Temporary Protection for Ukrainians

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Unusual times are said to call for unusual measures. The war of aggression against Ukraine, and the departure of literally millions of citizens within a few days have triggered an unprecedented wave of solidarity. UNHCR estimates that up to four million Ukrainians may seek refuge in neighbouring countries in the coming months. More than 150 thousand people are crossing the external borders each day. Member States are experiencing what Turkey and Lebanon witnessed in the early phases of the Syrian civil war: neighbouring states are the first countries of refuge.

Activating the Temporary Protection Directive 2001/55/EC was a smart and pragmatic response of the EU institutions. Member States unanimously agreed to do so at the meeting of the Justice and Home Affairs Council on Thursday, 3 March 2022. The final text of Council Implementing Decision (EU) 2022/382 was published the following day.

The Many Advantages of Temporary Protection

Recourse to this old Directive, which had not been activated a single time beforehand, has two main advantages. Firstly, it prevents an overstretch of scarce administrative resources. Beneficiaries will receive a protection status without the need to go through long and complex asylum procedures. Doing so would have taken weeks, if not months. State authorities can concentrate on the reception of beneficiaries instead.

Secondly, the Temporary Protection Directive had always been perceived as an instrument of interstate solidarity, in response to protracted policy disputes throughout the 1990s. Germany and Austria were among the countries which received most people fleeing the civil wars in the former Yugoslavia and lobbied, without much success, for mandatory solidarity (here, pp. 285-311). The Temporary Protection Directive was the outcome of years of debate on these matters, thus adjourning the design of solidarity mechanisms to the implementation stage.

Against this background, one might have expected that the activation of the Directive would witness a remake of the toxic disputes about ‘burden sharing’ following the mass influx of 2015/16. None of this happened, although the contents of the Implementing Decision (EU) 2022/382 is quite different from what many might think intuitively. Inter-state distribution keys or quotas give way to a simple allocation mechanism: ‘free choice’ is the surprise outcome of Thursday’s Council meeting.

Again, this solution has tangible advantages. At a practical level, allowing beneficiaries to decide where to go relieves state authorities of complex relocation procedures, which have been aptly described as an act of ‘technocratic overreach’ (here, p. 100; and here, p. 103-118). Politically speaking, negotiations

were not derailed by lengthy disputes over quotas, although they had informed the original debate about the Directive (here, Articles 5(3)(c), 25(1), (3)). The Implementing Decision refrains from specifying which country will accommodate how many people.

A Living Dinosaur: the Legal Costs of Pragmatism

Pragmatism comes with a price tag in terms of legal uncertainties about the interpretation of the Temporary Protection Directive and its interaction with both national laws and the supranational asylum legislation adopted afterwards. Few people would have predicted that the seemingly outdated Temporary Protection Directive would ever be activated. Legal experts have to engage in a sort of archaeological excavation and dig out materials that had disappeared from the radar of contemporary debates.

The remainder of this contribution will consider five questions that have arisen already, or will surface in the weeks and months to come. For those who want to embark on a further process of discovery of the Temporary Protection Directive, four other publications may prove particularly useful (here, ch. 19; here; here; and here, ch. 5).

Entry and Movement in the Schengen Area

It has been widely reported in the media that Ukrainian citizens may generally enter the Schengen area without a visa, provided they hold a biometric passport (here, Article 10(2)). The Commission has called upon Member States to authorise the entry and stay of those without biometric passports on humanitarian grounds (here, Article 6(5)(c)). Member States had done so over the past week anyway, at least for Ukrainians.

Technically, admission on humanitarian grounds covers the territory of the Member State concerned only, since it does not qualify as a residence permit in the meaning of EU migration law (here, Article 21(1)). However, this caveat is largely irrelevant at the moment. The Commission openly invites state authorities to set aside this condition (here, p. 5). Free movement within the Schengen area is the motto of the day. The state-owned German railways went as far as promising free train travel on important entry routes. The ‘welcome culture’ is back, across Europe.

With the entry into force of the Implementing Decision (EU) 2022/382 on Friday evening (here, Article 4), Member States are obliged to facilitate the entry of Ukrainians from abroad (here, Article 8(3)). Ukrainian nationals on visits or holidays elsewhere may arguably rely on this proviso to travel safely and legally to the EU. Carrier sanctions do not appear to apply in such scenarios (here, Annex V Part A(2)(a)). Such generous admission scheme is unprecedented in the history of EU migration.

Protection without Caveats for Ukrainians and (Some) Others

Waiving asylum procedures had always been a core advantage of temporary protection. Complex individualised assessments give way to generalised status acquisition. All Ukrainian nationals who 'reside' in the country and left on or after 24 February will receive temporary protection (here, Article 1(2)(a)). There are no additional requirements, for instance regarding the level of indiscriminate violence in the region of origin, only an exception on public security grounds (here, Article 28). The Implementing Decision covers people from war-torn Mariupol and those coming from the comparatively safe Galician city of Lviv in the far West of the country.

A comparison shows how generous these provisions are: the success of an asylum application of Iraqi nationals depends very much on personal circumstances and the security situation in the region of origin. None of this matters for Ukrainians. They will receive temporary protection on the basis of nationality and residence alone. Ukrainians staying in third states are covered as well, provided their place of habitual residence is in Ukraine. The Temporary Protection Directive did not prejudge this outcome, since the 'specific groups of persons' benefiting from the scheme could similarly be described in much narrower terms (here, Article 5(1)(a); and here, p. 1595-1596).

Only one question caused controversies in the Council: the status of third country nationals residing in Ukraine. The numbers involved are far from irrelevant: more than 70 thousand students, mostly from India and Africa, were studying at Ukrainian universities—in addition to workers and family members. The international media had criticised the reluctance of Member States to admit these foreigners. The Council finally agreed on a threefold differentiation:

(1) family members of Ukrainian citizens and refugees with a protection status are covered unconditionally (here, Article 2(1)). A reasonably generous definition of family membership apples, embracing spouses, unmarried partners, minor unmarried children, and other relatives, such as parents, who are dependent on a beneficiary (here, Article 2(3)). By way of example, the Russian spouse of a Ukrainian national from Kiev will receive temporary protection.

(2) third country nationals with valid Ukrainian permanent residence are equally covered. Member States are given leeway as to whether to apply the Directive or offer protection under national laws (here, Article 2(2)). Permanent residents will receive temporary protection if they are unable to return home safely. Applying these conditions may give rise to the examination of documents and other evidence we know from asylum procedures.

(3) students and other foreigners who had stayed legally in Ukraine, albeit without permanent residence, are not automatically covered (here, Article 2(3)). Member States decide autonomously whether or not to include these people. If they do so, they will receive temporary protection under the Directive (here, Article 7). Legal

residence in Ukraine and the inability to return home are the only criteria they must fulfil.

Automatism of Status Acquisition: Dublin Reloaded?

A common feature of all the directives on EU migration law adopted in recent years is the declaratory character of status acquisition. Third country nationals cannot rely on the benefits under a directive without an administrative decision verifying their status. Individuals may benefit from an individual right to be issued a residence permit, provided thy fulfil the criteria set out in secondary legislation, but status acquisition is not automatic (here, p. 14; and here, para 59).

Why does this matter for Ukrainians? The Temporary Protection Directive assumes that beneficiaries receive protection in a specific country, not the territory of the Union in the abstract. This raises the follow-up question how and when individuals qualify as beneficiaries of temporary protection: the moment they cross the external borders, irrespective of whether state authorities have verified their status? Or after having received a residence permit? Surprisingly, Directive 2001/55/EC remains largely silent on this matter, which was not discussed during the negotiations, National laws differ as well: while many countries appear to assume that status acquisition is automatic, others foresee an application procedure (here, p. 16, 28).

This seemingly technical question, which can be difficult to understand for those without a background in EU migration law, has important repercussions in scenarios of movements between the Member States. An example indicates the pertinence of this question. A Ukrainian national enters Romania on 6 March 2022 and moves on to Hungary three days later. In which country does she enjoy temporary protection? And does our assessment change if she receives a Romanian residence permit and moves on to Hungary in July this year? Asylum seekers would have to return to Romania in both scenarios under the Dublin III Regulation.

Great Surprise: Free Choice of the Country of Destination

In an astonishing about-turn, Member States abandoned the idea of stable asylum jurisdiction, which had defined policy debates ever since the original Schengen and Dublin Conventions, adopted in 1990. Ukrainians and other beneficiaries may choose their destination freely. NGOs had occasionally dreamt of ‘free choice’ as an alternative to the abhorred Dublin system, but few would have thought that it might ever be realised. Things turned out differently. The sheer need for pragmatic solutions in the face of more than a million entries made possible what would have been a political taboo only two weeks ago.

While there are few doubts that the location of temporary protection will be a matter of free choice in the weeks to come, the legal explanation is less clear. Readers who

are not interested in the intricacies of the doctrinal justification should skip the next four paragraphs and continue reading the section that follows. The degree of legal uncertainty can only be explained against the backdrop of the vague contents of the Temporary Protection Directive, which abstains from addressing core questions explicitly. There are at least two alternatives explanations for free choice, which hinge on whether status acquisition is automatic or not.

One the one hand, automatic status acquisition would mean that individuals qualify as beneficiaries of international protection *ipso iure* the moment they enter the territory of a Member State. A Ukrainian family travelling from Slovakia to Madrid via several countries, could ask all these countries to welcome their presence in accordance with the Temporary Protection Directive. The option of intergovernmental take back procedures (here, Article 11) would not alter the automatic acquisition of temporary protection. Free choice would be legally water-proof across the Union if status acquisition was automatic.

On the other hand, the situation would be less clear if residence permits were constitutive, as they usually are. In case of secondary movements, the destination country may rely on the temporary protection granted elsewhere to refuse to hand out another residence permit. Individuals might challenge this refusal in domestic courts, but it remains uncertain whether they would win the case. Article 11 could be read to imply that other countries are not obliged to recognise temporary protection status a second time. To be sure, they may voluntarily decide otherwise (here, Article 7), and there seems to be a political compromise to do precisely this, but the Directive need not contain a legal obligation to this end. Jurisdiction is not transferred under the Dublin III Regulation either, since the Regulation does not cover people seeking temporary protection (here, Articles 18(1), 24(3), 29(2)). In this scenario, free choice would be a matter of domestic practices more than supranational legal prescription. Access to the asylum system would be the fallback option if States declined to give temporary protection.

What solution is more convincing? It is impossible to give a definite answer at this juncture, but the doctrinal pros and cons appear on the horizon. Several arguments support automatic status acquisition: the Directive abstains from regulating application procedures; Council Decisions ‘shall have the effect of introducing temporary protection’ and terminating the status, seemingly *ipso iure* (here, Articles 5(3), 6); and entry into the territory shall be facilitated. To be sure, state authorities may have to ascertain whether someone is a Ukrainian national or poses a public security threat. However, such conditions need not prevent automatic status acquisition, provided the case law on Union citizens and Turkish nationals can be projected upon temporary protection (here, paras 31-32; and here, para 51).

At the same time, the general scheme and context argue in favour of declaratoriness: the wording deliberately refers to ‘obligations of the Member States’, not individual rights of migrants (here, Articles 8-19; and here, p. 201); temporary protection was generally perceived to be a matter of state discretion (here, p. 204, 211; and here, p. 291); hence, the plea for the option of parallel access to the asylum system to safeguard individual rights (here, p. 210-212); the Commission Memorandum recognised that the text does not address important topics in the first

place (here, Nos 5.3, 6.3); Member States may possibly even set numerical quotas, whose exhaustion means that temporary protection shall no longer be available (here, Article 25(1), (3)); 'take charge' transfers to countries, where the beneficiary had not stayed previously, are subject to the double consent of the individual and the country (here, Articles 25(2), 26(1); and here, p. 1220); in the absence of well-defined indications to the contrary, the principle of national procedural autonomy might apply; remember that the Directive built upon years of debate under the intergouvernmental third pillar, where automatic status acquisition was unthinkable (here, p. 413-437).

End of the Honeymoon? Changing Migratory Patterns over Time

The legal justification for free choice is not immediately relevant. The upsurge of wholehearted solidarity throughout Europe means that all Member States stand ready to assume responsibility at an unprecedented scale. In a declaration attached to the final text of the Council Implementing Decision (Recital 15), Member States agreed not to use the theoretical option of returning individuals to a country where she enjoys temporary protection in case of secondary movements (here, Article 11).

Nobody knows whether the initial sense of unlimited solidarity with Ukrainians and among the Member States will remain persist or decrease in the coming months. Queues at the Hungarian-Romanian border, which is an external border of the Schengen area, might be a first indication of things to come. Remember how state practices and public opinion changed quite dramatically during the winter of 2015/16. The potential of secondary movements after the initial allocation based on 'free choice' might become a bone of contention at some point in the future.

Experience shows that refugee movements often unfold in phases. People seek refuge in neighbouring countries at first, in the hope of quick return home. Geographic proximity, cultural and linguistic similarities, and historic connections habitually inform the initial choice of destination. In addition, many go where families and friends are residing already. Eurostat data illustrates that such 'chain migration' will primarily direct Ukrainians towards eastern Europe, as well as Italy, Spain, Germany, and Portugal.

However, geographic proximity may gradually lose relevance, as it did during 2015 when more and more Syrians started moving towards Europe. Better living conditions and labour market access are crucial factors in the medium run (here, p. 131-134). They might turn out not to be available in countries of first refuge where literally millions of people might have to be accommodated over an extended period of time. The abstract character of rights associated with temporary protection, which stay below the level of protection available to beneficiaries of subsidiary protection, further increases the potential of discrepancies across the Union (here, Articles 12-13; and here, Articles 20-34).

Asylum applications are no panacea to overcome these legislative limitations. Articles 17-19 of the Directive were designed so as to give States leeway to suspend

asylum procedures (here, p. 1212-1214). If Member States use this option, the Temporary Protection Directive 2001/55/EC arguably serves as a *lex specialis*, even in the absence of an explicit exception in the Asylum Procedures Directive 2013/32/EU. Member States not using this option may similarly suspend asylum processing *de facto* (here, Articles 31(3)-(6)). Remember that procedures occasionally take years to complete, even in ordinary situations. Applicants cannot rely on reception conditions for asylum seekers in the meantime (here, Article 3(3)).

Difficult living conditions and lack of economic prospect in the countries of first refuge might motivate many to go elsewhere in the medium run. If that happened, Member States might have second thoughts about free choice. This would turn the spotlight on the legal status of those who move to another Member States. The legal answer depends, as we have seen, on whether status acquisition is automatic or not. These doctrinal uncertainties are not relevant at this juncture, but they indicate how important the better understanding of the legal contours of temporary protection will be in the months to come. The political and pragmatic arguments for an activation of the Temporary Protection Directive are paramount, but the legal consequences of this decision remain to be discovered.

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