**Protecting Ukrainians fleeing to the EU … but for how long?**

[Two million](https://data2.unhcr.org/en/situations/ukraine) people have already fled across the EU’s eastern border since the start of the Russian invasion of Ukraine and the numbers of refugees who continue to flee suggest that the total numbers could rise to [multiple millions](https://www.weforum.org/agenda/2022/03/high-commissioner-statement-grandi-united-nations-ukraine/). It is already now the biggest refugee movement in Europe since the Second World War. EU Member States are committed under international and EU law to offer protection to people fleeing the conflict in Ukraine. This is not in doubt. Rather, the immediate issues are: (1) who benefits from the EU’s protection? (2) how is the burden of these large numbers of refugees shared? The EU’s swift response is the activation of a little-known, little-regarded and never-used law to provide those fleeing the war in Ukraine ‘temporary protection’. It is the right law at this time, but, shortly, the protection of refugees from Ukraine is likely to become a contested issue. These matters are considered in this blog post.

**EU Temporary Protection – a résumé**

The Temporary Protection [Directive](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32001L0055) (TPD) was the first-ever EU harmonising measure adopted in the area of asylum law. The experiences of the Member States hosting Bosnians and to a lesser extent also Kosovans under temporary protection measures in 1990s following the break-up of Yugoslavia [shaped](https://sas-space.sas.ac.uk/9171/) this legislation. Since its adoption in 2001, the Common European Asylum System (CEAS) has evolved but temporary protection had largely fallen out of favour.

Temporary protection has its critics. It is considered by some a weak and precarious form of international protection, at best. Some have also, not without reason, accused states of relying on it to [avoid](https://www.unhcr.org/5304b71c9.pdf) commitments to international protection, notably under the [1951 Refugee Convention](https://www.unhcr.org/1951-refugee-convention.html). However, some of this criticism has been at cross purposes. Temporary protection is indeed offered in some parts of the world as the only basis for protection of refugees and, in these states, it may be considered a weaker and precarious form of protection. Temporary protection in the EU has however evolved into primarily an emergency [*process*](https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=45a4da562&skip=0&query=%22temporary%20protection%22&coi=JOR)) to manage a mass influx. The point of it is to enable *immediate* protection to refugees *en masse* and to avoid overwhelming asylum systems through hundreds of thousands, maybe even millions of individual applications for protection.

This, of course, touches on the reason why temporary protection has been shunned by EU Member States. By its very design, it is intended to admit large numbers of refugees. The politics and perceptions of hosting large numbers of refugees for an indeterminate period is highly problematic in European politics. Protection of refugees in Europe is associated with long-term and permanent obligations to host and integrate such persons. For this reason, there has been in the past – including very recently – strong resistance to any moves at national and EU levels towards making it easier to welcome large numbers of refugees. For instance, the overall negative perception of large numbers of Syrian asylum seekers arriving in the EU led to the controversial 2016 ‘[EU-Turkey Statement’](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/) since when the EU has been paying Turkey to keep Syrians there.

**When there is a will, there is a way**

This time, the shock and emotions to the unconscionable and illegal Russian invasion, the plight of Ukrainians and the scale of the disaster has changed the calculus in the EU … for now.

There are [reports](https://www.bbc.co.uk/news/world-europe-60611188) of acts of great generosity from ordinary people who have opened literally their doors to welcome refugees from Ukraine. The politics of the EU has achieved something that it has rarely before: solidarity and consensus for an open-door policy to refugees. The EU has been resolute and has acted quickly to manage this through a temporary protection measure.

**Temporary Protection Directive: swift sanctuary … for some**

The TPD requires the Council to implement a Decision to determine a ‘mass influx’ situation. This has been done by a [unanimous](https://www.consilium.europa.eu/en/press/press-releases/2022/03/04/ukraine-council-introduces-temporary-protection-for-persons-fleeing-the-war/) vote. The Council Implementing [Decision](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.071.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A071%3ATOC) 2022/382 (Decision) does three things:

1. it *activates* the TPD by determining a mass-influx situation (Article 1);
2. it specifies the *groups* who are the beneficiaries, designated ‘displaced persons’ (Article 2);
3. it directs EU Member States and agencies to *cooperate and coordinate* the management of displaced persons with a central role for the Commission (Article 3).

Given the urgency of the situation, EU temporary protection came into force on 4 March 2022, the same date the Decision was published in the Official Journal (Article 4).

Article 1 of the Decision states that the ‘existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict is hereby established.’ This activates the TPD and, under Article 5 TPD, temporary protection is instituted in all EU states (with the exception of Denmark which has maintained an opt-out (Recital 26 TPD)).

The Decision falls short, however, of giving the same protection to everyone fleeing Ukraine. Article 2, in effect, specifies four groups some of which may not benefit from temporary protection if they cannot meet the conditions.

The core group is:

* Ukrainian nationals residing ‘in Ukraine before 24 February 2022’ (Article 2(1)(a)); and
* third-country nationals and stateless persons who benefitted from international protection or its equivalent under national law ‘in Ukraine before 24 February 2022’ (Article 2(1)(b)).

The second group are certain family members of the core group who were ‘already present and residing in Ukraine before 24 February 2022’ (Article 2(1)(c)). These are specified in Article 2(4) of the Decision as:

* + spouse or unmarried partner if the relationship is stable and if the host state treats the relationship as comparable to marriage under its law for alien;
	+ unmarried minor children; and
	+ ‘other close relatives’ if they were dependent on and living with a member of the core group as a family unit at the time of the ‘circumstances surrounding the mass influx’.

The third group are third-country nationals who can ‘prove’ that they were legally resident in Ukraine before 24 February 2022 ‘on the basis of a valid permanent residence permit’ and on the condition that they cannot be safe elsewhere.

The fourth and final group are all others who were residing legally in Ukraine and who are unable to be safe elsewhere (Article 2(4) Decision). This group includes mostly those on short-term permits, such as students. This group is not guaranteed temporary protection status under the TPD. Rather, their temporary protection status is at the discretion of the receiving state which may authorise to extend to them the rights of the TPD.

Given that the Decision falls short of giving protection to everyone fleeing Ukraine, it is very likely to give rise to differences of interpretation and assessments of individual circumstances in the Member States. While temporary protection is protection of a group, individuals may have difficulties to establish that they belong to one of the groups or meet the conditions. For example, it seems that temporary protection is not guaranteed for those who anticipated the invasion and fled before 24 February 2022 (see recital 14 of the Decision). All those who fall outside the groups or whose status is disputed maintain the right to make an individual claim for asylum.

Member States will almost certainly implement some form of registration of those granted temporary protection. They will not only want to monitor the numbers of people they are protecting but are also required to provide each displaced person a residence permit of some description (Article 8 TPD). Finally, all Member States will surely screen those to be granted temporary protection for security purposes, as they are able to exclude particular individuals on those grounds whilst still respecting the principle of proportionality (Article 28 TPD).

**Temporary protection rights**

The rights granted under temporary protection are set out in the TPD. Member States are required to provide a basis in national law for immediate protection for one year (Article 4(1) TPD). Member States must provide a right to stay (evidenced through a document or something equivalent), a minimum set of social and welfare rights, the right to work and access to education for minors. There are also provisions on family reunification (Articles 8-16 TPD). The combination of the TPD and the implementing Decision should override any faulty national implementation or [national](https://helsinki.hu/wp-content/uploads/2022/02/Hungarian_Helsinki_Comittee_Ukraine_Guide_2022_02_25_EN.pdf) measures that provide fewer or lesser protections.

**Sharing the burden**

The TPD provides minimal prescription of how the burden of the mass influx is to be shared amongst Member States other than, under Article 25, Member States ‘shall receive [beneficiaries] in a spirit of solidarity’. This is a point of a tension and weakness given the lack of a mechanism for obligations to hard numbers, and, until now, the EU’s lack of unity. The implementing Decision has addressed this key issue.

The implementing Decision uses neither the flawed [Dublin rules](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0604-20130629) (under which the frontline states bear the burden) nor a quota system but gives temporary protection beneficiaries the right to choose the asylum state. The EU’s reasoning is that many – maybe even half of the Ukrainians fleeing – have family connections in the EU and will be housed and supported by them (see recital 6 of the Decision). That being so, the EU projects between 2.5 and 6.5 million displaced persons but also states that the current reported spare capacity in the EU is only 310,000 asylum spaces (see recitals 6 and 20 of the Decision). While this is presented as a conservative figure, it is an indication of the huge pressure that some states will come under. This will become a point of contention as there are likely to be significant imbalances between Member States even if they are eligible for financial aid under Article 24 TPD.

**The timeline**

In the first instance, the TPD requires all EU states to grant a basis for residence for twelve months. Thereafter, there is the possibility of agreeing to extensions up to a total period of three years (Article 4 TPD).

The hope will be that, within a short time, Ukrainians will be able to return to their home country in safety. If the conflict ends rapidly, the Council could even vote to end the provision of temporary protection before the end of twelve months (Article 6 TPD).

The unsaid premise of temporary protection is that with the passage of time, refugees return home. If this does not happen or not quickly enough, as the shock and emotion subside, and assuming this conflict is not the beginning of something [unimaginable](https://www.independent.co.uk/news/world/europe/putin-nuclear-weapons-attack-russia-b2030857.html), we are likely to see the resumption of squabbles about where responsibility should lie and end. The TPD recognises the right of the beneficiaries of temporary protection to apply for asylum on an individual basis (Article 17 TPD). EU projections are that there could be over three million applications for asylum (see recital 6 of the Decision). The overburdened Member States may resist this, first, by suspending the asylum application (this may be possible under Article 19 TPD) and, later, some may simply resist their full obligations under international refugee law. At the end of temporary protection period, national immigration measures apply and the right to ‘enforced return’ is recognised under Article 22 TPD. The circumstances to effect this while remaining on the right side of international [law](https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf) would, however, be legally and administratively challenging.

**Some thoughts about the future**

While there is it seems universal support for temporary protection including from the [UNHCR](https://www.unhcr.org/cy/2022/03/04/news-comment-unhcr-welcomes-eu-decision-to-offer-temporary-protection-to-refugees-fleeing-ukraine/), there will, undoubtedly, also be tensions and consequences to follow.

First, as the UNHCR has previously [acknowledged](https://www.unhcr.org/globaltrends2019/), the ‘reality in that forced displacement nowadays is not only vastly more widespread but is simply no longer a short-term and temporary phenomenon.’ EU Member States know that south of Ukraine, on the EU’s external border, Turkey has been hosting [3.7 million](https://en.goc.gov.tr/temporary-protection27) Syrians under its own temporary protection measures since 2014. [Russia](https://www.bbc.co.uk/news/world-middle-east-45284121) is involved in the Syrian conflict too. If the Ukrainian conflict persists and states see this as a basis to deny, suspend or compromise asylum rights, then the EU will, understandably, face criticism that it has enabled a separate and weaker protection basis.

Second, there is also the issue of differential treatment between groups of asylum seekers. This is already apparent in the above-mentioned Decision as not all people fleeing Ukraine benefit from temporary protection (and under the same conditions). There have already been reports of exclusion and discrimination [against non-Europeans](https://www.washingtonpost.com/world/europe-welcomes-ukrainian-refugees--others-not-so-much/2022/02/28/96981546-9867-11ec-9987-9dceee62a3f6_story.html) which, in the case of the Polish authorities, have been [denied](https://www.gov.pl/web/nigeria-en/important-notice-crossing-ukrainian-polish-border). In 1992, Bosnians fleeing conflict with the break-up of Yugoslavia were, at least initially, [admitted](https://blogs.lse.ac.uk/europpblog/2017/02/20/integration-bosnian-refugees/) under national forms temporary protection in many European states. The EU is rightly welcoming Ukrainians. Yet, the non-entry policies towards non-European asylum seekers such as Syrians in 2015 and, more recently, in 2021, the very small number of asylum seekers at the Polish-Belarusian [border](https://reliefweb.int/report/poland/press-briefing-notes-polandbelarus-border-21-december-2021#:~:text=Location%3A%20Geneva%20Date%3A%2021%20December%202021%20Given%20the,under%20international%20human%20rights%20law%20and%20refugee%20law.) cannot be overlooked. Despite all the good that the EU is doing at this time, this differential treatment is already attracting critical comment, e.g. see [here](https://www.washingtonpost.com/world/2022/02/28/ukraine-refugees-europe/), and [here.](https://euobserver.com/opinion/154458?utm_source=euobs&utm_medium=email) There are some explanatory factors such as the regional dimensions reflecting a shared geography and history; perhaps there is some force in considering this as a crisis in Europe about Europe – Europeansfeel it. There is also the scale and suddenness of it which is unprecedented in post-war European history. But the comparisons do indicate that there are other nationalistic forces to be reckoned with.

Finally, until very recently, the EU Commission itself considered that the TPD did not ‘correspond to current reality’ and even [proposed](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020PC0613) to repeal it. The swift actions of the EU this time show the central importance of political will in relation to effective protection. The speed and size of this influx shows too the importance of temporary protection as part of the asylum architecture.

**Conclusion**

The consequences of the Russian invasion have enabled a perspective on crisis. The misnomer ‘migration crisis’ of 2015-2016 was a failure of EU political leadership and a compromise of the EU’s values. In response to the aggression in Ukraine, the resources and capacity of Europeans to welcome those fleeing for their lives is clear. A benchmark in hospitality and solidarity has been set.

The destiny of the TPD – once a little-regarded EU instrument – is to be a measure of what European solidarity can achieve. It is an act for sanctuary offered to millions. But it is not the long-term solution. This will be either the safe return home of those who have fled or a commitment to protection under well-established and clear [obligations](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en) of all EU states. It is said that Vladimir Putin plays for the long game. If this is the case, EU solidarity and values will most certainly be tested. EU solidarity must endure if the EU is to avoid a real migration crisis.

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**Bio**

John Koo is an Associate Professor in law at London South Bank University. He lectures and researches in areas of EU asylum law. He has previously published on temporary protection.