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THE EU RESPONSE TO THE MASSIVE INFLUX OF DISPLACED PERSONS FROM UKRAINE IN 2022*

1. INTRODUCTION

On 24 February 2022, Russia launched its military invasion of Ukraine, violating a fundamental, if not the main, principle of modern international law: the prohibition of the threat or use of violence against a state's territorial integrity or independence.¹ This fact is not altered by Russia's avoidance of using the word "war" and substituting it with the term "special military operation," nor by the absence of a formal declaration of war.²

In response to Russia's unprecedented act of aggression, which has had a profound impact on Europe and the world and has led to a significant increase in migration pressure on the European Union

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¹ Article 2(4) of the Charter of the United Nations.

² A. WYROZUMSKA, „Specjalna operacja wojskowa” Federacji Rosyjskiej w Ukrainie w sądach międzynarodowych” [*Special military operation of the Russian Federation in Ukraine in international courts*], «Państwo i Prawo» 9/2022, p. 30.

and Moldova, the EU has taken a decisive step. It has opted to activate temporary protection for displaced persons who are fleeing Ukraine due to the Russian invasion. The criteria for granting this protection and the measures to ensure a fair distribution of efforts among Member States in receiving displaced persons are governed by Council Directive 2001/55/EC of 20 July 2001 (Directive 2001/55/EC; TPD), which is a key component of this process.³

Activating temporary protection in 2022 was a momentous step, marking the first time the EU chose to do so.⁴ This decision, a direct response to the 2022 Russian invasion of Ukraine, is a unique and unprecedented move that warrants a closer examination of its implications and the circumstances that led to it.⁵

The primary objective of this article is to shed light on the unique construction of temporary protection for displaced persons, particularly in the context of the international protection of refugees under the Common European Asylum System (CEAS).⁶ The article's subsequent research question and purpose are directly linked to the 2022 Russian invasion of Ukraine and the EU's response, highlighting the exceptional and complex circumstances that necessitated the activation of temporary protection. It is important to note that these circumstances are far from ordinary. The article's next research objective is to confirm the unique nature of the activation process, covering not only its formal stages but also its immediate and broader context.

³ 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 (OJ 2001/L 212/12).

⁴ See also S.K. MAZUR, *The temporary protection directive is dead, so long live the temporary protection directive! The indispensability of the temporary protection scheme in the EU legal landscape*, «Polish Yearbook of International Law» 42/2022, pp. 297-298.

⁵ On the migration crisis, see E.H. MORAWSKA ET AL., *Common procedural guarantees for granting and withdrawing international protection in the Member States of the European Union at a time of migration crisis*, [in:] *Human Rights in the European Paradigm of the Protection of Aliens*, Warsaw 2023, pp. 189 et seq.

⁶ E.H. MORAWSKA ET AL., *op.cit.*, p. 319 et seq.

The article's final research questions touch upon specific elements of the normative construction of temporary protection. These elements are its duration, the categories of its beneficiaries, and, finally, the entitlements of these beneficiaries and the resulting obligations for Member States.

Certain issues have been excluded from the following analysis due to the framework of the article. They are broader questions, and their regulation goes beyond Directive 2001/55/EC. In the first instance, they arise from the common rules on the right to family reunification for beneficiaries of temporary protection,⁷ followed by specific issues concerning the protection of minors, including unaccompanied minors in the migration process,⁸ and complex issues related to the global phenomenon of trafficking in human beings, including human beings in the migration process.⁹

⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ EU 2003/L 251); see also the Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) (COM(2011) 735 final of 5 November 2011; Report from the Commission to the Council and the European Parliament on the application of Directive 2003/86/EC on the right to family reunification (COM(2008) 610 final, 8 October 2008; Communication from the Commission to the European Parliament and the Council on guidelines on the application of Directive 2003/86/EC on the right to family reunification, COM/2014/0210 final.

⁸ EU Council conclusions on the promotion and protection of the rights of the child, 3 April 2017, doc. 7775/17; Conclusions of the Council of the EU and the Representatives of the Governments of the Member States on the protection of child migrants, 8 June 2017, doc. 10085/17; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on the establishment of standards for the reception of applicants for international protection (recast) (OJ 2016/L 180/105), in particular Articles 21-24; see also European Parliament resolution of 12 September 2013 on the problem of unaccompanied minors in the EU (2012/2263(INI)) (OJ 2016/C 093/26).

⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011/L 101). The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *An EU Strategy to Combat Trafficking in Human Beings 2021-2025*, COM(2021) 171 final, Brussels, 4 April 2021.

2. TEMPORARY PROTECTION AS AN INSTRUMENT OF EU ASYLUM POLICY

European cooperation on asylum and migration has been developing more or less since the 1980s, first outside the framework of the European Community and subsequently within the EU, after the EU gained its first, albeit modest, powers in the field of asylum and migration under the Maastricht Treaty.¹⁰ A milestone in developing this cooperation was marked at the European Council's meeting in Tampere in 1999 when it announced its plan to establish the CEAS.¹¹ Interestingly, the European Council did this even though the Treaty of Amsterdam (AT) provided only for the adoption of minimum standards for certain aspects of asylum systems.¹² Article 63 AT, particularly its Section (2), was crucial to the emergence of temporary protection as an instrument of asylum policy.¹³ It provided that

“[T]he Council, acting in accordance of the procedure referred to in Article 67, shall . . . adopt . . . measures on asylum . . . relating to the status of refugees and other relevant treaties, within the following areas:

. . .

(2) measures on refugees and displaced persons within the following areas:

a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their

¹⁰ The Treaty on the European Union was officially signed at Maastricht on 7 February 1992 (OJ 1992/C 191/01).

¹¹ Tampere European Council 15 and 16 October 1999 Presidency Conclusions; www.europarl.europa.eu/summits/tam_en.htm [accessed 11 December 2023].

¹² Officially, the Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997/C 340); the AT introduced Title IV on visas, asylum, immigration and other policies related to free movement of persons, see in particular Articles 61 and 63 TEC. 61 and 63 of the revised EC Treaty.

¹³ Article 63 of the revised EC Treaty (ex Article 73k).

country of origin and for persons who otherwise need international protection,
b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.”

No limit of “5 years from the entry into force of the AT” is applied to these measures. Therefore, in May 2001, the Commission published a relevant legislative proposal.¹⁴ The solutions it contained were largely based on the experience the EU had acquired in connection with several *ad hoc* measures¹⁵ and various regulatory initiatives it had taken in connection with the influx of persons displaced by the conflict in former Yugoslavia.¹⁶ The first of these initiatives was taken in 1992,¹⁷ and the rest in 1995 and 1996.¹⁸ Nevertheless, from the point of view of temporary protection, the Council and Commission Action Plan of December 1998, adopted in connection with the wave of almost 850,000 displaced persons

¹⁴ Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2000/C 311 E/251).

¹⁵ Z. KUŹNIAR, A. FRONCZYK, *Wojna etniczna w byłej Jugosławii-źródła i skutki. Wybrane aspekty* [Ethnic war in the former Yugoslavia-sources and consequences. Selected aspects], «Zeszyty Naukowe WSOWL» 2/2013, p. 37 et seq.

¹⁶ N.A. HIDALGO, *The concept of the mass influx of displaced persons in the European Directive establishing the temporary protection system*, «European Journal of Migration and Law» 7/2006, p. 435.

¹⁷ Conclusions relating to persons displaced by the conflict in former Yugoslavia were adopted by the Ministers responsible for immigration at their meetings in London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993.

¹⁸ Accordingly: Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, 25 September 1995; Decision 96/198/JHA on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, 4 March 1996; Council Decision 96/198/JHA of 4 March 1996. on an emergency and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.

from Kosovo, was constitutive.¹⁹ It provided for a catalogue of measures for “asylum, external borders and immigration,” for the adoption as soon as possible of “minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and measures to promote a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons.”²⁰ It thus announced the implementation of Article 63(2) of the AT. This announcement was explicitly reiterated in the 1999 Tampere European Council Conclusions.²¹

The Council’s adoption of Directive 2001/55/EC on 20 July 2001 directly resulted from the Commission’s proposal. This Directive was aimed at achieving two main objectives: to standardise the legal systems of Member States in terms of the minimum standards for granting temporary protection in the event of a mass influx of displaced persons from third countries, unable to return to their country of origin; and to ensure a fair distribution of the responsibility among the Member States in receiving these displaced persons.

The Tampere conclusions played a pivotal role in integrating Directive 2001/55/EC and, by extension, temporary protection into the CESA. The establishment of minimum standards for temporary protection under Directive 2001/55/EC was in line with the short-term vision of the ESA, which was based on common minimum standards in procedural and substantive international protection. However, it’s important to note that Directive 2001/55/EC was not part of the CEAS instrument recast programme under the Hague Programme, nor was it included in the Stockholm Programme. As a result, it did not become an instrument for a “dynamic and comprehensive migration policy” based on the

¹⁹ See www.unic.un.org.pl/jugoslawia/index.php?id=wojna_w_kosowie; [accessed 11 December 2023]; see also the recommendations of the Parliamentary Assembly of the Council of Europe on the crisis in Kosovo and the Federal Republic of Yugoslavia: Nos. 1403 (1999), 1404 (1999), 1397 (1999), and 1400 (1999).

²⁰ The Action Plan of the Council and the Commission of 3 December 1998, para 37 (a) I (b).

²¹ Note no 11.

Global Approach to Migration,²² on the recast CEAS instruments and the integrated management system for the EU's external borders.

As a result, the regulation of temporary protection at the EU level has not moved beyond minimum standards. Its exclusion from the CEAS programmes, together with the apparent lack of political will to activate it even during the so-called migration crisis, has led to it being considered a secondary tool of EU asylum policy and, therefore, one that does not affect its everyday, fundamental dimension. Consequently, the Commission's proposal to repeal Directive 2001/55/EC was not at all surprising. It came in the Commission's proposal for a Regulation of the European Parliament and the Council on emergency and force majeure responses on migration and asylum.²³ The Commission presented this proposal as one element of a new comprehensive approach to migration and asylum management, which called for revised proposals for a regulation on asylum procedures and asylum and migration management, a proposal introducing screening and a proposal amending the Eurodac proposal. However, when temporary protection was activated in 2022, these legislative proposals were still under negotiation, and their adoption was not expected any time soon.²⁴ Therefore, to respond to the urgent challenges posed by the Ukraine

²² The European Council first set out the Global Approach to Migration (GAM) in December 2005 (COM(2007) 247); the concept was further developed in 2007 and 2008. It provides a framework for EU cooperation with third countries on migration and asylum. The Stockholm Programme emphasises the importance of consolidating, strengthening and implementing the GAM. See https://ec.europa.eu/home-affairs/orphan-pages/glossary/global-approach-migration-and-mobility-gamm_en; [accessed 24 September 2021].

²³ COM(2020) 613 final, Brussels, 23 September 2020.

²⁴ According to a Council communication of 20 December 2023, the Spanish Presidency of the Council and the European Parliament have agreed on the main political elements of five key regulations to thoroughly modernise the EU asylum and migration legal framework. Work is currently underway at a technical level to flesh out the details of the new regulations. Once finalised, an initial agreement will be submitted to the Permanent Representatives of the Governments of the Member States to the EU (Coreper) for approval. See *Council and Parliament's landmark agreement on the reform of the EU asylum and migration system*; www.consilium.europa.eu/pl/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach

crisis, the Commission sought a response based on the existing Directive 2001/55/EC and considered it “an appropriate tool to provide an effective and proportionate response to the situation.”²⁵

3. INSTRUMENTS AND CONTEXT FOR THE ACTIVATION OF THE 2022 TEMPORARY PROTECTION

From the perspective of the earlier rejection of requests to activate temporary protection, the broader political context of its recognition as “the most appropriate instrument in the situation of Russian military invasion of Ukraine” seems important.²⁶

Firstly, it is important to note the conclusions of the extraordinary meeting of the European Council on 24 February 2022, when the European Council condemned Russia’s military aggression against Ukraine, considering it a gross violation of international law and the principles of the UN Charter.²⁷ While there is no doubt that these words of condemnation set the stage for the EU’s response to the Russian invasion, it is nevertheless important for the determination of the EU’s reaction to the displacement of Ukrainian citizens that the European Council recognised the “tragic loss of life and human suffering caused by Russian aggression” and the resulting threat to the lives of civilians in Ukraine due to Russia’s “unprovoked and unjustified military actions.”²⁸

-breakthrough-in-reform-of-eu-asylum-and-migration-system/; [accessed 04 January 2024].

²⁵ Commission Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and giving rise to temporary protection, Brussels, 02 March 2022. COM(2022) 91 final 2022/0069 (NLE).

²⁶ Commission Proposal of 2 March 2023.

²⁷ European Council conclusions on Russia’s unprovoked and unjustified military aggression against Ukraine, www.consilium.europa.eu/en/meetings/european-council/2022/02/24/; [accessed 13 December 2023].

²⁸ Ibid, paragraph 3; independently of the European Council’s conclusions, EU Member States have taken a position on the Russian invasion. See *Joint statement by the members of the European Council*, European Council, Statements and remarks,

These general recommendations were clarified at the urgent extraordinary Justice and Home Affairs Council meeting on 27 February 2022. Most importantly, the Council expressed “broad support” for the mechanism in Directive 2001/55/EC and announced that the Commission would consider an appropriate proposal without delay.²⁹ Its proposal reached the Council on 2 March 2022. Its purpose was for the Council to declare that the mass influx of displaced persons from Ukraine was within the meaning of Directive 2001/55/EC, which thereby resulted in the activation of temporary protection.³⁰

On the grounds of Article 5(2) of the TPD, the Commission’s proposal included a description of the specific group of persons to whom the temporary protection was to apply, followed by the date from which the temporary protection was to take effect and an estimate of the scale of the migration of displaced persons.

At the same time, the Commission issued a Communication containing operational guidelines for managing the external borders to facilitate border crossings between the EU and Ukraine (Operational Guidelines).³¹ This facilitation consisted of a flexible application of the

24 February.2022; www.consilium.europa.eu/en/press/press-releases/2022/02/24/joint-statement-by-the-members-of-the-european-council-24-02-2022/; [accessed 14 December 2023].

²⁹ Extraordinary Justice and Home Affairs Council, 27 February 2022; www.consilium.europa.eu/en/meetings/jha/2022/02/27/; [accessed 14 December 2023]. However, according to the press release, “during the meeting, representatives of some Member States expressed doubts as to whether it was the right moment to launch the Directive and whether it would not be appropriate to wait a little longer.” These doubts were dismissed by the French minister Gérald Darmanin (France held the presidency of the Council at the time). “EU Ministers seek solutions as Ukraine humanitarian crisis looms,” by J. Dahm EURACTIV.com, 27 February 2022 (updated 28 February .2022); www.euractiv.com/section/justice-home-affairs/news/eu-ministers-seek-solutions-as-ukraine-humanitarian-crisis-looms/; [accessed 14 December 2023].

³⁰ Commission proposal of 2 March 2022.

³¹ Communication from the Commission of 2 March 2022 providing operational guidance on managing the external borders to facilitate border crossings between the EU and Ukraine (OJ 2022/C 104 I/01). This concerns measures available on the Schengen Borders Code while ensuring the necessary level of border checks.

Schengen Borders Code.³² In turn, the main objective of the Guidelines was to prevent the negative effects of a mass influx of displaced persons on the asylum systems of the Member States.³³ More than 650,000 displaced persons had arrived in the EU from Ukraine by 1 March 2022, so efficient implementation was necessary to achieve this objective. Moreover, the number of displaced persons grew dramatically, with a total figure of over 1 million by 5 March 2022. Therefore, the situation called for prompt action, so on 3 March. The Council unanimously agreed on an Implementation Decision and formally adopted it on 4 March. It took effect the same day (Executive Decision 2022/382; ID). This unanimous decision underscores the unity and solidarity of the EU in this crisis. It was addressed to those Member States to which Directive 2001/55/EC applied.

The last instrument for the activation of temporary protection in 2022 at the EU level was the Operational Guidelines for the Implementation of Council Implementing Decision 2022/382 Determining the Existence of a Massive Inflow of Displaced Persons from Ukraine within the Meaning of Article 5 of the TPD and Resulting in Temporary Protection (Implementing Guidelines). The Commission published them on 21 March 2022.³⁴ Their publication was necessitated by the lack of harmonisation in implementing Council Implementing Decision 2022/382 by individual Member States, which seriously jeopardised the objectives of activating temporary protection.³⁵

These instruments were adopted under specific political conditions. Their importance cannot be overestimated. The key factor warranting

³² These guidelines apply to all Member States except Ireland and the Schengen-associated countries (Norway, Iceland, Switzerland and Liechtenstein). Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on an EU Code on the rules governing the movement of persons across borders (Schengen Borders Code) (consolidated text).

³³ Article 2(a) of the TPD.

³⁴ Communication from the Commission on Operational Guidelines for the implementation of Council Implementing Decision 2022/382 determining the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and giving rise to temporary protection (OJ 2022/C 126 I/01).

³⁵ Recital 16 of Council Implementing Decision 2022/382.

their adoption was the Russian invasion of Ukraine and its nature. It was deemed unjustified and unlawful and was carried out because of Ukraine's rapprochement with the European Union and NATO, the West's defensive military alliance. Hence, the EU considered that it had a "direct interest in this conflict."³⁶

Notwithstanding this "interest," i.e. political will, the basic premise to launch temporary protection is the existence of a mass influx of displaced persons. This is a premise of a factual nature. It requires

... the arrival in the Community of many displaced persons, who come from a specific country or geographical area, whether their arrival in the Community is spontaneous or aided, for example, through an evacuation programme.

In short, a massive influx of displaced persons means "a significant number of displaced persons." Therefore, in justifying its decision, the Council first observed the large and escalating number of persons arriving in the EU and the risk of high migratory pressure at the EU's eastern borders.³⁷ On the grounds of Directive 2001/55/EC, the reality of these risks was confirmed by the United Nations High Commissioner for Refugees (UNHCR), who pointed out that, according to the most pessimistic scenario, up to 4 million persons could flee from Ukraine.³⁸ These circumstances posed a real threat to Member States' asylum systems and the operational efficiency of the CEAS.³⁹ They were further compounded by the border factor, i.e., four EU Member States (Romania,

³⁶ Commission proposal of 2 March 2022.

³⁷ Article 2(d) TPD and Recital 6 of Council Implementing Decision 2022/382.

³⁸ See UNHCR, *Operational Data Portal for the Ukraine Refugee Situation: Refugees from Ukraine recorded in Europe*. It is worth adding that, according to the UNHCR (as of 12 June), 6,554,800 refugees have fled Ukraine as a result of Russian aggression. The UNHCR uses the term "refugee" generically to refer to anyone who has left Ukraine due to the war; at: <https://data.unhcr.org/en/situations/ukraine> [accessed 14 June 2024].

³⁹ UNHCR's initial estimate of the number of people who have left Ukraine as a result of Russian aggression has proved to be extremely accurate. For, according to Eurostat data as of 8 March 2024, 4.3 million people are under temporary protection; at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20240308-3> [accessed 14 June 2024].

Poland, Slovakia and Hungary) have a direct land border with Ukraine.⁴⁰ Indeed, this meant no third country with which the EU could conclude a migration agreement to stop the mass influx of refugees from Ukraine into the EU. In other words, it could not apply the same arrangements as those in the 2016 EU-Turkey Statement, intended to end irregular migration from Turkey to the EU.⁴¹

4. DURATION OF THE TEMPORARY PROTECTION ACTIVATED IN 2022

An important element in the construction of temporary protection is its duration. Undoubtedly, duration reflects the specificity of a given protection in the refugee protection system. It is not a permanent solution for displaced persons,⁴² but it is intended to last for a specific period and expires at the end of that period. Therefore, the question arises: how long does or may temporary protection last?

The answer to this question must be sought at two levels of regulation. The first is contained in Directive 2001/55/EC. It allows us to distinguish at least three phases of temporary protection. Firstly, there is the initial level, which should be one year; this is not a minimum period, as the Council may shorten it at any time.⁴³ If it does not do so, this level is subject to automatic renewal for successive periods of six months up to a maximum of one year. Therefore, there is no need for a Council decision in this case. At the end of these six-month periods, and where the reasons for which the temporary protection was activated have not ceased, the Council may, on a proposal from the Commission, decide

⁴⁰ The influx of displaced persons from Ukraine thus affected, first and foremost, EU Member States whose governments had so far shown no political will to cooperate on asylum policy. This was significant because a qualified majority in the Council was required for the decision to activate temporary protection. S.K. MAZUR, *op. cit.*, p. 297.

⁴¹ *Statement of the EU Heads of State and Government*; www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/; [accessed 16 December 2023].

⁴² E. KÜÇÜK, *Temporary Protection Directive: Testing New Frontiers?* «European Journal of Migration and Law» 25.1/2023, p. 18 et seq.

⁴³ Article 6(1)(b) of the TPD.

by a qualified majority vote to extend the temporary protection by one year.⁴⁴

In sum, if the situation in the beneficiaries' country of origin does not allow them to safely and sustainably return from temporary protection with due respect for human rights and fundamental freedoms and taking into account the prohibition of *refoulement*, the maximum duration of temporary protection may be extended to three years.

The second regulation level for the duration of temporary protection derives from Council Implementing Decision 2022/382. It relates exclusively to temporary protection activated in connection with the Russian armed invasion of Ukraine, which began on 24 February 2022. This mode of temporary protection was activated on 4 March 2022, the date of publication of Council Implementing Decision 2022/382 in the Official Journal of the EU. Thus, the initial period of temporary protection introduced in connection with the Russian invasion of Ukraine lasted until March 4, 2023. As the Commission considered that the situation in Ukraine did not allow for the safe and durable return of persons granted temporary protection, it was automatically extended twice: the first time until 4 September 2023 and the second time until 4 March 2024.

However, the temporary protection of displaced persons from Ukraine will not end with the expiry of the second extension on 19 October 2023. The Council prolonged Executive Decision 2023/2409 until 4 March 2025.⁴⁵ Thus, the Council has "exhausted" the maximum duration of temporary protection provided by Directive 2011/55/EC.

In making this extension and acting on a proposal from the Commission, the Council took due notice of the situation in Ukraine, recognising that it was volatile and uncertain owing to Russia's hostile operations. It further noted that "heavy fighting [was] still taking place in many areas, and there [was] still a risk of escalation" and that the

⁴⁴ Article 6(2) of the TPD.

⁴⁵ Council Implementing Decision (EU) 2023/2409 of 19 October 2023 on the extension of the temporary protection introduced by Implementing Decision (EU) 2022/382 (OJ 2023/L 2409)

humanitarian situation was extremely difficult.⁴⁶ Therefore, displaced persons still cannot return to safe and durable conditions.

Subsequently, the Council took into account the risk of overloading the national asylum systems with a significant increase in the number of applications for international protection, which could occur with the termination of temporary protection on 4 March 2024. The Council considered it highly likely that displaced persons benefiting from temporary protection would start applying for international protection once it ended. Since currently there are around 4.1 million beneficiaries, with only a small percentage declaring their intention to return to Ukraine for permanent residence, the Council considered that the scale of this phenomenon could be enormous and pose a serious threat to the effective operation of the asylum systems in the Member States.⁴⁷

5. CATEGORIES OF DISPLACED PERSONS UNDER THE TEMPORARY PROTECTION ACTIVATED IN 2022

For its definition of the content of the implementing decision, Directive 2001/55/EC required the Council to describe the specific group of persons eligible for temporary protection.⁴⁸ Nevertheless, in principle, this group of persons defined by the Council first qualified as displaced persons under the definition in Directive 2001/55/EC.

This broad definition consists of two layers, the first containing an exhaustive list of general grounds and the second with examples of individual grounds. Essentially, therefore, displaced persons within the meaning of Directive 2001/55/EC are those who have been forced “to leave their country or region of origin or have been evacuated, in

⁴⁶ The Council noted that UNHCR estimates that more than 17 million people in Ukraine need urgent humanitarian assistance. See UNHCR, Position on Voluntary Return to Ukraine, June 2023; www.refworld.org/cgi-bin/texis/vtx/vwmain?docid=649a7c744. [accessed 28 December 2023].

⁴⁷ Recital 5 of Council Implementing Decision 2022/382.

⁴⁸ Article 5(3)(a) of the TPD.

particular in response to an appeal by international organisations,” and at the same time who

- are unable to return in safe and durable conditions because of the situation prevailing in that country;
- who may fall within the scope of Article 1A of the 1951 Geneva Convention or any other international or national instrument granting international protection...⁴⁹

Directive 2001/55/EC gives two examples of categories of persons who may meet these general criteria. The first concerns “persons who have fled areas of armed conflict or endemic violence,” and the second concerns “persons at serious risk of, or who have been victims of, systematic or generalised violations of their human rights.”⁵⁰

Under Executive Decision 2022/382, the preliminary criterion applies to the Russian invasion. Indeed, it is assumed that Executive Decision 2022/382 refers to those displaced persons who left Ukraine on or after 24 February 2022 following the military invasion launched by Russian armed forces on that day. It further divides these displaced persons into two categories: those under mandatory temporary protection and those under optional protection. The first category of displaced persons consists of

- a. Ukrainian nationals residing in Ukraine before 24 February 2022;
- b. stateless persons or 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 aforementioned Ukrainian nationals, insofar as the family was resident in Ukraine at the time of the circumstances leading to the mass influx of displaced persons.⁵¹

⁴⁹ The UN Convention Relating to the Status of Refugees, Geneva, 28 July 1951, (UNTS, vol. 189, p. 137) and the UN Protocol Relating to the Status of Refugees, New York, 31 January 1967, (UNTS, vol. 606, p. 267).

⁵⁰ Article 2(c) of the TPD.

⁵¹ Article 2(1) of Implementing Decision 2022/382.

The inclusion of family members of displaced persons under mandatory temporary protection in the first category was intended to express the importance of preserving family unity and the need to avoid differences in the status of members of the same family.⁵² Nevertheless, differences on this issue can be discerned between the Directive 2001/55/EC approach and Implementing Decision 2022/382. For example, the provisions of Directive 2001/55/EC are addressed to members of a “family separated” as a result of a displacement⁵³ and consequently impose an obligation on Member States to take appropriate measures for their reunification,⁵⁴ whereas Implementing Decision 2022/382 considers certain family members obligatory beneficiaries of temporary protection, regardless of whether the family member can safely and permanently return to their country or region of origin.⁵⁵

Also, displaced persons granted temporary protection on an optional basis can be separated into several sub-groups, the recognition of which is optional and requires the fulfilment of additional criteria or is solely at the discretion of the Member State. At least three sub-groups of this type can be identified. The first is made up 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 based on a valid permanent residence permit issued with Ukrainian law, and who

⁵² In the context of the principle of keeping families together in the migration process, see Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification (OJ 2003/L 251); see also Council of Europe Commissioner for Human Rights, *Realising the Right to Family Reunification of Refugees in Europe* (2017); <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0>; [accessed 20 December 2023].

⁵³ Article 2(h) of the TPD and Article 15(1) of the TPD.

⁵⁴ Article 15(2) and (3) of the TPD. Certain provisions of Directive 2001/55/EC are of particular relevance to family members: the interests of children (paragraph 4), solidarity in relation to transfers for the purposes of family reunification (paragraph 5), the issue and withdrawal of documents following family reunification (paragraph 6), cooperation and exchange of information (paragraphs 6 and 7).

⁵⁵ This condition holds for the remaining groups of beneficiaries of the 2022 temporary protection.

are unable to return in safe and durable conditions to their country or region of origin.”⁵⁶

These persons may be covered by temporary protection activated by Implementing Decision 2022/382 or by the corresponding protection provided by the national law of Member States (respective national protection). Nevertheless, this protection does not apply to their family members. The adequacy of national protection does not mean it is identical to temporary protection. However, within the framework of national protection, Member States must respect the provisions of the Charter of Fundamental Rights of the European Union⁵⁷ and act in the spirit of Directive 2001/55/EC and, in particular, they are obliged to ensure that these displaced persons have a right of residence, access to means of subsistence and housing, emergency medical care and appropriate care for minors and a decent standard of living.

Persons in this sub-group should be able to prove that they meet the eligibility criteria by presenting documents that “can help in establishing identity and residence” or “attesting family relationship or family unity and dependency with close relatives.”⁵⁸ Member States should redirect them to the relevant asylum procedure. However, the implementing guidelines tempered this requirement, encouraging Member States to take a flexible approach and “redirect [such persons] to an asylum procedure” only as a last resort.⁵⁹ Member States should take a similar approach to persons who state that they cannot safely return to their country/region of origin only if “the process of determining entitlement to temporary protection or adequate national protection becomes too

⁵⁶ Recital 12 of Implementing Decision 2022/382 refers to this category of beneficiaries.

⁵⁷ Charter of Fundamental Rights of the European Union (OJ 2012/C326/2).

⁵⁸ Commission Implementing Guidelines. This approach to the requirements made of refugees to present documents is not an isolated instance of how the matter is treated. See E.H. MORAWSKA ET AL., *op. cit.*, p. 73 et seq.

⁵⁹ However, in the Implementing Guidelines, the Commission encourages Member States to extend temporary protection or the corresponding protection provided by national law to include the family members of these persons.

complex;” such persons “should, in any case, be redirected to the asylum procedure.”⁶⁰

The second optional category of temporary protection beneficiaries consists of stateless persons and citizens of third countries other than Ukraine residing legally in Ukraine and cannot return to their country or region of origin in safe and durable conditions. Such persons may be third-country nationals who, for example, were studying or working in Ukraine on a short-term basis during the events leading up to the mass influx of displaced persons. The admission of such persons is determined on humanitarian grounds. Therefore, they do not need a valid visa, sufficient means of subsistence or valid travel documents to return safely to their country or region of origin.⁶¹

The third optional category of displaced persons is made up of those “who fled Ukraine not long before 24 February 2022 as tensions increased or who found themselves in the territory of the Union (e.g. on holidays or for work reasons) just before that date and who, as a result of the armed conflict, cannot return to Ukraine.” However, the extension of temporary protection or appropriate national protection to these persons is left to the discretion of the Member State, and Implementing Decision 2022/382 only provides that “Member States should be encouraged to consider extending temporary protection to those persons.”⁶² This peculiar encouragement seems to have grounds in Article 7(1) of the TPD,⁶³ with Directive 2001/55/EC excluding, in this case, the operation of the solidarity mechanism “of the structural support included into the European Refugee Fund, established by Decision 2000/596/EC, under the conditions laid down in that Decision.”⁶⁴ It appears that the above exclusion may significantly weaken this specific incentive.

⁶⁰ Commission Implementing Guidelines.

⁶¹ Recital 13 of Executive Decision 2022/382.

⁶² Recital 14 of Implementing Decision 2022/382.

⁶³ Article 7(1) of the TPD.

⁶⁴ Article 7(2) of the TPD, in conjunction with Articles 24 - 25 and 26, the European Refugee Fund in the 2021-2027 perspective, has been replaced by the Asylum, Migration and Integration Fund, the European Union financial mechanism established

Following in the footsteps of the 1951 Geneva Convention, Directive 2001/55/EC defines the grounds on which a Member State is obliged to exclude a displaced person from temporary protection. Two distinct categories of “serious” grounds can be identified in this respect.

The first category of these grounds includes three sub-categories. These are, firstly, evidence that the person has committed a crime against peace, a war crime or a crime against humanity; secondly, that they have committed a serious non-political crime; and thirdly, that they are guilty of acts contrary to the purposes and principles of the United Nations.⁶⁵ Again, it is worth pointing out that it is up to the Member State to deny a person temporary protection, and Directive 2001/55/EC leaves it free to do so. Therefore, the above are serious reasons for Member States to consider exclusion from temporary protection; in such cases, Member States are neither obliged nor automatically bound to grant temporary protection.

The second category of grounds for exclusion is similar; again, Directive 2001/55/EC speaks only of reasonable grounds for consideration. These may relate to the person concerned constituting a danger to the security of the Member State or the community of the host Member State.⁶⁶

In light of Implementing Guidelines 2022/382, the obligation to exclude a displaced person from eligibility for temporary protection is part of the general obligation of Member States to maintain law and order and safeguard internal security.⁶⁷ However, in the Operational Guidelines, the Commission “strongly recommends” that Member States carry out the necessary security checks, consult the relevant international, EU and national databases, and particularly the Schengen Information System (SIS).

for 2021-2027. See Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund.

⁶⁵ Article 28(1)(a) of the TPD.

⁶⁶ Although, in the latter case, Directive 2001/55/EC requires a final conviction for a particularly serious offence.

⁶⁷ Para 18 of the ID.

6. EU MEMBER STATES' OBLIGATIONS TO BENEFICIARIES OF THE TEMPORARY PROTECTION ACTIVATED IN 2022

One of the reasons for introducing and extending temporary protection was that it guarantees immediate protection and access to a harmonised set of rights while keeping formalities to a minimum in the event of a mass influx of displaced persons into the Union.⁶⁸

However, the guarantees of a rapid process for granting this protection are not intended for all displaced persons, for use in the same way as obligatory displaced persons, and the first group of optional displaced persons can use them. They are the only ones without a temporary or corresponding national protection application procedure.

The third attribute of temporary protection, besides the immediacy of protection and speed of procedures, in favour of its launch in March 2022, was to ensure that displaced persons have access to a harmonised set of rights in all Member States. This access appears to help displaced persons and the country of their first entry into the EU.⁶⁹ It implies the possibility of leaving the Member State of first entry and thus protects that State from the undue burden of a mass influx of displaced persons. A prerequisite for this access to become a reality is the right of movement of displaced persons, both before and after the issue of a residence permit. However, the range of persons entitled to exercise these rights varies.

Two groups of subjects can be distinguished regarding the right of movement before issuing a residence permit. These actors are, first and foremost, Ukrainian citizens holding biometric passports, as they may freely cross the external borders of the Union for stays not exceeding 90 days in any 180 days since 11 June 2017,⁷⁰ which allows them to choose the

⁶⁸ See, for example, para. 3.4 of the ID.

⁶⁹ Nevertheless, the treatment standards for beneficiaries are lower than those set out in the 1951 Geneva Convention. See D. TÜRKÖZÜ, *Two Sides of the Same Coin: Temporary Protection as a Practical and Unsettled Concept*, «Die Friedens-Warte» 92.3-4/2017-2019, p. 215.

⁷⁰ Regulation (EU) 2017/850 of the European Parliament and of the Council of May 2017 amending Regulation (EC) No 539/2001, which lists third countries whose nationals are entitled to cross the EU's external borders without a visa. The Regulation

Member State in which they wish to exercise their temporary protection rights.⁷¹

The second group of persons in terms of the right of movement before the issuance of a residence permit consists of those who, although entitled to temporary or appropriate national protection, are not exempted from the visa requirement (e.g. because they do not hold a biometric passport) and who do not hold a short-term visa, a long-term visa or a residence permit.⁷² This follows from Article 8(3) of Directive 2001/55/EC, which imposes a general obligation on Member States to provide persons entitled to temporary protection or adequate national protection with every facility to obtain the necessary visas for admission to their territory. Moreover, Member States should keep any related formalities to a minimum. Furthermore, the Commission recommends that “visas should be free of charge or their cost reduced to a minimum,” one of several recommendations that the Commission makes to Member States in its Operational and Implementation Guidelines.⁷³ Undoubtedly, they aim to protect the Member States of first entry.

The right to free movement after the issue of a residence permit pursues a similar objective. Indeed, according to Article 8 of Directive 2001/55/EC, once a Member State has issued a residence permit, a beneficiary of

included Ukraine in the list with effect from 11 June 2017. The provisions apply to all Member States (and Schengen-associated countries) except Ireland; Ireland recently unilaterally abolished short-term visas for Ukrainians.

⁷¹ This includes Member States (and Schengen-associated countries), including Ireland, which recently unilaterally abolished the requirement for short-term visas for Ukrainian citizens.

⁷² Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must have visas when crossing the external borders and those whose nationals are exempt from that requirement (consolidated text) (OJ 2018/L 303) as amended by Regulation (EU) 2019/592 of the European Parliament and of the Council of 10 April 2019.

⁷³ The Commission encourages Member States to use the measures provided for in Article 33 and Article 35(3) of the Visa Code, among other things, for a person wishing to exercise their rights in a Member State other than the Member State of first entry. See Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

temporary protection is entitled to leave for and reside in Member States other than the one issuing the residence permit for 90 days within 180 days. Moreover, the person may be granted another residence permit under temporary protection in these other Member States.⁷⁴

This point is associated with a joint declaration by Member States not to apply Article 11 of Directive 2001/55/EC, i.e. a declaration that they will not return persons enjoying temporary protection in a Member State under Council Implementing Decision 2022/382 and moving to another Member State without authorisation.⁷⁵

A prerequisite for a beneficiary of temporary protection to have access to harmonised rights is obtaining residence permits or other equivalent evidence from the Member State granting such protection.⁷⁶

These documents cover the duration of the protection, their validity ends with the termination of the protection, irrespective of when they were issued, and the duration of these documents may not adversely affect the treatment of persons enjoying temporary protection.⁷⁷ Moreover, these documents are purely declaratory since the right to reside on EU territory during the period of temporary protection derives from the relevant Council implementing decision, not from the Member State's decision to issue these documents. Consequently, at present, under Article 4(1) of Directive 2001/55/EC and Council Implementing Decision 2023/2409, the expiry date for all residence permits is 4 March 2025 unless the Council decides to terminate temporary protection earlier, on a proposal from the Commission, on the grounds of Article 6(1)(b) of Directive 2001/55/EC.

⁷⁴ In this context, see Article 15(6) and Article 26(4) of the TPD.

⁷⁵ Unless otherwise agreed by Member States on a bilateral basis; <https://data.consilium.europa.eu/doc/document/ST-6826-2022-ADD-1/pl/pdf>; [accessed 29 December 2023].

⁷⁶ Once again, it may be stressed that, before issuing these documents, Member States should consult the relevant international, EU, and national databases, in particular, the alerts on persons and documents in the Schengen Information System (SIS) and the data of the persons to whom they are issued.

⁷⁷ Article 8 of the TPD.

Residence permits are intended to confirm the status of the temporary or corresponding national protection beneficiary. Persons holding them should use them in their transactions with various authorities, such as employment offices, schools or hospitals. These documents should give the provisions relating to temporary protection and be written in a language understood by the beneficiary.⁷⁸

Therefore, residence permits are intended to enable beneficiaries to exercise the harmonised rights deriving from temporary or equivalent national protection. This function of residence permits is also referred to in the Commission, which recommends Member States “facilitate the opening of a bank account and access to relevant services of based on an identification document or equivalent identification solution accepted by Member States and of proof of entry to the EU on or after 24 February 2022, even if the procedure for issuing a residence permit is still pending.”⁷⁹

Turning to the construction of harmonised rights deriving from temporary or corresponding national protection, attention should be drawn to their social dimension, for they involve entitlements to economic, social and cultural rights. Thus, the related obligations of the Member States require action entailing a certain amount of financial expenditure. Therefore, they are obligations of deed (*facere* obligations) consisting of an obligation to provide a service. Its content is a specific (factual) act or deed.⁸⁰ In terms of temporary protection, however, they are obligations of a mixed nature. This is because the Member State is obliged to take action that directly benefits the beneficiary of temporary protection.

Therefore, it may be concluded that the obligations of the Member State consist, on the one hand, in action, but, on the other hand, in the beneficiary of temporary protection acquiring certain harmonised rights which have become real due to the Member State’s action. These obligations further consist of due performance, i.e. the careful creation of

⁷⁸ Article 9 of the TPD.

⁷⁹ Commission Implementing Guidelines.

⁸⁰ E.H. MORAWSKA, *Positive Obligations of States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Warsaw 2016, p. 337.

the factual and legal conditions which enable the beneficiary of temporary protection to exercise those rights, with the manner of performance left to the discretion of the Member State. Therefore, they are not obligations of results but diligent action to achieve a certain result. Nevertheless, the result to be pursued by the Member State through its action may sometimes be obtained without its diligence or not obtained despite its due diligence.

Thus, in the light of Directive 2001/55/EC, a Member State is obliged, for the duration of the temporary protection, to

- authorise the beneficiary's self-employment,
- grant them a work permit,
- authorise them to use offers of adult education,
- provide access to education for persons under the age of 18,
- make provisions to ensure the necessary social welfare,
- make provisions to ensure them of the necessary assistance to obtain a livelihood,
- make provisions for access to the necessary medical care,
- provide necessary special medical care to a person in need of such care,
- ensure access to adequate accommodation.

Based on the type of necessary measures a Member State is obliged to take, the above obligations may be divided into obligations to grant authorisations, obligations to provide access, obligations to lay down rules, and finally, obligations to provide the necessary assistance.

From the point of view of the necessary financial outlay, the obligation which appears to be the most far-reaching is the Member State's obligation to ensure that the beneficiary of temporary protection has "access to suitable accommodation or, if necessary, receive the means to obtain housing." ⁸¹ The latter obligation is not so far-reaching, although its proper implementation may require a financial effort on the part of the Member State. Nevertheless, the limits of its scope should be noted. Necessary medical care is intended to provide for the needs of persons requiring special assistance, i.e. unaccompanied minors, persons

⁸¹ Article 13(1) of the TPD.

who have been tortured, victims of rape or other forms of physical, psychological or sexual violence.⁸²

In medical care and financial outlay, attention should also be paid to obligations to provide the necessary medical care.⁸³ Therefore, this is a formal and legal obligation. Moreover, a Member State may limit it to necessary emergency aid and essential treatment of illness. In addition, the Member State should review the extent of such medical care concerning beneficiaries who are employees or self-employed, considering “their ability to meet their own needs.”⁸⁴ A similar verification of the aid level is to be made by the Member State in the case of essential assistance to help the beneficiary obtain a job. Moreover, in this case, it is also a matter of specific legal provisions regulating only necessary aid, and only if the beneficiary does not have sufficient resources.⁸⁵

From the point of view of the scope of benefits, the area of education appears to be the most open, with the level of this openness differentiated according to the age of the beneficiaries of temporary protection. The limit is 18 years, which is understandable in light of the UN Convention on the Rights of the Child.⁸⁶ For beneficiaries under 18, the Member State must provide access to education based on the national standard,

⁸² Article 13(4) of the TPD.

⁸³ Article 13(2) of the TPD.

⁸⁴ Article 13(3) of the TPD.

⁸⁵ *Ibidem*.

⁸⁶ The Convention on the Rights of the Child is a universal instrument for the protection of children’s rights also in the migration process (UN, Treaty Series, vol. 1577, p. 3/ OJ 1991 No. 120 item 526); all EU Member States are party to this Convention; its regulations in the context of safeguarding the best interests of the child in the migration process have been developed by the Committee on the Rights of the Child, in particular in Joint General Comment No. 3 (2017) of the CMW and No. 22 of the CRC in the Context of International Migration: General principles; Joint General Comment No. 4 (2017) of the CMW and No. 23 of the CRC in the Context of International Migration of 16 November 2017 states parties’ obligations, in particular concerning countries of origin, transit, destination and return; General Comment No. 13 (2011): The Right of the Child to Freedom from all Forms of Violence; General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin.

although this may apply only to the state education system.⁸⁷ On the other hand, adult beneficiaries are obligated to allow access to adult educational offers, vocational training, and the enhancement of practical vocational skills. In addition, the Member State may authorise such beneficiaries to benefit from the general education system.⁸⁸

The Commission has significantly expanded the above catalogue of obligations in the field of education for under-18s in its Implementing Guidelines. It draws the attention of Member States to the urgent need to support children under temporary protection to access and participate in the education system as soon as possible.⁸⁹ This support, a testimonial to our collective care and responsibility, may consist of organising assistance to learn the host country's language, providing information about that country, and psychological support or support for teachers and other educational staff receiving displaced persons. Furthermore, the Commission recommends broadening the scope of the national standard of treatment for children and parents under temporary protection in terms of early childhood education and care as a clear indication of our commitment to their holistic development.⁹⁰ In the same vein, the Commission draws the attention of Member States to the education of unaccompanied minors. They should have easier access to the education system as soon as possible, even if the relevant procedures are still ongoing, in a measure that underscores our dedication to their educational needs.⁹¹

⁸⁷ Article 14(1) of the TPD.

⁸⁸ Article 14(2) of the TPD.

⁸⁹ The Commission recommends that minors be given access to education as soon as physically possible and when they unquestionably meet the conditions for temporary or adequate national protection, even if the procedure for issuing a residence permit is still pending.

⁹⁰ Admittedly, the Commission indicates that this refers to Member States with a legal right to or a requirement to participate in early childhood education and care.

⁹¹ These are the procedures necessary to appoint a guardian or legal representative and to determine the type of care to which the child is entitled.

Finally, two obligations remain to be discussed. These require the least financial effort on the part of the Member State. The obligation is to allow the beneficiary to take up temporary self-employment or employment.⁹²

Again, these benefits have limits. The Member State must consider the rules applicable to its professional activities and labour policies. Accordingly, a Member State may “give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and to legally resident third-country nationals who receive unemployment benefit.”⁹³

In contrast, regarding remuneration, access to the social security system for employed and self-employed workers and other working and employment conditions, the Member State must apply the generally applicable regulations.

7. CONCLUDING REMARKS

This analysis shows that while temporary protection is an immediate and rapid instrument, it is not a permanent solution. The specification of three years as its maximum duration strongly emphasises its temporary nature. The question is, therefore, what rights do the beneficiaries of temporary protection have in the event of its termination?

In principle, these persons have at least two options. Firstly, they can apply for international protection. According to Directive 2001/55/EC, temporary protection does not prejudice the possibility of granting international protection, which under the CEAS may consist of refugee status or subsidiary protection beneficiary status.⁹⁴

Secondly, they may return to their home country or region. It should be noted that the Return Directive does not apply when terminating

⁹² Article 12 TPD.

⁹³ *Ibidem*.

⁹⁴ Article 3(1) of the TPD *mutatis mutandis*.

temporary protection, as it applies to third-country nationals staying illegally on the territory of a Member State.⁹⁵

Thus, as far as Directive 2001/55/EC is concerned, it is possible to distinguish between three types of return applicable to temporary protection beneficiaries and persons whose protection has ended. Priority is given to voluntary returns, which Member States are obliged to organise, showing respect for the dignity of returnees.⁹⁶ Moreover, such persons should be able to decide on a return once they have full knowledge of the prevailing situation at the place of return.⁹⁷ To that end, Member States may provide exploratory visits for those persons.⁹⁸

The second type of return of beneficiaries of temporary protection is enforced return. This concerns persons whose temporary protection has expired and who are not eligible for admission.⁹⁹ However, fulfilling these two conditions does not imply an automatic return. States must, in this case, consider “any compelling humanitarian reasons which may

⁹⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals (OJ L 2008/L 348/98).

⁹⁶ Article 21(1) sentence 1 of the TPD.

⁹⁷ In this respect, reference should be made to the EUAA Country of Origin Information (COI), available on the EUAA COI Portal. This portal provides access to Country of Origin Information (COI) for use in protection status determination procedures. It is managed by the European Union Asylum Agency (EUAA) in cooperation with the national asylum authorities of the EU+ countries (EU Member States plus Norway and Switzerland).

⁹⁸ Article 21(1), second sentence of the TPD. It should be added that the decision of the beneficiary of temporary protection to return during its duration to their country of origin is not final. Directive 2001/55/EC obliged Member States to consider requests for readmission in the host Member State “from persons who have enjoyed temporary protection and exercised their right to a voluntary return” favourably (Article 21(2) of the TPD). Thus, it may be concluded that Member States have learned from the tragedy of the forced returns of post-war displaced persons (DPs). See E.H. MORAWSKA, *The Implementing the Idea of Refugee Resettlement as a Permanent Solution to the Global Refugee Protection Regime (1921-1946)*, «European Review of Law and International Relations» 3/2023, p. 51.

⁹⁹ Article 22(1) sentence 1 of the TPD.

make a return impossible or unreasonable in specific cases.”¹⁰⁰ The third type of return is special. Indeed, implementation may be postponed on broadly defined humanitarian grounds. This must be the case when the state of health of beneficiaries of temporary protection is so serious that they cannot travel, as well as when the interruption of treatment would have serious adverse effects on them. Member States may not expel such persons if such a situation occurs.¹⁰¹ This may also hold for a family with minor children attending school in a Member State. Their return may be postponed, and they may enjoy their stay until the children have completed the current school period.¹⁰²

A final remark should be added that Directive 2001/55/EC allows Member States to adopt more favourable solutions for beneficiaries of temporary protection. The standards it contains are only minimum standards. However, another side is that if the national system is less favourable, the Member State should provide the additional rights in Directive 2001/55/EC.

As indicated in the introduction, this article aimed to describe the construction of temporary protection for displaced persons and its specificity against the background of the other instruments of the CEAS. Nevertheless, at the end of this dogmatic and formal analysis, the question may be whether Member States have correctly transposed Directive 2001/55/EC¹⁰³ and are correctly implementing Council Implementing Decision 2022/381. Both reports by UNHCR and the EU Asylum Agency and reports prepared by NGOs¹⁰⁴ and academic experts in the field of

¹⁰⁰ Article 22(2) of the TPD.

¹⁰¹ Article 23(1) of the TPD.

¹⁰² Article 23(2) of the TPD.

¹⁰³ For a critical analysis of the transposition of Directive 2001/55/EC, see, for example, G. NOLL, M. GUNNEFLO, *Conformity checking of the transposition by Member states of 10 EC directives in the sector of asylum and immigration*, Academic Network for Legal Studies on Immigration and Asylum in Europe, Synthesis Report, 2007; at: <https://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf>; [accessed 14 June 2024].

¹⁰⁴ European Council on Refugees and Exiles, *ECRE’s analysis of the main options available to ensure a smooth transition out of the TPD regime for people displaced from Ukraine: Transitioning out of the temporary protection directive*, Policy Paper 13, February

migration show that Member States still have a lot to do in this area.¹⁰⁵ For example, while acknowledging the efforts of Member States to manage the mass flow of displaced persons from Ukraine effectively, UNHCR has highlighted the need for greater consistency in the application of the TPD, pointing to the lack of harmonisation between Member States in their approach to certain social rights protected under the Directive. In UNHCR's view, it is important to improve consistency in implementing the Directive to maintain solidarity and burden-sharing between States and avoid unnecessary secondary movements. UNHCR has also highlighted some practical, administrative and legal barriers, common challenges related to lack of information, language barriers, difficulties securing a permanent address, limited childcare options and inability to produce some forms of identification.¹⁰⁶

On the other hand, however, it cannot be denied that the reception of such a large number of displaced persons from Ukraine is unprecedented and could be a difficult task, generating social tensions. These multiple tensions are compounded by uncertainty about what will happen when temporary protection ends, i.e. after 4 March 2025. Extending temporary protection based on a broad interpretation of Article 4/2 of

2024; at: https://ecre.org/wp-content/uploads/2024/02/ECRE-Policy-Paper-13_Transitioning-Out-of-the-Temporary-Protection-Directive.pdf; [accessed 14 June 2024].

¹⁰⁵ In this context, it is important to note the objections to the Polish system of temporary protection, and in particular, to the so-called special act, i.e. the Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country, as amended). See *Temporary protection provisions must be aligned with EU law*, <https://interwencjaprawna.pl/en/polands-temporary-protection-law-is-incompatible-with-eu-legislation-we-write-to-the-european-commission/> [accessed 4 January 2024]; the Special Act on assistance to Ukrainians contradicts the EU Council Executive Decision; www.prawo.pl/kadry/specustawa-o-pomocy-dla-ukraincow-a-decyzja-wykonawcza-rady,513948.html; [accessed 4 January 2024]. See also M. ŁYSIENIA, *Following the EU Response to the Russian Invasion of Ukraine? The Implementation of the Temporary Protection Directive in Poland*, «Central and Eastern European Migration Review», 12.1/2023, pp. 180-200.

¹⁰⁶ UNHCR, *The Implementation of the Temporary Protection Directive – Six Months on* data.unhcr.org/en/documents/details/96266 and UNHCR (2023) *Displacement Patterns, Protection Risks and Needs of Refugees from Ukraine – Regional Protection Analysis #2* data.unhcr.org/en/documents/details/100191; [accessed 14 June 2024].

the TPD seems to contradict the temporary nature of this instrument and the wording of Article 6(1)(a) of the TPD. Moreover, with the changing political situation and the deepening polarisation of Member States' positions on Russian aggression, it may be risky to assume that EU Member States will maintain a united position on the provision of temporary protection - in general, or, more specifically, in the same way, they decided in March 2022. This decision requires a qualified majority of 55% of Member States voting in favour, representing at least 65% of the total EU population.¹⁰⁷

The complexity and difficulty of finding an appropriate solution after March 2025 has another dimension. It stems from the need to strike the proper balance between the expectations of the Ukrainian authorities for the return of Ukrainian citizens so that they can join in the defence and future reconstruction of the country and the legitimate desire of Ukrainians enjoying temporary protection to continue the new life they have started in EU countries.¹⁰⁸

Therefore, finding the best solution to the above situation will undoubtedly be a real challenge for all the States and non-state actors operating under the temporary protection procedure.

THE EU RESPONSE TO THE MASSIVE INFLUX OF DISPLACED PERSONS FROM UKRAINE IN 2022

Summary

Russia has been conducting military action against Ukraine since 24 February 2022, in violation of the prohibition on the threat or use of violence against the territorial integrity or independence of any state, which is one of the fundamental principles of modern international law.

¹⁰⁷ K. LUYTEN, *One year of temporary protection for people displaced from Ukraine*, The European Parliamentary Research Service (EPRS) 2024; at <https://ephinktank.eu/2023/02/28/one-year-of-temporary-protection-for-people-displaced-from-ukraine/>; [accessed 14 June 2024].

¹⁰⁸ International Centre for Migration Policy Development, *Extending temporary protection: It seems most viable, but is it?*; at <https://www.icmpd.org/blog/2024/extending-temporary-protection-it-seems-most-viable-but-is-it/>; [accessed 14 June 2024].

The Russian aggression has resulted in a sharp increase in migratory pressure on the EU. As a result, the Union launched a special temporary protection procedure for the first time in its history. As temporary protection is one of the instruments of the Common European Asylum System, this article begins with an analysis of its nature within EU asylum policy. The article's next research question and objective relate directly to the EU's response to the Russian act of aggression. They are relevant for clarifying the political context of the activation of temporary protection and, simultaneously, establishing the circumstances necessary for the activation of temporary protection in the light of Council Directive 2001/55/EC. This Directive and Council Implementing Decision 2022/382 determine the normative construction of the temporary protection 2022. These elements are its duration, the categories of beneficiaries, and the beneficiaries' entitlements, which result in obligations for Member States. The analysis of these issues will determine to what extent temporary protection is a viable and effective measure of international protection for displaced persons from Ukraine.

ODPOWIEDŹ UNII EUROPEJSKIEJ NA MASOWY NAPŁYW WYSIEDLEŃCÓW Z UKRAINY W 2022 R.

Streszczenie

Od 24 lutego 2022 r. Rosja prowadzi działania wojskowe przeciwko Ukrainie, naruszając tym samym zakaz groźby lub użycia siły przeciwko integralności terytorialnej lub niepodległości jakiegokolwiek państwa. Jest on jedną z podstawową zasadą współczesnego prawa międzynarodowego. Rosyjska agresja spowodowała gwałtowny wzrost presji migracyjnej na UE. W związku z tym Unia po raz pierwszy w swej historii uruchomić specjalną procedurę ochrony tymczasowej. Ponieważ ochrona tymczasowa jest jednym z instrumentów Wspólnego Europejskiego Systemu Azylowego, artykuł rozpoczyna się od analizy jej charakteru w ramach polityki azylowej UE. Kolejne pytanie badawcze i cel artykułu są bezpośrednio związane z reakcją UE na rosyjski akt agresji. Są one istotne dla wyjaśnienia politycznego kontekstu aktywacji ochrony tymczasowej i jednocześnie wykazania okoliczności niezbędnych do uruchomienia ochrony tymczasowej w świetle dyrektywy Rady 2001/55/WE. Dyrektywa ta i decyzja wykonawcza Rady 2022/382 przesądza o konstrukcji normatywnej ochrony tymczasowej z 2022 roku. Elementami tymi są czas jej trwania, kategorie beneficjentów i wreszcie uprawnienia beneficjentów wraz z wynikającymi z nich obowiązkami dla państw członkowskich. Analiza tych kwestii pozwoli określić, w jakim stopniu ochrona tymczasowa jest realnym i skutecznym środkiem ochrony międzynarodowej dla wysiedleńców z Ukrainy.

Keywords: Russian invasion of Ukraine; European Union Asylum Policy; Common European Asylum System; Temporary Protection.

Słowa kluczowe: rosyjska inwazja na Ukrainę; polityka azylowa Unii Europejskiej; Wspólny Europejski System Azylowy; ochrona tymczasowa.

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