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## The war in Ukraine and the renaissance of temporary protection - why this might be the only way to go

by Martin Wagner

**This Thursday, 3 March 2022, an Extraordinary Justice and Home Affairs (JHA) Council meeting is expected to vote on a proposal by the European Commission to activate the EU's Temporary Protection Directive for the first time for people fleeing the war in Ukraine. There are good reasons to do so.**

With the war in Ukraine ongoing at a larger scale than anyone expected, many Ukrainians are forced to seek protection in neighbouring countries. The severity with which the Russian military is hitting all parts of Ukraine raises concerns of forced displacement on a scale unprecedented in Europe's recent history. In less than a week, [874,000 people have already left Ukraine](#) (as of 2 March) The neighbouring EU countries, Poland, Slovakia, Hungary, and Romania, have already shown a remarkably quick and unbureaucratic response, opening their borders and allowing people to enter. While immediate protection from physical harm is undoubtedly the most important aim, the decision on people's legal status within the EU is and will be important, as it also determines their rights.

While it is true that Ukrainians can enter the EU visa-free, this does not come with any rights. The visa-free regime is designed for short-term stays (up to 90 days) in the EU, mainly for touristic reasons or short visits. This certainly gives Ukrainians an important right to enter and stay in EU countries – a right that most other refugees who arrived in the EU in the past, like Afghans, Syrians, or Eritreans, cannot lean on. However, it does not allow access to any services, and particularly important amidst the ongoing pandemic, does not include any insurance for medical needs. Additionally, the visa-free regime only applies to Ukrainian nationals and not to citizens of other countries who resided in Ukraine, such as foreign students, stateless people, or people who were granted refugee status in Ukraine, who also needed to flee amid the outbreak of war.

## What protection is available?

The EU has been building its Common European Asylum System (CEAS) since 1999 to harmonise and standardise it across all 27 EU Member States. Essentially, these standards determine who shall receive protection and what rights come with this protection. The CEAS has three different statuses available for people in need of protection, which vary in their suitability for receiving refugees from Ukraine:

- 1) Refugee protection
- 2) Subsidiary protection
- 3) Temporary protection

The most-known instrument is **refugee protection**, which is the strongest form of protection, as it comes with far-reaching rights similar to those of citizens. It guarantees a right to stay for at least 3 years, access to services, family reunification, the right to work, and education. However, refugee protection in the EU essentially follows a persecution-centred logic. In accordance with the [1951 Refugee Convention](#), the CEAS applies this protection to a person who has a well-founded fear of persecution for at least one of five reasons (race, religion, nationality, political opinion, or membership in a particular social group) and is outside the country of origin. Situations of indiscriminate violence like the war in Ukraine, which targets the general population at random, do not (necessarily) satisfy this persecution-centred logic.

In 2004, the EU decided to close this protection gap by introducing a **subsidiary protection** status. Among other reasons, subsidiary protection addresses situations of serious and individual threats to persons facing indiscriminate violence in situations of international or internal armed conflict. The ongoing war in Ukraine certainly satisfies such a definition. Subsidiary protection also comes with broad rights, although they are less than those offered to people with refugee status. Its duration is usually shorter (at least 1 year, renewable) and it comes with access to work and other services and more limited rights for family reunification.

Both refugee and subsidiary protection are established by EU Member States in tedious and often long-lasting, individualised procedures to assess whether or not a person fulfils the criteria. The procedure would last even longer if high numbers of applicants enter the system

within a short time. When the war in former Yugoslavia in the 1990s forced thousands of Bosnians to flee, countries like Austria or Germany soon saw their asylum systems collapsing. Lacking any appropriate instrument that could provide ad hoc protection to so many people, countries like Austria granted “temporary stay” to Bosnians, which ultimately served as a blueprint for the first EU asylum directive, the [Temporary Protection Directive](#), in 2001.

## **Temporary protection – the EU instrument for a “mass influx”**

While EU Member States have granted refugee or subsidiary protection status to thousands of people in need over the last two decades, no one was ever granted temporary protection according to the Temporary Protection Directive. This is because this instrument has never been triggered. For the Directive to be triggered, the Council must agree on a proposal by the Commission with a majority vote (at least 15 Member States that represent at least 65% of the EU population). There were some attempts in the past to draw on this instrument – in 2011, when many people crossed the Mediterranean from North African countries in the wake of the Arab Spring, and more prominently in the context of high numbers of refugee and migrant arrivals in 2015-2016 and the recent flight of Afghans following the Taliban takeover in August 2021. Still, the calls did not find enough support to trigger the instrument, and the Directive has been broadly labelled dead law. Now, with hundreds of thousands of Ukrainians arriving in eastern EU countries, this instrument [may experience an unexpected renaissance](#).

The complex process of triggering this instrument, however, was not the only reason that temporary protection remained unused. The lack of a common understanding of how to define “mass influx” and the fear of creating a pull effect that would result in even more arrivals were two other key factors in the decision. The latter argument, which as yet lacks evidence, might have had its merits in other contexts. Fast-tracked protection for Afghans in 2021 or Syrians in 2015-2016, for instance, could have attracted more refugees to make their way to the EU. In the current context, however, Ukrainians pushed to flee Russian aggression have no other choice than turning to neighbouring EU countries (and Moldova).

Interestingly, the Temporary Protection Directive also includes a solidarity clause, which equally found little support from Member States in the past. Under this clause, EU countries should notify the Council and the Commission of their reception capacities and relocate people from countries where capacities are exceeded. This time, however, those countries that opposed relocation most strongly in the past (like Poland, Hungary, the Czech Republic, and Slovakia) are the main destination countries at the moment – not only due to their

geographic location but also their sizable Ukrainian diasporas. Still, it can be expected that relocation will be a topic of discussion even with the current broad support for people fleeing Ukraine – not least because it will concern a significant number of people and, according to the Directive, relocation will also require the consent of persons concerned.

But there is more to clarify than just relocation. Under which circumstances can people under temporary protection access regular asylum procedures (which the Directive suggests remain open)? How will reception support be organised if the [Reception Conditions Directive](#) does not apply under temporary protection? What concrete next steps will Member States need to take following the activation of the Temporary Protection Directive? These are just a few of the questions that need answers and guidance once (if) the Directive is triggered.

The Temporary Protection Directive, above all, avoids lengthy procedures for determining whether someone is individually persecuted or faces indiscriminate violence. All those who arrive in large numbers (a “mass influx”) from a specific country or geographic region described by the Commission and adopted by the Council immediately enjoy temporary protection for at least one year. Temporary protection allows for access to employment and self-employment activities, education, housing, health care, and family unity. It basically contains most of the rights that come with refugee or subsidiary protection status – without the bureaucratic headache.

Finally, while the title of the protection status suggests temporality, it can in fact last for a long time. Turkey, for example, introduced temporary protection for Syrians in 2014, and 8 years later, this status is still valid. All depends on the developments in Ukraine, particularly when the war is over and the situation allows people to return. Before then, temporary status will not be lifted. In the former Yugoslavian context, after temporary protection was lifted, many returned or had to return but a significant number of Bosnians remained in Austria and Germany, transitioning to a regular residence permit and eventually naturalising.

## **What next?**

What is currently most important is to swiftly grant access to health care, housing, and other basic needs for a large number of people, who right now are largely women, children, and elderly men. This is what temporary protection can offer better than the conventional statuses. And in fact countries like [Hungary](#), [Slovakia](#), and [Poland](#) have already adopted or

plan to adopt national emergency regulations that in essence provide temporary protection. But national approaches could lead to unwanted differences in protection across the EU.

But first, the ball is in the Commission's court. During the [Extraordinary Justice and Home Affairs \(JHA\) Council on 27 February 2022](#), the Commission proposed the activation of the Directive, and ministers appeared to broadly support it. With a qualified majority vote, a Council Decision could introduce temporary protection within the EU as soon as tomorrow's Council meeting (3 March).

Ahead of this Council meeting, the Commission today [released its proposal](#) to the Council. The Commission proposes to apply temporary protection to Ukrainian nationals as well as third country nationals and stateless persons residing legally in Ukraine (given that they are unable to return to their country or region of origin or they resided long-term in Ukraine) and their family members. It will take immediate effect with the publication of the Council Decision and will last initially for one year (which can be prolonged). Member States shall exchange information on its implementation via the [Migration Preparedness and Crisis Management Network](#), coordinated by the Commission. Solidarity or relocation are not described in more detail. In addition, the proposal comes with a [Communication providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders](#). Overall, the Commission estimates the expected displacement between 2.5 and 6.5 million people. Around half of these people are expected to find support from the large Ukrainian diaspora in the EU, while the other half might seek international protection in the coming years.

Temporary protection, which has already been declared dead many times, could therefore see a historic revival as soon as tomorrow – probably not because it is the best instrument, but because it is the only one available right now. Still, it could become a key symbol of the much-needed unbureaucratic and unified EU response for Ukrainians suffering the darkest hour in our recent history.

Suggested further reading:

- European Commission [Study on the Temporary Protection Directive](#) by Hanne Beirens, Sheila Maas, Salvatore Petronella & Maurice van der Velden, January 2016
- [Temporary Protection for Ukrainians in the EU? Q and A](#) by Steve Peers, February 2022

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