

As regards the first, obligatory personal scope of the provision of EU temporary protection, the following categories of persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date belong to this group: (a) Ukrainian nationals residing in Ukraine before 24 February 2022; (b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and, (c) family members of the persons referred to in points (a) and (b).<sup>25</sup>

Compared to the Commission's proposal, point (b) was narrowed to a great extent as it was originally proposed to cover all third-country nationals or stateless persons residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin.<sup>26</sup> The requirement of inability to return in safe and durable conditions to their country or region of origin shall not apply to third-country nationals or stateless persons who have been legally residing on a long-term basis in Ukraine. It has been reported that the change was made at the request of Poland and several other countries<sup>27</sup> and narrowing down the personal scope through the Council Decision may be attributed to political and legal grounds. As regards applying the TPD to non-Ukrainian nationals, the issue may evoke recent grim recollections of illegal

25 For the purposes of paragraph 1(c), the following persons shall be considered to be part of a family, in so far as the family was already present and residing in Ukraine before 24 February 2022: (a) the spouse of a person referred to in paragraph 1, point (a) or (b), or the unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its national law relating to aliens; (b) the minor unmarried children of a person referred to in paragraph 1(a) or (b), or of his or her spouse, without distinction as to whether they were born in or out wedlock or adopted; (c) other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced persons, and who were wholly or mainly dependent on a person referred to in paragraph 1(a) or (b) at the time.

26 COM(2022) 91 final, Article 2(1)(b).

27 See at <https://politico.eu/article/eu-ministers-historical-deal-protect-ukraine-refugees/>.

migration having been instrumentalized by Belarus at the EU's Eastern borders.<sup>28</sup> This hybrid attack may have been behind the cautious approach of Member States when restricting the obligatory application of the TPD to those who had already benefited from international protection or equivalent national protection in Ukraine before 24 February 2022.

When carrying out this narrowing of scope in line with the EU *acquis*, the extent of harmonization could have been a useful guide. While the EU recognizes a number of international protection statuses, there is no harmonized status at EU level for tolerated stay that is to be provided to those who cannot be removed either because of the principle of *non-refoulement*<sup>29</sup> applies in their case or because certain factors delay their removal.<sup>30</sup> Consequently, in the Council Decision it was decided not to cover such persons with a harmonized status of temporary protection even if they are fleeing from Ukraine, but rather left it up to the Member States to decide. Nevertheless, the Council Decision even divides this category by setting out an obligation to protect those having permanently resided in Ukraine, while merely providing an opportunity to apply the TPD to those who only temporarily resided legally in Ukraine. Nevertheless, it should be noted that where the principle of non-refoulement applies, national law should allow those concerned to stay even if the Council Decision does not envision the obligatory or optional provision of EU harmonized temporary protection status for that specific category.

The second category, therefore, where the Council puts emphasis on the substance of the protection instead of its type, contains the category of stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin. The third category to whom the TPD may optionally be applied includes stateless persons and nationals of third countries other than Ukraine, who were residing legally in Ukraine and are unable to return in safe and durable conditions to their country or region of origin.

### 3.2. *Solidarity Measures*

Chapter VI of the TPD sets out various forms of solidarity for the activation of the Directive. In the recent context of the reform of the CEAS that has been ongoing for several years, the main question was whether these solidarity measures shall be applied in an obligatory way or whether Member States may

28 European Council conclusions on Belarus, 24 May 2021, at <https://consilium.europa.eu/en/press/press-releases/2021/05/24/european-council-conclusions-on-belarus-24-may-2021/>.

29 Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.

30 Responses to long-term irregularly staying migrants: practices and challenges in EU Member States and Norway, Common Template for EMN Study 2020, 17 July 2020, Final Version, at [https://ec.europa.eu/home-affairs/system/files/2020-12/estonia\\_ltim\\_study\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/system/files/2020-12/estonia_ltim_study_final_en.pdf).



decide which ones to apply. In order to understand the legal context, it should be borne in mind that the TPD is the first EU Directive adopted in the field of asylum. As it is a Directive “belonging to a different era where the EU had different legal competences in the Treaties and migration priorities”,<sup>31</sup> the formulation of the provisions of the Directive is rather vague. Nevertheless, it sets out a toolbox of solidarity measures that may be applied should the Member States decide to do so when activating the Directive. Consequently, the tools applied during a specific activation and the legal nature of those depend on the decision of the Council.

A number of helping tools are offered, including that of operational support by the relevant EU agencies. On 7 March 2022 the EU Agency for Law Enforcement Training (CEPOL) located in Budapest, Hungary, issued a statement<sup>32</sup> on behalf of the network of nine EU Agencies working on freedom, security and justice in the EU.<sup>33</sup> According to the statement the EU Justice and Home Affairs Agencies support the work of EU institutions and Member States as they help Ukraine and its people now that war once again reached Europe. By working together and utilizing each agency’s particular expertise, they act as a matter of urgency to assist EU Member States in terms of humanitarian support, respect for fundamental rights, management of EU external borders, visa measures, anticipation of hybrid threats, and reception of people fleeing war.

In the following I would like to highlight three main types of assistance agreed on and provided at EU level, namely financial support, monitoring and coordination, as well as potential assistance regarding the intra-EU mobility of eligible persons.

### 3.2.1. *Financial Support*

First and foremost, Article 24 TPD provides for financial assistance to Member States. The Directive only refers to the then European Refugee Fund, now Asylum, Migration and Integration Fund (AMIF), yet this does not cover all the financial support available. In its Communication<sup>34</sup> the Commission set out the aim of helping Member States to use EU funds quickly and flexibly, so that tailor-

31 Sergio Carrera *et al.*, ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine’, *CEPS Policy Insights*, No 2022-09, March 2022, p. 16, at [https://ceps.eu/wp-content/uploads/2022/03/CEPS-PI2022-09\\_ASILE\\_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf](https://ceps.eu/wp-content/uploads/2022/03/CEPS-PI2022-09_ASILE_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf).

32 See at <https://cepol.europa.eu/media/news/eu-justice-home-affairs-agencies-joint-statement-ukraine>.

33 The nine agencies are: the European Institute for Gender Equality (EIGE), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the EU Agency for Asylum (EUAA), the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), the EU Agency for Criminal Justice Cooperation (Eurojust), the EU’s Law Enforcement Agency (Europol), the EU Agency for Fundamental Rights (FRA), the European Border and Coast Guard Agency (Frontex) and the EU Agency for Law Enforcement Training (CEPOL).

34 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming those fleeing war in Ukraine: Reaching Europe to meet the needs, Brussels, 23 March 2022, COM(2022) 131 final.

made funding can flow rapidly to support the efforts of Member States, key organizations and civil society to make the rights granted through temporary protection a reality. On 4 April 2022 the Council adopted legislative amendments<sup>35</sup> to EU funds as a clear evidence of the EU's continued solidarity with the refugees from Ukraine and with the Member States hosting them, in particular those sharing borders with Ukraine. This is an important step in ensuring that Member States have sufficient resources to meet the growing needs for housing, education and healthcare. The amendments provide for further flexibilities both as regards cohesion policy funds and home affairs funds and by redirecting resources to assist people escaping the Russian military aggression against Ukraine.

In the field of cohesion policy, the Council adopted the Regulation on Cohesion's Action for Refugees in Europe (CARE) amending the 2014-2020 legal framework governing the European Structural and Investment Funds (ESIF) and the Fund for European Aid for the Most Deprived (FEAD). The changes include exceptional flexibility to transfer resources between programs financed by the European Regional Development Fund and the European Social Fund to address the inflow of refugees, including the reallocation of resources earmarked for infrastructural projects to provide healthcare and education to persons fleeing from Ukraine. Member States can use overall up to EUR 9.5 billion under the 2022 tranche of REACT-EU, one of the largest post-pandemic EU public investment programs, as well as unallocated cohesion policy resources under the 2014-2020 budgetary period. CARE also extends the 100% financing from the EU budget for cohesion programs by one accounting year. The extension of the 100% financing, the unlocking of programmed 2014-2020 cohesion funding, and the 2022 React-EU tranche are estimated to release almost EUR 17 billion.

The Council also adopted an amendment to the 2014-2020 home affairs funds and to the 2021-2027 Asylum, Migration and Integration Fund. This amendment will provide extra resources for the reception of persons escaping the war in Ukraine. It will extend by one year the implementation period of the 2014-2020 home affairs funds and unlock access to unspent amounts in the Asylum, Migration and Integration Fund which had previously been earmarked for other purposes, such as for example relocation. This will enable Member States to urgently use the remaining funds to help address the mass inflow of persons, and it is expected to release an estimated maximum amount of EUR 420 million of additional support from unused funds.

While the adoption of these new measures were extraordinarily swift and the use of available resources is facilitated to a great extent, most of the resources offered by the Commission are already available, but unspent, for instance because they had been previously earmarked. This therefore raises the question whether all Member States affected the most by the inflow of persons fleeing

35 See at [https://consilium.europa.eu/en/press/press-releases/2022/04/04/ukraine-council-unlocks-17-billion-of-eu-funds-to-help-refugees/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Ukraine%3A%20%25u20ac17%20billion%20of%20EU%20funds%20to%20help%20refugees](https://consilium.europa.eu/en/press/press-releases/2022/04/04/ukraine-council-unlocks-17-billion-of-eu-funds-to-help-refugees/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Ukraine%3A%20%25u20ac17%20billion%20of%20EU%20funds%20to%20help%20refugees).

from Ukraine have such unspent resources at hand or were they more successful in spending them earlier, therefore having less amounts available for coping with the present extraordinary situation. If so, will the European Commission be able to mobilize further financial support? The new generation of Home Affairs funds for 2021-27 opens the door to significant extra resources for Member States to provide effective reception facilities, including specialized support to vulnerable persons, and to manage asylum procedures.<sup>36</sup> Nevertheless, the adoption of many national programs is still ongoing, which does not allow for the swift use of such resources.

### 3.2.2. *Monitoring Member States' Capacity and the Task of Coordination*

Article 25 of the Directive puts much emphasis on the capacity of Member States to receive persons benefitting from the activation of the Directive. The TPD in theory requires the reception capacity of Member States to be set out in the Council Decision in figures or in general terms. According to the present practice it may be an impossible or useless exercise as certain Member States may mobilize further capacities should the situation so require, while the available capacities of other Member States may easily become occupied by non-Ukrainian asylum-seekers in the meantime. Therefore, instead of following the Directive word by word, the Council Decision chose a different approach. In order to allow the Union to coordinate and closely monitor the reception capacity of Member States so as to take action and provide additional support as needed, it creates a so-called 'Solidarity Platform' where Member States exchange information on their reception capacities and the number of persons enjoying temporary protection in their territories.

It should be noted that in recent years various platforms have been established with the aim of ensuring cooperation between Member States, of which the EU Migration Preparedness and Crisis Blueprint Network<sup>37</sup> (also called Blueprint Network) is the most recent one, initiated by the Commission in its Communication on the Asylum and Migration Pact. Its objective is to provide an operational framework for monitoring and anticipating migration flows and migration situations, building resilience, as well as organizing a situational response to a migration crisis. Member States should also contribute to a common situational awareness by sharing relevant information through the integrated political crisis response (IPCR) arrangements.

The new European response and the Solidarity Platform is meant to monitor the specific situation and the capacities of the Member States related to the war in Ukraine, while the Blueprint Network, as well as IPCR will also be used to collect information. The Solidarity Platform will collect information and examine the needs identified in the Member States and coordinate the operational follow-up in response to these needs. The Blueprint network will also continue to share situational information and consolidate all relevant information on migration

36 See Commission Communication, COM(2022) 107 final, para. 4.

37 Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, C/2020/6469.

management related to the Russian invasion on Ukraine, including on the implementation of Directive 2001/55/EC. One may have the impression that the various networks existing in parallel and each having functions to collect and analyze information as well as coordinate may result in a duplication of certain exercises, but Member States' officials are definitely encouraged to share and assess information on a regular basis via these networks.<sup>38</sup>

### 3.2.3. *Intra-EU Movements*

It is also a key question why the capacities of certain Member States are exhausted. The answer may lie in the provision of Article 26 of TPD, which sets out that

“for the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferal of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferal.”<sup>39</sup>

The Directive uses the term ‘transferal of the residence of persons’, which may be synonymous with the more recently used term relocation. In the ongoing debate on the CEAS reforms the key question is whether it is set out as an obligation or as an option. The Directive only imposes an obligation on Member States to communicate requests for transfers to the other Member States as well as the other Member States to inform the requesting Member State of their capacity for receiving transferees. While no distribution mechanism is envisioned by the Directive, yet it does not prohibit Member States from establishing one for this specific situation, either. Commissioner Johansson’s speech at the Plenary Session on EU Protection of children and young people fleeing the war against Ukraine contained a reference to standard operating procedures for transferring unaccompanied minors between Member States, yet it still cannot be understood as a proposal for a relocation mechanism for this specific group of children.

While there may be several Member States opposing from a political perspective any form of obligatory relocation mechanism, there is a different legal context that needs to be taken into account. Ukraine is listed in Annex II to Regulation (EU) 2018/1806,<sup>40</sup> and nationals of Ukraine are exempt from the requirement to be in possession of a visa when crossing the external borders of Member States for stays of no more than 90 days in any 180-day period. Therefore, Ukrainian citizens in the possession of a biometric passport enjoy the right of visa free travel within the Schengen area for three months. Many of those fleeing from Ukraine can therefore practice short-term free movement within the

38 Article 3 of the Council Decision.

39 Article 26(1) TPD.

40 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

EU, furthermore, even those not enjoying such a right are allowed to enter Member States not bordering Ukraine.

The Commission Guidelines highlight that the beneficiaries of the activation of the TPD also enjoy the right to move freely after a Member State has issued a residence permit in accordance with Article 8 of the Directive as the person enjoying temporary protection has the right to travel to Member States other than the one issuing the residence permit for 90 days within a 180-day period. Yet, double statuses should be avoided and thus, where such a person subsequently moves to another Member State, the first residence permit issued and the ensuing rights must expire and be withdrawn, in accordance with the spirit of Articles 15(6) and 26(4) of Directive 2001/55/EC. While the Eurodac Regulation<sup>41</sup> does not extend to the collection and storage of the data of beneficiaries of temporary protection, Member States and the Commission have been working on creating an *ad hoc* scheme in line with EU data protection provisions that would allow for the regular exchange of such data in order to be able to identify potential double statuses.

In this context, it should also be highlighted that it is not the residence permit issued by Member States but the Council Decision that creates the right to temporary protection for those belonging to one of the categories of its personal scope (also depending on the choice of Member States as regards specific categories of persons). Consequently, while Article 11 of the Directive sets out that a Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or seeks to enter without authorization onto, the territory of another Member State, this could hardly be implemented given the simple declarative nature of a residence permit issued by a specific Member State.

Therefore, it was a logical choice to apply the provision setting out that Member States may, on the basis of a bilateral agreement, decide that this Article should not apply. With a view to supporting Member States who are the main entry points of the mass arrival of displaced persons fleeing war from Ukraine, Member States also agreed not to apply Article 11 of the Directive on the margins of activating the TPD by adopting the Council Decision. This move seems practical from at least two viewpoints. Firstly, it allows Ukrainian nationals to find the most optimal Member State where they receive ideal support from their family, friends, employers or the state that is crucial for their integration should they need to or decide to stay for a longer period. Secondly, this also alleviates

41 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

pressure from EU Member States bearing a disproportionate burden resulting from a mass influx of people fleeing from Ukraine.

Therefore, instead of an artificial relocation scheme where Member States and not the beneficiaries of temporary protection themselves decide on where to transfer, this scheme of simply disapplying Article 11 allows for a situation more focused on the needs of those fleeing from Ukraine. Nevertheless, it should be highlighted that such a move was only possible since it extends solely to those enjoying temporary protection from the moment they step onto the territory of the EU. This also distinguishes them from other persons requesting international protection from EU Member States.

#### 4. Temporary Protection in Practice

Based on the input from Member States on the implementation of the Council Decision and the Temporary Protection Directive, the Commission has identified a number of issues on which it found it useful to provide guidance to the Member States in the form of operational guidelines.<sup>42</sup> The issues covered are mainly related to the scope of the Council Decision, including the issue of persons not covered by the Council Decision, how to handle children, particularly unaccompanied minors, and also questions on the right to move freely between Member States, registration and provision of information. At this point, I would just like to highlight a number of remaining practical issues.

According to the Commission Guidelines, no application process for temporary protection or adequate protection under national law should take place as the right to temporary protection of these persons is immediate. Therefore, the person concerned presenting themselves to the authorities to avail of the rights attached to temporary protection or adequate protection, would only have to demonstrate their nationality, their international protection or equivalent protection status, residence in Ukraine or family link as appropriate.

However, there are several practical questions arising from the special legal nature of the Council decision. First and foremost, a declaratory document is practical and is also foreseen by Article 8 of the Directive so as to avoid questioning the eligibility of further rights deriving from the temporary protection. Secondly, requirements still exist, even if no application procedure is envisaged, such as presenting evidence that the person in question belongs to one of the categories specified in the Directive, as well as checking whether no exclusion criteria are applicable. Therefore, the proper administration and registration of the persons concerned shall be organized by the Member States.

Another challenge for national legislators is to decide on the personal scope of the application of the Council Decision. As it was discussed previously, the Council Decision allowed some room for maneuver for Member States as regards

42 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.



the second and third category of beneficiaries or potential beneficiaries. In the following I aim to show the reverse effect of EU harmonization on the scope of the temporary protection offered by Hungary. Furthermore, Denmark as a country not applying the TPD and the Council Decision as well as the no-longer EU Member State UK are interesting examples, since many of Ukrainians may also seek protection in these countries.

#### 4.1. *Temporary Protection in Hungary*

There is a unique feature of the Directive as regards the division of competences. Article 7 TPD sets out that Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom Article 5 of the Council Decision applies, where they are displaced for the same reasons and from the same country or region of origin. Member States shall notify the Council and the Commission immediately if this provision is applied. While Article 7 regulates the application of the temporary protection to categories not belonging to the non-obligatory personal scope, once the TPD is activated, there may be situations when Member States already activate in their national law the use of a similar temporary protection status as specified in the Directive.

According to Section 19 of Hungary's Act LXXX of 2007 on asylum, Hungary grants temporary protection not only on the basis of the TPD, but also on the basis of the Government's decision. It should be noted that before 2014 it was the Hungarian Parliament that had such a right, yet in 2014 – presumably as a result of the Crimean conflict – this competence was moved to the Government to establish a quicker activation procedure.<sup>43</sup> Nevertheless, just as in the case of the TPD, the national application process had not been activated before the Ukrainian war either. Yet, already on the eve of 24 February 2022 the Hungarian Government made an instant move, and by issuing a Government Decree<sup>44</sup> it activated the national temporary protection mechanism to those fleeing from Ukraine.

The personal scope of the national activation was surprisingly wide as it extended to all Ukrainian citizens who arrived from the territory of Ukraine and all the third-country nationals legally residing in Ukraine. The laconic Government Decree did not therefore exclude non-Ukrainian nationals, who only temporarily, but legally resided in Ukraine before having to leave the country. Nevertheless, following the activation of the TPD at EU level, a new Government Decree,<sup>45</sup> repealing the previous one, significantly narrowed down the categories

43 Act XVI of 2014, Section 277(2).

44 Government Decree No. 56/2022. (II. 24.) on the different application of the transitional rules of the asylum procedure set out in Act LVIII of 2020 on transitional rules and epidemiological preparedness related to the cessation of an emergency.

45 Government Decree No. 86/2022. (III. 7.) on the different application of the rules of the Act on the emergency rules related to persons recognized as entitled to temporary protection, as well as on the amendment of Act CVI of 2011 on public employment and amendments to other laws related to public employment.

eligible for temporary protection in Hungary. Section 1 of the new Government Decree repeats the obligatory categories set out in the Council Decision.

As regards the second category of the personal scope discussed above, Section 2(2) declares the fact that Hungary chose not to apply the Council Directive, in accordance with its Article 2(2), to stateless persons and third-country nationals who can prove they held a valid permanent residence permit issued in accordance with Ukrainian law before 24 February 2022, who have resided legally in Ukraine on the basis of a residence permit and who are unable to return to their country or region of origin in safe and durable conditions. Section 2(3) merely adds that instead of the EU harmonized status of temporary protection, the immigration authority shall act in accordance with the general national rules. One may be puzzled by the interpretation and practical implementation of the consequence of choosing not to apply temporary protection to this category of persons. However, there are a number of specific rules that may apply in case of such humanitarian situations in Hungary that result in the ample protection which the Council Directive requires. For instance, Section 13(2) of Act II of 2007 on the entry and residence of third country nationals sets out that even in the absence of the conditions set out in this Act, entry and residence may be granted exceptionally, for the purpose of fulfilling an international obligation, for urgent humanitarian reasons or in the national interest.

It should also be noted that as regards a further, optional extension of the personal scope allowed by the Council Decision, although the national activation of the status covered this third category of persons with only a temporary legal status in Ukraine regardless of their ability to return to their country or region of origin, the Hungarian Government decided not to make such persons eligible for temporary protection at all. While this is not contrary to EU law, this will result in the rejection of applications for temporary protection by those falling within this category, who submitted their request between 24 February and 7 March 2022 based on the first Government Decree activating temporary protection in the national competence.<sup>46</sup> Nevertheless, the practice of the immigration authorities show that, by issuing certificates of temporary stay, they allow ample time for these people to make their decision on where to continue their stay and if they decide to reside in Hungary, to submit their application for their first residence permit on the territory of Hungary.

#### *4.2. Other Forms of Temporary Protection*

As regards the two countries, Ireland and Denmark that have an opt-out from the taking part in EU home affairs harmonization, Ireland is bound by the Temporary Protection Directive and therefore took part in the adoption of the Council Decision. Nevertheless, in accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and TFEU, Denmark is not taking

46 Section 12 of Government Decree No. 86/2022. (III. 7.) sets out that the provisions of this Decree shall also apply to proceedings concerning an application pending before the entry into force of this Decree.

part in the adoption of the Council Decision and is not bound by it or is subject to its application. However, Denmark decided to unilaterally show solidarity by adopting a new special act<sup>47</sup> on temporary residence permits for persons displaced from Ukraine.<sup>48</sup>

The new Danish provisions make it possible for Ukrainians to apply for a residence permit in Denmark. One can be granted a temporary residence permit under the law on temporary residence permits for displaced persons from Ukraine, if one is staying in Denmark, and is either a Ukrainian citizen or recognized as a refugee in Ukraine. One can also be granted a residence permit, if they are a close family member to a person in Denmark, who has been granted a residence permit under this Special Act.

Before the withdrawal of the United Kingdom from the EU, the TPD was applicable to the UK as well. Although the United Kingdom had an opt-out,<sup>49</sup> it gave notice, by letter of 27 September 2000, of its wish to take part in both the adoption and application of this Directive. Nevertheless, as a non-EU Member State, the UK does not take part in the implementation of the TPD, although many Ukrainians were ready to choose it as their country providing protection. In order to fulfil these expectations and show solidarity, the United Kingdom started to offer on the one hand a Ukraine Family Scheme visa from 15 March 2022 in order to allow applicants to join family members or extend their stay in the UK,<sup>50</sup> and on the other hand a Ukraine Sponsorship Scheme (Homes for Ukraine) allowing Ukrainian nationals and their family members to go to the UK if they have a named sponsor under the Homes for Ukraine Scheme.<sup>51</sup>

To apply to the Ukraine Family Scheme, one must apply to join or accompany their UK-based family member, and be Ukrainian or the immediate family member of a Ukrainian national who is applying to the scheme, and have been residing in Ukraine on or immediately before 1 January 2022. Once an application is approved, such persons can stay in the UK for up to three years and will be able to live, work and study in the UK and access public funds. Since the introduction of this new scheme, both the category of family member as well as the scope of the UK-based family member had been expanded. For example, while originally the scheme only provided for family reunification with British nationals, now someone having settled or pre-settled in the UK may also be joined by their family members through this scheme.

To apply to the Ukraine Sponsorship Scheme one must be Ukrainian, or the immediate family member of a Ukrainian national, and have been residing in Ukraine on or immediately before 1 January 2022, be outside of the UK, and have

47 A bill on temporary residence permits for displaced persons from Ukraine (the Special Act) was adopted by the Danish Parliament on 16 March 2022 and is in force since 17 March 2022.

48 See at <https://nyidanmark.dk/en-GB/Words%20and%20Concepts%20Front%20Page/Shared/Information%20Ukraine>.

49 In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to TEU and to the Treaty establishing the European Community.

50 See at <https://gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa>.

51 See at <https://gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme>.

an eligible UK-based sponsor. The UK-based sponsor does not need to register with the Homes for Ukraine Scheme if they are already in contact with the applicant, otherwise the applicant will be matched with people or organizations who have recorded their interest as ones wanting to offer a home to people fleeing Ukraine and become a ‘sponsor’ as part of the Homes for Ukraine scheme. Anyone in the UK with a spare room or home can become a sponsor as long as they can offer accommodation for at least six months and if they are not a British citizen, they have leave to remain in the UK for at least six months.<sup>52</sup>

## 5. Effect on the debate on the new EU Migration Pact

The New Pact on Asylum and Migration was initiated in a Commission Communication<sup>53</sup> on 23 September 2020 with another set of ideas and legislative proposals, with among others, the aims of giving a new impetus to reforming the CEAS. Although the newest reform proposals were prepared in rounds of consultation with the capitals and they aim at balancing the various interests of the different groups of like-minded countries, what has been proposed is a strange mixture of already existing elements of migration and asylum policy that have a questionable effect on their own, and when arranged into one set of rules, they do not necessarily create a truly operable system that is capable of resisting a crisis.

The main and almost exclusive form of reaction the Pact proposes to situations of disproportionate pressure is relocation or return sponsorship, the latter being in practice a delayed relocation after unsuccessful implementation of return decisions from the Member State of entry. Relocation has already proven to be an ineffective solution as it is neither capable of effectively alleviating the burden caused by constant inflows, nor is it capable of stemming further inflows of migrants. Those rescued and disembarked after a search and rescue (SAR) operation are handled as a separate category by the reform proposals, and the Pact envisions the automatic relocation of most of the rescued after a SAR operation, thus, it can generate further embarkations and increase the loss of lives, having the opposite effect of what is intended. While in 2020 the Commission was supportive of a quick adoption of the proposals, or at least those that have advanced well during the negotiations, the only reform element in which the co-legislators could reach an agreement was to turn EASO into a fully-fledged EU Asylum Agency.<sup>54</sup>

The protection provided by Central and Eastern European countries finding themselves on the frontline may raise two particular issues. (i) Firstly, the volatile situation of Ukraine has been in the spotlight in these countries for some time.

52 See at <https://gov.uk/register-interest-homes-ukraine>.

53 COM(2020) 609 final.

54 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, PE/61/2021/REV/1.

As regards the migration crisis in 2015, Kowalski<sup>55</sup> pointed out that Polish authorities should have put their perception of the crisis in a broader context by highlighting the potential outflow of internally displaced persons in Ukraine after the annexation of the Crimean Peninsula by Russia in 2014 together with the tens of thousands of Ukrainian workers in Poland who could easily turn into refugees should the situation escalate further. (ii) Secondly, many regard the current action of solidarity towards Ukrainian refugees as a shift in the asylum policy of Central European states. The basis for this is the misperception that an anti-migration narrative means a complete denial of the international human rights of people in need of protection. The Greek Government has always been advocating for an automatic, wide-spread relocation mechanism with a compulsory nature that the Central European countries had collectively rejected.<sup>56</sup> The issue of changing the current outlook on the migration issue was raised during a recent meeting between Notis Mitarakis, Greece's Minister of Migration and Asylum, and his German counterpart Nancy Faeser.

“While Greece is showing support for Ukrainians, the country's lawmakers are also hoping that Russia's invasion of Ukraine and the resulting refugee crisis will reopen the debate on a new EU Pact on Migration and Asylum that the government insists must now be completed. The prospect of a change in attitudes among the Visegrad countries, by far the toughest on migration issues, now seems to be on the agenda, given that those countries are now faced with the stark reality of increased migration flows. The goal of the Greek government, and the migration ministry in particular, according to local media reports, is for all EU countries to realize the value of the proportional relocation of refugees, a concept which until now had not gained traction among all of the EU partners.”<sup>57</sup>

This interpretation simply ignores the position also highlighted by Visegrad countries that refugees should be supported in the region closest to their country of origin, and those who arrived during or after the 2015 migration crisis have either crossed several safe third countries or are not in genuine need of international protection. Therefore, being ready from the start to fulfil the protection needs of those now fleeing a war in our neighborhood is not only not contradictory to previous positions, in fact, quite the opposite is true: the new situation just provided an opportunity for them to confirm their position in practice by offering their help when it is primarily this region's duty to welcome these refugees. Even think tank CEPS acknowledges that triggering the temporary protection regime is fully consistent with the position held by some EU Member

55 Michał Kowalski, 'From a Different Angle – Poland and the Mediterranean Refugee Crisis', *German Law Journal*, Special Issue on Constitutional Dimensions of the Refugee Crisis, Vol. 17, Issue 6, 2016, p. 968.

56 Joint Statement of the Prime Ministers of the Visegrad Group, 9 July 2021, at <https://visegradgroup.eu/download.php?docID=461>, p. 3.

57 See at <https://infomigrants.net/en/post/39312/greece-ramps-up-measures-to-help-ukrainian-refugees>.

States, including that of the Visegrad countries.<sup>58</sup> CEPS nevertheless criticizes the *à la carte* nature of showing openness depending on the different origins of asylum-seekers arriving at the borders of the EU.<sup>59</sup>

## 6. Conclusions

Responding to the enormous numbers fleeing Russian military aggression, the EU made an unprecedented move by activating the Temporary Protection Directive on 4 March 2022, thereby offering a unified protection status for Ukrainian nationals and their family members. Nevertheless, it should also be highlighted that many of the Member States close to Ukraine already made a step towards providing national protection from the beginning of the war. For instance, the Hungarian Government already activated the national scheme of temporary protection on the eve of 24 February 2022, although as a result of EU harmonization this was followed by the narrowing of the scope of temporary protection to the minimum obligatory category set out by the Council Decision.

Ensuring an EU harmonized status for those fleeing Europe had a number of positive results. People fleeing from Ukraine may not only enter, but may also be sure of receiving legal protection the same way all over the EU. While the level of services provided in the areas specified by the Directive may differ across the Member States because EU law does not allow for the harmonization of social rights or educational systems, beneficiaries of temporary protection enjoy the same set of rights all over the EU. Nevertheless, if they find more ideal circumstances because of their family members, friends, employment or benefits provided by the state, they may choose to move on to the Member State of preference.

The Council Decision was also unique in terms of its adoption. While the TPD sets out a qualified majority requirement for the Council, all the Member States were on board as a result of negotiations focusing on the personal scope and the agreement on the disapplication of readmission rules between the Member States. Think tank CEPS found that

“the decision-making strategy followed a long-standing malpractice in EU migration/asylum policy by both the previous and current European Commission which seeks to achieve an artificial need for a unanimous vote or ‘consensus’ among all EU Member States in this policy area.”

I find calling the aim of full implementation and aiming for consensus a malpractice that is incomprehensible after the major tensions and failure of implementing the 2015 relocation schemes. Commissioner Ylva Johansson also defended the direction of negotiations “arguing that the unanimous decision on

58 CEPS 2022, p. ii.

59 Id. p. 3.



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the ultimate product was more important than adopting the original proposal via a so-called qualified majority.”<sup>60</sup>

The direction of negotiation and the final compromise reflected the wounds Member States suffered during the past couple of years. Whether these bruises were from the tensions and mistrust from the 2015 relocation quotas crossing the red lines of several Member States or the more recent hybrid attack generated by Belarus instrumentalizing illegally arriving migrants, Member States learned to be cautious. So especially in the midst of a war going on in our direct neighborhood, we should allow them to feel at peace with their decision when activating the EU-wide temporary protection for the first time in EU history.

The most recent tragic events in Ukraine and the millions of people fleeing also showed that even situations emerging in the direct neighborhood of the EU may require Member States to be prepared to provide instant help and protection. Central and Eastern European states were ready from the outset to mobilize their reception and protection systems. The large scale of the influx of Ukrainians in clear need of protection nevertheless raises the question for the rest of the EU as well, whether it can continue spending a huge part of its administrative and reception capacities on asylum-seekers not in genuine need of protection.

60 See at <https://politico.eu/article/eu-ministers-historical-deal-protect-ukraine-refugees/>.