

TEMPORARY PROTECTION IN THE EUROPEAN UNION: A LEGAL ANALYSIS

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Abstract

Russia's full-scale invasion of Ukraine in 2022 led to a mass migration of people to European Union countries. This, in turn, has highlighted the issue of legal regulation of temporary protection for such individuals. Analyzing this issue is essential for understanding the mechanisms of providing assistance, defining the rights and obligations of beneficiaries of temporary protection, and assessing the effectiveness of European legislation in the context of a large-scale humanitarian crisis. The aim of the article is to conduct a comprehensive study of the legal regulation of temporary protection in the European Union, including an analysis of the relevant norms of European and national legislation of EU member states, as well as the practice of their application in the context of the Ukrainian crisis. To achieve the research goal, methods such as legal analysis, through which a detailed analysis of Directive 2001/55/EC on temporary protection and other relevant regulatory documents was carried out, were used. Using the comparative analysis method, a comparison was made of the national legislation of different EU member states to identify common features and differences in approaches to providing temporary protection. The results of the study can be used for further research into such issues as the long-term consequences of temporary protection for EU migration policy; the integration of beneficiaries of temporary protection into the labor market of EU member states; and the problems of the return of beneficiaries of temporary protection to their countries of origin after the end of the war.

Keywords: mass influx; Directive 2001/55/EC; activation of the Directive 2001/55/EC; rights of beneficiaries of temporary protection.

1. Introduction

Humanity has faced a long history of displacement, forced by wars, natural disasters, and other adverse events. These crises have resulted in massive migration flows, underscoring the urgent need for effective protection mechanisms for displaced persons. The European Union, as a prominent global actor, has been at the forefront of developing and implementing such mechanisms.

The recent conflict in Ukraine has highlighted the pressing need for temporary protection measures within the EU. Russia's unprovoked invasion has led to a mass

exodus of Ukrainians, with over 4.1 million individuals seeking refuge in EU member states as of June 2024 (Temporary protection for persons fleeing Ukraine - monthly statistics - Statistics Explained, 2024). This unprecedented influx has placed a significant strain on the EU's support services (Kuzmenko et al., 2023).

In response to this humanitarian crisis, the EU activated Directive 2001/55/EC on temporary protection, marking a significant departure from its previous reluctance to invoke this mechanism. While the directive had been in place for over two decades, it had remained largely dormant until the Ukrainian crisis. This activation underscores the EU's recognition of the urgent need for a coordinated approach to protect displaced persons during times of crisis.

The decision to activate temporary protection for Ukrainians was influenced by several factors. First, the scale and nature of the Ukrainian crisis, characterized by a sudden and massive influx of refugees, necessitated a swift and effective response. Second, the geographical proximity of Ukraine to EU member states facilitated the rapid movement of refugees and increased the urgency of providing protection. Third, the predominantly female composition of the Ukrainian refugee population, coupled with the presence of a significant Ukrainian diaspora within the EU, created solidarity among European citizens.

Moreover, the EU's visa-free travel regime for Ukrainian citizens and the absence of significant racial or religious differences between Ukrainians and Europeans facilitated the integration of refugees into host communities. These factors combined to create a favorable environment for the activation of temporary protection and the provision of essential services to displaced Ukrainians (Fullerton, 2023).

This article aims to contribute to a deeper understanding of the EU's migration policy and its effectiveness in responding to humanitarian crises. It will delve into the legal regulation of temporary protection within the EU, exploring its historical development, underlying principles, and practical application. By examining the relevant EU directives, national legislation, and case law, we will gain a comprehensive understanding of the rights and obligations of both individuals seeking temporary protection and EU member states.

Furthermore, the article will analyze the challenges and opportunities associated with the implementation of temporary protection regimes. These include issues such as access to services, integration into host communities, and the potential for abuse of the system. By addressing these challenges, policymakers can ensure that temporary protection remains an effective tool for providing humanitarian assistance to those in need. A comprehensive analysis of these aspects will enable policymakers to identify areas for improvement and ensure that temporary protection remains a viable and effective tool for protecting displaced persons in the future.

2. Literature Review

The issue of temporary protection in the European Union has gained significant attention in recent years, particularly due to the ongoing Russian war against Ukraine. Several scholars have explored various aspects of this phenomenon, providing valuable insights into its implications and potential future developments.

For example, M. Ciğer offers a forward-looking perspective by focusing on potential scenarios and solutions for people from Ukraine following the end of the current temporary protection regime in the EU. This analysis is crucial for understanding the potential challenges and opportunities that may arise in the future (Ciğer, 2023).

M. Dei M et al. contribute to the literature by analyzing the peculiarities of the concept of temporary protection in the EU within the context of defense against threats. Their work highlights the intersection between migration and security, providing a broader understanding of the implications of temporary protection policies (Dei et al., 2023).

F. Maryellen offers a multifaceted explanation for the activation of temporary protection in the EU, considering various factors such as geographical proximity, the perception of a temporary armed incursion, the demographic composition of refugees, the existence of a Ukrainian diaspora, visa-free travel, and the absence of racial and religious differences. This analysis provides valuable insights into the complex interplay of factors that influenced the EU's decision to activate temporary protection (Fullerton, 2023).

C. Xhardez and D. Soennecken (2023) take a comparative approach, analyzing the policy responses of the EU and Canada to the Ukrainian crisis. Their study, using a paired comparison strategy, sheds light on the similarities and differences between these two influential regions in their approach to temporary protection during a major crisis. This comparative perspective enriches the understanding of how temporary protection is implemented within different regions.

These studies collectively contribute to a growing body of literature on temporary protection in the EU. They offer diverse perspectives and insights, providing a comprehensive understanding of the phenomenon and its implications. By examining the potential future scenarios, the relationship between temporary protection and hybrid threats, and the factors that influenced the EU's decision to activate temporary protection, these studies offer valuable contributions to the field.

3. Results and Discussion

3.1. *The historical basis for temporary protection*

Nowadays, temporary protection is a highly relevant issue for discussions related to international migrant protection. For a long time, it has been seen as one of the instruments available to a state facing a massive influx of migrants.

Temporary protection started to form during the Balkan crisis of the 1990s. According to statistics, in the 1970s the number of asylum applications in Western Europe reached 13 000 per year, and 15 years later it exceeded 100 000. In the early 1990s, EU member states received 674,000 asylum applications (Koo, 2016). After the outbreak of the war, UNHCR introduced temporary protection as a response to the humanitarian crisis and encouraged states to implement protection regimes. Consequently, European states began to implement various schemes for the temporary acceptance of displaced persons during the conflict in former Yugoslavia (Genç et al., 2019). Thus, at that time, there were no unified rules or approaches to the provision of temporary protection.

In turn, the European Commission set the aim of a collective response to the conflict. In 1992-1993, a meeting of European ministers was held to discuss the problem of displaced persons and the need to develop approaches to solving it. The result of this meeting was the adoption of Council Resolution No 31995Y1007(01) (1995) on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis and Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, that established the range of persons whom EU member states are ready to accept on a temporary basis in the event of an armed conflict or civil war: prisoners-of-war, injured, seriously ill, victims of sexual violence, and those who came directly from the war zones (Article 1(a) of the 1995 Resolution) (Council Resolution No 31995Y1007(01)..., 1995; Malynovska, 2023).

But the documents on temporary protection that were introduced in the EU were not unified, so the policies implemented by the EU states varied.

An agreement that paved the way for harmonization in the field of immigration and asylum was the Treaty of Amsterdam. According to the provisions of Title IIIa on visas, asylum, immigration and other policies related to the free movement of persons, namely Article 73k, the EU Council must adopt "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their

country of origin and for persons who otherwise need international protection” (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 1995). The main legislative act adopted by the EU on temporary protection is the Temporary Protection Directive (Kortukova et al., 2022). Under Article 1, “the purpose of this Directive is 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 and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons” (Council Directive No 2001/55/EC..., 2001).

3.2. Directive 2001/55/EU in the context of the russian invasion of Ukraine

The Temporary Protection Directive, adopted in 2001, was activated for the first time in 2022, in response to Russia's unprecedented invasion of Ukraine (Dei et al., 2022). The European Commission quickly proposed the activation of the Temporary Protection Directive on March 2, 2022, following a call by the Home Affairs Ministers. On March 4, 2022, the Council of the EU voted unanimously to adopt Decision 2022/382 granting temporary protection to those fleeing the war in Ukraine (Temporary protection. Migration and Home Affairs, 2001). The Council of the EU referred in particular to the provisions of Article 5 of The Directive on the ‘existence of a mass influx of displaced persons’: as of March 1, 2022, more than 650,000 displaced persons had arrived in the Union from Ukraine through Poland, Slovakia, Hungary, and Romania (Malynovska, 2023); as of March 9, 2022, more than 2.3 million people had left Ukraine: Poland has received 1,400,000 of all people who fled Ukraine; Hungary - 214,160; Slovakia - 165,199; Moldova - 82,732; Romania - 84,671 (according to UNHCR) (Carrera et al., 2022).

The interesting thing is that, according to paragraph 15 of the preamble to the Decision, the EU Member States agreed not to apply Article 11 of Directive 2001/55/EC. This means that persons enjoying temporary protection can move freely within the EU without the risk of losing their temporary protection (Document No 52022XC0321(03)..., 2022).

Since Council Decision (EU) 2022/382 on the application of the Temporary Protection Directive was introduced for the first time, it can be called a precedent. This raises a logical question: why has this Directive not been used until now, and why did the situation in Ukraine lead to this decision? Since the adoption of The Directive in 2001, Europe has experienced several ‘migration crises’, the most relevant of which was probably the migration crisis of 2015 and 2016. Nevertheless, EU member states didn't use the legal act in these situations, which led some international lawyers to believe that the law would be a dead letter. According to scholars, one of the main reasons for non-application is the concept of ‘mass influx’ (Bidonko, 2023). Because the directive doesn't give a numerical value to this concept, there is uncertainty as to what number of persons equals a ‘mass influx’ for the mechanism of temporary protection to be implemented. Secondly, most EU Member States and the EU itself have preferred alternative instruments to deal with the influx of refugees instead of the Temporary Protection Directive (for example, emergency funding, enhanced assistance from the European Union Agency for Asylum). Another reason is related to the content of the Temporary Protection Directive. Some EU Member States considered The Directive too liberal, as temporary protection grants a wide range of rights, is collective in nature and has a fast mechanism for obtaining it, and access to work is granted instantly. They also feared that the activation of The Directive would create a ‘pull factor’ for more migrants from crisis regions to come to the EU (The EU's Response to Displacement from Ukraine ECRE's Recommendations..., 2023).

As for the situation in Ukraine, firstly, the EU member states recognized the Ukrainian displacement as a ‘mass influx’, which is the first step towards granting temporary protection. Secondly, according to Esin Küçük, the activation of The Directive

was considered necessary to prevent accusations of EU inaction. It was well fitted to the circumstances and didn't cause interstate disputes. The solidarity scheme was the main reason why the negotiations on the reform proposal reached a deadlock (Küçük, 2023). In the case of Ukraine, the decision was taken very quickly, in just a few days. Thirdly, the peculiar nature of the Russian invasion of Ukraine shocked many Europeans, which contributed to the rapid activation of The Directive. And given that Ukraine is in the process of 'European integration', the EU was interested in helping Ukrainians in this war. Another reason for the activation of The Directive was the so-called 'whiteness' or 'Europeanness' of Ukrainians. According to Bulgarian Prime Minister Petkov, «these are not the refugees we are used to... these people (i.e., Ukrainians) are Europeans»; 'these people are intelligent, they are educated people. ... This is not the refugee wave we have been used to, people we were not sure about their identity, people with unclear pasts, who could have been even terrorists...' (Europe welcomes Ukrainian refugees but others, less so, 2022).

3.3. The challenges of activating Directive 2001/55/EU

In general, the reaction of EU member states to the emergency in Ukraine with the number of people in need of protection changed the traditional concept. The Directive was initiated not only by the required qualified majority, but also by the unanimous support of all Member States. However, the activation of The Temporary Protection Directive led to a number of discussions and criticisms.

The first problem faced after The Directive came into force was the criticism of the EU's double standards. Of course, Council Decision (EU) 2022/382 isn't a mistake. However, scholars and experts don't abandon their thoughts about the reluctance of EU member states to activate the same mechanism in previous crises (Arab Spring 2010 or crisis in Syria 2015) (Garavello, 2022). At one time, even the European Commission itself concluded that it was unlikely to reach an agreement on The Directive's possible activation (Proposal for a regulation of the European parliament and of the council addressing situations of crisis and force majeure in the field of migration and asylum, 2020). The current crisis situation has obviously shattered all preconceptions, demonstrating that "there was simply no political will in the Commission and the Council to activate it" (Ciger, 2023). Therefore, one cannot be sure that the EU would have activated The Directive if the aggressor country against Ukraine had not been Russia.

The second problem is discrimination against third world countries. The fact is that by Council Decision (EU) 2022/382, The Temporary Protection Directive was activated in relation to Ukrainian citizens. This creates unequal conditions for asylum seekers from other countries (Bidonko, 2023). When analyzing the legal status of persons under temporary protection and regular asylum seekers, the situation of the former is more beneficial. Although UNHCR welcomes the special status provided for in The Temporary Protection Directive, it also emphasizes the importance of non-discrimination (Rodrigues & Tobler, 2022). Thus, states have a right, rather than an obligation, to extend temporary protection to this category of persons. Only eight out of twenty-seven EU Member States have decided to include the last category in their implementation schemes.

The next set of problems and gaps are primarily related to the practice of EU Member States in applying The Temporary Protection Directive. The European Council on Refugees and Exiles, analysing this aspect, notes the following existing gaps:

1) failure to provide or delayed provision of residence permits, exacerbated by the lack of access to an effective remedy and clear information on the rights of beneficiaries of temporary protection;

2) the lack of clear information on the rights of beneficiaries, available in appropriate languages and in an easily accessible form;

3) the problem of a narrow definition of family: there have been cases of discriminatory treatment of unmarried partners and third-country nationals married to

fleeing Ukrainians who are not covered by The Directive, which is also inconsistent with the Decision;

4) different interpretations of freedom of movement: although the European Commission has publicly confirmed that beneficiaries of temporary protection can move to another EU Member State and apply for temporary protection there, and Council Decision (EU) 2022/382 contains an agreement that Article 11 of Directive 2001/55/EC will not apply, this is not always respected by Member States (The EU's Response to Displacement from Ukraine ECRE's Recommendations, 2023).

With regard to access to socio-economic rights, the following problems arose: 1) limited access to long-term separate housing; 2) lack of simplified procedures for the recognition of qualifications and affordable training; 3) limited access to education; 4) limited access to medical and social assistance (Op-ed: Two years since the triggering of the Temporary Protection Directive: The dilemma of unity over fragmentation for the transitioning phase, 2024).

Temporary Protection Directive was adopted in 2001 and has been implemented into national law in all EU Member States. After Council Decision (EU) 2022/382, most countries introduced temporary protection for displaced persons from Ukraine at the national level. The first countries to introduce temporary protection for displaced persons from Ukraine were Hungary and Slovakia, while other border or neighboring countries (Poland, Latvia and Estonia) provided unrestricted access on the basis of short-term or long-term visa schemes (Rapid response by EU+ countries to address the needs of displaced people from Ukraine, 2022).

According to Article 9 of the Directive, the Member States shall provide persons enjoying temporary protection with a document, in a language likely to be understood by them, in which the provisions relating to temporary protection and which are relevant to them are clearly set out (Council Directive No 2001/55/EC..., 2001). As technology, in particular digital and social communication, has advanced, all EU countries have launched dedicated websites or webpages to provide all necessary information on entry, documents, protection schemes and practical advice. All websites are available in several languages, mainly in English and the official national language of the country, but also in Ukrainian. Further platforms for sharing information were social media and YouTube. For example, Latvia shared video instructions on how to register; Germany, in order to decentralise inbound flows, posted a video message from the German Federal Minister of the Interior on YouTube to explain the support, reception and integration services available; and the Czech Republic introduced virtual assistant technology to answer questions via a voice bot on its Ukrainian refugee helpline (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine: Situational Report, 2022).

Initially, reception centers were created as temporary shelters and resting places for people arriving in host countries. After the implementation of temporary protection, these structures were transformed into service centers where different agencies work under one roof. The services provided range from information, registration, advice on accessing rights, counselling, accommodation referrals, basic care, biometric data documentation and security checks. One-stop service points have been established in, for example, Belgium, the Czech Republic, Estonia, France, Greece, Latvia, Lithuania, Portugal, and Spain (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine: Situational Report, 2022).

Article 10 of the Temporary Protection Directive establishes the obligation of Member States to register the personal data of persons enjoying temporary protection. In particular, the name, nationality, date, and place of birth, marital status, family relationships (Council Directive No 2001/55/EC..., 2001). In the Operational Guidelines, the European Commission pointed out the fact that large-scale IT systems (e.g. Eurodac) and EU databases could not be used to register persons enjoying protection (Document No 52022XC0321(03)..., 2022). Therefore, Member States have to register such persons

in their national registers for foreigners or other national registers in accordance with the General Data Protection Regulation. But there is a problem - working only with national databases limits the possibilities of sharing information exchange, so the Commission, together with the EU Agency for Asylum, decided to provide a platform for information exchange. In practice, registration for temporary protection differs across the EU in terms of the responsible authority, documentation issued and processing time. According to the analysis provided by the European Union Agency for Asylum (EUAA), 1) in 17 EU countries, the authority that carries out the registration also issues the relevant documentation; 2) in 7 countries, several authorities control the registration procedure. As for the documentation, 17 EU countries issue the relevant documents on the day of registration, the rest - from 24 hours to 2 weeks (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine: Situational Report, 2022). Therefore, in order to manage registration flows more efficiently and speed up personal reception procedures, some EU countries have introduced electronic services for online registration, pre-registration or appointment making.

The Temporary Protection Directive provides for relevant rights, such as access to the labour market, education, and training (Article 12), healthcare, social welfare, and means of subsistence (Article 13), and access to the education system (Article 14). For this reason, free access to the relevant services is ensured by the issued documents (e.g. temporary protection certificate or residence permit). For emergency medical care, access is granted even before registration for temporary protection upon presentation of the relevant document (for example, a passport). With regard to employment, several countries offer personalised consulting services provided by accommodation centers or competent employment authorities, as well as special platforms for job opportunities (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine: Situational Report, 2022).

4. Conclusions

The concept of temporary protection, while relatively recent in international law, has emerged as a vital mechanism for safeguarding the rights of displaced persons during times of crisis. Its development can be traced back to the armed conflicts of the late 20th century, particularly the Yugoslav Wars, which precipitated a significant influx of refugees into neighboring countries and the EU. It served as a catalyst for the EU's adoption of the Temporary Protection Directive in 2001.

Temporary protection is a unique mechanism designed to offer immediate and temporary safeguards to individuals facing mass displacement. Unlike refugee status, which is granted on an individual basis and requires a rigorous assessment of persecution or well-founded fear of persecution, temporary protection is a collective measure that applies to a group of individuals fleeing a specific conflict or crisis. It differs from refugee status in terms of legal framework, applicable subjects, and procedures. This allows for a more expedited process, enabling authorities to provide essential services and support to displaced persons quickly.

The 2022 Russian invasion of Ukraine marked the first activation of the Temporary Protection Directive. This decision was driven by the political will and solidarity of EU member states, coupled with the scale of the displacement, which qualified as a "mass influx".

However, the implementation of the directive has not been without challenges. Issues such as double standards and discrimination against third-country nationals have surfaced. Furthermore, inconsistencies in the implementation of temporary protection across EU member states can lead to confusion and disparities in treatment. This can hinder the effective protection of displaced persons and undermine the EU's collective efforts to address migration challenges. These challenges underscore the need for further refinement of the temporary protection framework.

To address these challenges, it is essential to strengthen the legal framework governing temporary protection, promote consistency in its implementation, and ensure that it is applied in a fair and equitable manner. By doing so, the EU can continue to play a leading role in safeguarding the rights of displaced persons and promoting human rights on a global scale.

Based on the analysis presented in this article, several recommendations can be made to enhance the effectiveness of temporary protection within the European Union and ensure that it remains a viable mechanism for safeguarding the rights of displaced persons:

Firstly, the EU should review and update the Temporary Protection Directive to address the challenges and lessons learned from its implementation during the Ukrainian crisis. This may include clarifying eligibility criteria, expanding access to services, and strengthening enforcement mechanisms.

Secondly, member states should work together to develop common standards and guidelines for the implementation of temporary protection. This will help to ensure that displaced persons are treated fairly and consistently across the EU.

Thirdly, member states should strengthen their cooperation and coordination in managing temporary protection schemes. This includes sharing information, best practices, and resources, as well as working together to address common challenges.

By implementing these recommendations, the EU can enhance the effectiveness of temporary protection and ensure that it remains a valuable tool for safeguarding the rights of displaced persons during times of crisis.

Acknowledgements

The study was carried out as part of the grant Jean Monnet Module «EU MIGRATION POLICY WITHIN HYBRID THREATS» (project number: 101081717, project acronym: EUMPHT, call: ERASMUS-JMO-2022-HEI-TCH-RSCH. Project duration: 2022-2025) supported by the European Education and Culture Executive Agency.

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