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The EU's Temporary Protection Regime for Ukrainians: Understanding the Legal and Political Background and Its Implications

On February 24, 2022, Russia started a military invasion of Ukraine. Russian President Vladimir Putin probably calculated that a large number of Ukrainians fleeing to Europe would add to the pressures of and on EU member states, similar to prior migration crises. According to the UN's Refugee Agency, Russia's attack will likely create "Europe's largest refugee crisis this century" (UNHCR 2022). Still, the EU has reacted differently to the mass influx of Ukrainians compared to former migration crises. The EU member states have opened their borders and welcomed the Ukrainians. The EU as a whole has granted all newly arrived Ukrainians with a temporary protection status. This has been uncharted waters for the EU. The EU's asylum system is usually based upon an individual assessment of a migrant's protection claims. Such an individualized approach does not work in view of the high numbers of Ukrainians displaced from the conflict.

This article analyzes the origin, background, and implications of the EU's temporary protection regime for Ukrainians. It poses the question of why the EU Temporary Protection Directive (TPD) has never been used until the Russian invasion (albeit already established in 2001) and how it is working now that it has been triggered. The article concludes with a brief discussion regarding the likely consequences of this temporary protection regime for EU asylum policy at large.

THE EU TEMPORARY PROTECTION DIRECTIVE

The TPD was adopted in 2001 in view of the experience with the refugee crises in the 1990s induced by the Yugoslav wars. This EU-wide mechanism allows responding to mass influx of refugees and provides a group-based temporary protection status (European Commission 2016). The Directive sets minimum standards for temporary protection and seeks to promote a "balance of effort between Member States" regarding the reception and protection of displaced persons covered by the mechanism (Council Directive 2001/55/EC 2001). The directive is flexible in the sense that it can be activated as soon as member states perceive a "mass influx" (European Commission 2016). This flexibility and the rather vague definition of mass influx, however, also imply that it is essentially a political decision if or when to use the directive.

On 4 March 2022, the EU interior ministers triggered the directive for the first time and provided people fleeing the Russian invasion with temporary protection. The directive covers Ukrainian nationals and third-country nationals under international protection (e.g., refugee status) who were residing in Ukraine and have been displaced on or after 24 February 2022, along with their families. Under the directive or national law, the protection is also extended to stateless persons and third-country nationals permanently residing in Ukraine who are unable to safely return to their place of origin (Council Implementing Decision (EU) 2022/382). Those granted protection will be able to obtain a temporary residence permit, gain access to education, the labor market, and other social service benefits. These measures will last for an initial period of one year and can be extended by two six-month periods. Additionally, the Council, on the Commission's proposal, may extend the temporary protection up to one more year if necessary. It should be noted that third-country nationals temporarily staying in Ukraine are not covered by the Directive. However, they are allowed to enter the EU's territory, where they receive immediate support and assistance to return to their country of origin (Council Implementing Decision (EU) 2022/382).

Following the activation of the directive, messages of solidarity and unity were at the core of EU officials' communications. To exemplify, European Commission's President von der Leyen (2022) wrote that "refugees from Ukraine deserve our solidarity and support, and so do the countries that welcome



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them.” Similar views were echoed in the words of the High Representative/Vice President Josep Borrell, when he assured that the EU would protect everyone fleeing Russia’s aggression. Commenting on the swift decision to provide temporary protection, Commissioner for Home Affairs Ylva Johansson argued that “this is Europe at its best” (European Commission 2022b).

WHY HAS THE DIRECTIVE NEVER BEEN USED?

There have been several “migration crises” in Europe since the TPD was established in 2001, the most relevant of which probably was the Syrian crisis of 2015 and 2016 (Trauner 2016). Still, the EU member states never used the TPD, leading some authors to believe that the law would be dead letter (for example, see İneli-Ciğer 2015). One of the main reasons why it was never activated relates to the decision-making procedures: at any given crisis, usually only a few member states are particularly exposed to the mass influx. However, the TPD needs a qualified majority in the Council to take effect. This has proven difficult (European Commission 2016; İneli-Ciğer 2015). Second, instead of the TPD, the EU and its member states gave preference to alternative tools to deal with refugee influxes, such as emergency funding, reinforced assistance by the European Asylum Support Office, a mechanism for early warning, preparedness, and crisis management (European Commission 2016).

Another reason relates to the substance of the directive. Several member states considered the law as too liberal. Compared to an asylum procedure, it provides rather generous rights and no individualized (and lengthy) asylum procedure. Access to the labor market is provided instantly. This level of rights was seen as too costly by some member states, leading them to oppose the activation. Some member states also feared that the activation of the directive would create a “pull-factor” for more migrants of a crisis region to come to the EU. Last but not least, member states had very different political preferences in the field of asylum, notably regarding the issue of the responsibility-sharing regarding newly arrived refugees and displaced persons (European Commission 2016).

WHY HAS THE UKRAINIAN DISPLACEMENT BEEN DIFFERENT?

The Russian invasion of Ukraine has created a context in which most of these concerns of member states were no longer of relevance. To start with, no member state disputed that the Ukrainian displacement was a situation of a “mass influx.” A few days before the activation of the directive, more than 1 million people had fled Ukraine, while more than 650,000 people reached the EU by 1 March 2022 (Council Implementing Decision (EU) 2022/382). The European Commission (2022c)

estimated that up to 6.5 million Ukrainians could become displaced by the conflict.

Second, the decision-making procedure was swift and uncontested. Between the Commission’s proposal and the Council’s decision were only a few days. There were no lengthy discussions or a high level of politicization, which has characterized many negotiations on EU asylum law in recent years. An agreement was reached in a period of one week after the outbreak of the war.

Third, the particular nature of Russia’s invasion of Ukraine has shocked many Europeans, which facilitated the quick activation of the TPD. According to İneli-Ciğer (2022), a justification that Russia put forward for its invasion was its disapproval of Ukraine integrating into the Euro-Atlantic structures (NATO and the EU). The Union has hence had a stake in this war as well as sympathy towards Ukrainians fleeing the Russian aggression. The Commission, the Council, and other EU actors have regularly emphasized a need for solidarity with people fleeing the Russian aggression (see Peseckyte 2022; Council Implementing Decision (EU) 2022/382; European Commission 2022a).

Finally, the “whiteness” or “Europeanism” of Ukrainians is also frequently mentioned as one of the reasons why the directive was triggered. When referring to Ukrainians fleeing the war, politicians and journalists would often refer to them as “people like us.” To exemplify, the Bulgarian Prime Minister Petkov said: “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.” According to him, “these people are Europeans” and hence the EU needs to show strong support towards them (Sajjad 2022). Euro-Med Human Rights Monitor (2022) argues that statements like these uncovered racist tendencies in EU migration policies and discrimination against non-Europeans. Similarly, İneli-Ciğer (2022) writes about double standards in the treatment of refugees in Europe, arguing that the directive was activated because “Ukraine is acknowledged as a European country and the Ukrainians are white Christian Europeans.”

THE IMPLICATIONS OF THE TEMPORARY PROTECTION REGIME

The directive should avoid overwhelming the national asylum systems by reducing formalities and procedures to a minimum. Moreover, the TPD lays down the minimum standards for protection, so every member state can grant more generous rights and introduce national variations in the eligibility scope or application processes (Council Implementing Decision (EU) 2022/382).

The TPD defines a range of obligations by the member states towards people eligible for temporary protection. Inter alia, the member states are required

to provide residency permits over the duration of protection, access to accommodation, education, and labor markets, and offer social welfare assistance and medical care (Council Directive 2001/55/EC).

The directive calls for solidarity among EU member states to ensure a proper implementation of temporary protection. Member states should cooperate regarding their reception capacity and transfers of displaced persons from one state to another, seeking a “balance of effort” throughout the Union (Council Directive 2001/55/EC). The TPD stipulates that solidarity should come in a dual form: through financial support and reception capacity. In the current crisis, financial assistance comes from resources such as the Asylum, Migration and Integration Fund (AMIF) and Cohesion Policy funds, while member states’ reception capacities are consulted and coordinated within the Solidarity Platform (European Commission 2022c).

However, solidarity expressions in terms of relocations of Ukrainians are essentially voluntary for member states. This may hamper an equitable distribution of protection responsibilities (Ineli-Ciğer 2015). In the early stages of the Russian invasion, there was no debate on a lack of solidarity among EU member states. Poland welcomed almost two million refugees from Ukraine in the first month after the invasion.¹ In contrast to the hard-line stance in the past, the Polish Minister of Interior Mariusz Kamiński assured that “anyone fleeing from bombs, from Russian rifles, can count on the support of the Polish state” (Ministry of the Interior and Administration 2022). But it remains to be seen whether the distribution issue will not become more relevant if even higher numbers of displaced Ukrainians come to Poland or other Eastern European states. The Council can propose measures to moderate uneven pressures and ensure a fairer sharing of responsibilities (Ineli-Ciğer 2015).

OUTLOOK: WILL THE TEMPORARY PROTECTION REGIME CHANGE EU ASYLUM POLICY AT LARGE?

It is still too early to evaluate the impact of the temporary protection regime on EU asylum policy at large. However, there are two likely outcomes. It could be that the Ukrainian displacement remains largely decoupled from EU asylum policy. Alternatively, the Ukrainian crisis may foster the reform of EU asylum policy, reinforcing, for instance, existing solidarity tools.

In the early stages of the Russian aggression, the temporary protection regime for Ukrainians has remained largely decoupled from the EU’s asylum policy. There were different procedures (group protection vs. individualized examination of protection claims) and diverging sets of rights and duties for the affected individuals. A more hospitable reception of Ukrainians by the EU member states, including staunch support-

ers of restrictive anti-migration policies such as Poland and Hungary, has been obvious. Warsaw refused to take in asylum seekers in 2015 and pushed against EU’s open-door policy towards refugees (Ciobanu 2022). Sierakowski (2022) emphasizes that Poland’s current leadership invoked a strong anti-refugee sentiment in 2015, which is in sharp contrast to the current message of solidarity with Ukraine. However, Poland continued to have a very different border and migration policy towards migrants (from countries in the Middle East and elsewhere) seeking to come from Belarus. The Polish government has not lifted its emergency state at this border, which has been accompanied by a policy of pushing back migrants to Belarus.

The two-tracked approach towards Ukrainians and the rest can also be observed in other member states. The extraordinary nature of the Russian war has led to an exceptional policy towards Ukrainians. Thus far, there have been few signs that the hospitality levels will increase for refugees from other world regions, too. There were even reports that the member states were discriminatory towards Ukrainian minorities or non-Ukrainians arriving from Ukraine. Lighthouse Reports (2022) collected accounts of certain people being prohibited from boarding evacuation trains, among others. Moreover, Carrera et al. (2022) note that Ukrainian minorities (e.g., Roma), people without biometric passports, and unaccompanied children have also encountered difficulties during evacuation and reception processes. Some of the narratives created by political leaders and media further reinforced the notion of double standards of refugee protection and revealed racist tendencies in EU migration and asylum policies (Brito 2022; Carrera et al. 2022).

Still, the Ukrainian crisis has the potential to alter the dynamics of negotiating EU asylum laws in the medium to long term. The Eastern European member states have been at the forefront of preventing the EU to install a mandatory relocation quota for newly arrived asylum seekers in the EU (Zaun 2018). They did not want to allow a physical relocation of migrants from Greece or Italy to their territory. However, their political preference may now shift given the evolving situation on the ground. They may no longer face demands to relocate migrants from Southern Europe to their territory. In case more and more Ukrainians arrive, these states may rather get in the position to ask other member states to bring migrants physically away from Eastern Europe. To exemplify, the Mayor of Warsaw R. Trzaskowski suggested that due to the enormous influx of refugees into Polish territory, the country’s reception capacities would be quickly exhausted. To deal with such situation, he called for a more “synchronized and structured” system of relocation support on the European or international level (BBC Newsnight 2022).

The EU is currently negotiating a package of EU asylum laws first presented in the “new Pact of Migra-

¹ UNHCR, Situation Ukraine – Refugee Situation, <https://data2.unhcr.org/en/situations/ukraine>.

tion and Asylum” in September 2020. A key objective of this pact was to achieve “a new balance between responsibility and solidarity” (European Commission 2020). The Pact foresees several types of solidarity: relocation, return sponsorship as well as operational support and capacity building. Thym (2020) notes that for all the pledges to reboot the solidarity framework, it remains to be of a voluntary nature in normal times. Although in a moment of crisis solidarity becomes mandatory, the EU capitals can still decide if they want to assist in terms of relocation or return. The negotiations on this Pact may get a new stimulus through the Ukrainian displacement in terms of even getting to a compromise or allowing for more binding solidarity commitments. The UN High Commissioner for Refugees F. Grandi already sees a risk of overburdening some EU member states. He calls for a revision of the solidarity mechanism from a more “spontaneous” burden sharing towards a more structured one (Barigazzi 2022).

Overall, therefore, the temporary protection regime has been a watershed moment for the EU. It has presented the EU with a refugee challenge of unprecedented scale. The support of and welcome to Ukrainians differs from prior situations of “mass influxes” into the EU. In the early stages of the Russian invasion, the temporary protection regime for Ukrainians has remained relatively decoupled from the ways in which the EU treats other asylum seekers. The EU member states are likely to keep this differentiated treatment between Ukrainians and asylum seekers. Still, the Ukrainian displacement has the potential to alter the dynamics of negotiating EU asylum laws, most importantly regarding a more binding EU solidarity mechanism.

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