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Should Temporary stay Temporary? An interpretation of the Temporary Protection Directive in line with its rationale.

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Nearly 4 million people fled Ukraine since the Russian invasion started in February 2022. Within the territory of the EU, those persons who are unable to return enjoy residence rights derived from the [Temporary Protection Directive](#) (TPD). As the name of the Directive indicates, any derived right, such as the right to stay, work and receive medical assistance in the EU, are limited in time. The application of the Directive, and the rights thereof, have been prolonged until the 4th of March 2025. What happens after this time 'runs out' is for now - in the Directive's first-time application - up in the air, or rather: up to the EU legislator and the Member States, with the help of creative scholars.

The dominant academic opinion, as illustrated by [the Meijers Committee report, Asscher's Report](#), and a recent post on this blog by [Bilousov and Woolrych](#), is to simply assume that the TPD has a maximum duration of 3 years based on certain provisions of the Directive. This inference is also featured in a [Dutch Council of State ruling](#) on whether the TPD allows for ending temporary protection for third-country nationals who were in Ukraine on a temporary residence permit at the time of the invasion. This assumption means that either the temporary protection for Ukrainians will come to a definite end in 2025, or the TPD needs an amendment to allow for further prolongation. Given the lengthy and often cumbersome negotiations that the ordinary legislative procedure – which underlies this change – imply, and particularly the upcoming EP elections, it is not only nearly inconceivable that such an amendment will happen in time, but also questionable whether it will happen at all.

Therefore, the aforementioned academic commentators, have considered possible alternative solutions for this crux, all with their own considerable downsides. [Bilousov and](#)

[Woolrych](#) on the one hand focus their attention on a solution on the national level as Article 20 of the TPD requires to 'hand over' the task to national authorities as soon as the TPD is expired. [The Meijers Committee](#) on the other hand suggests that a solution on the national level is not desirable, and therefore propose the amendment of other EU tools to accommodate the gap left behind by the expired TPD.

However, this blogpost challenges the common assumption that the TPD explicitly digs its own grave after three years. From a careful examination of the relevant provision in the TPD, it seems that no explicit time limit for the application is mentioned. This realisation could be crucial for breaking the political deadlock that can be expected to arise on this issue. The Dutch State Secretary for Justice and Security, in charge of migration policy, has for example already [hinted](#) at discussions with the Commission aimed on prolonging the TPD without amending the instrument. This inventory shows us that the possibility to extend the TPD, without amending it, is likely on the Commissions' agenda, deviating from the widely shared assumption that has informed the current academic debate on the future for Ukrainian refugees in Europe.

Therefore, this blogpost closely examines the TPD, and more specifically its Article 4(2), which states that the Council can prolong the TPD by up to one year, following a proposal by the Commission. By considering the Directive's objective and purpose, I argue that an alternative - but sound - interpretation of Article 4(2) TPD allows for an extension of the Directive without amendments. The relevance of this finding is furthermore underscored by the fact that the alternative solutions suggested by the aforementioned academic commentators are neither flawless nor necessary, as I will demonstrate below.

The Temporary Protection Directive's Place in the Common European Asylum System

Before we dive into the different problem solutions, we must look at the TPD itself. The Directive was created for cases of mass influx of displaced persons who cannot return to their country of origin. The Yugoslavian war gave rise to the creation of this tool, enabling the Union to share the burden and show solidarity vis-à-vis migrants – and other Member States – in the future. The future became the present as the war in Ukraine gave rise to the Directive's application. [A Council Decision](#) triggered the first-time application of the TPD for people fleeing the war in Ukraine.

But why was the establishment of the TPD necessary? Could Ukrainians not have simply applied for international protection under the EU's 'normal' asylum procedure? Let us examine these considerations. The 'normal' asylum procedure is regulated by the [Qualification Directive](#) which lays down the qualifications needed for such international protection within the EU. Two categories of protection are apparent: refugee status and subsidiary protection, neither of which is suitable for situations of war. First, for refugee

status, an act of persecution must be linked to an individual reason for persecution. In other words, one must fear to be individually endangered by (for example) torture, due to their (for example) sexual orientation. The establishment of such individually threatened, particular social groups is a recurring topic of discussion, as for instance apparent from recent judgments such as [C-621/21](#), as discussed on this blog by [Kübek and Bornemann](#). In war, it is hard to establish such an individual reason for persecution. Secondly, while subsidiary protection only requires an act of persecution, without an individual reason of persecution, even if such an act is clear (for example due to war), an individual assessment must still be made. National migration authorities would be overburdened by the number of applications lodged. An individual assessment would not be feasible. Hence, such status is also unsuitable for a large number of war-refugees entering the EU.

So again, why was the TPD established in the first place? The answer is simple: we cannot rely on the 'normal' asylum procedures to grant protection to a massive influx of people seeking protection from war. The rationale is to ensure minimum harmonised standards and rights for displaced people of a mass influx that are currently not able to return to their country of origin.

The Downside of Proposed Solutions

As the EU now seems well-equipped with the TPD as a legal instrument to deal with situations of a mass influx, let us look more closely at the present problem. Following the name and the status quo of interpreting the TPD, it is ought to be temporary. Henceforth, as 85% of the Ukrainians in the EU expressed in a [poll](#) that they do not want to voluntarily return, especially in light of the ongoing war, it is unclear what the consequences of the end of the TPD's application would be.

Amongst all the forthcoming suggestions, one thing is certain: either the EU or the Member States must deal with the consequences of ending the TPD's application and deliver any follow-up solutions. As suggested in the TPD itself, it will be up to the Member States to deal with asylum applications lodged post-TPD. Apparent from Article 20 TPD, it is an explicit choice by the EU legislator to hand over the responsibility to the Member States once the protection afforded by the TPD expired. Furthermore, the Common European Asylum System, as a harmonised system, theoretically affords protection to people qualifying therefore, regardless of the national system they find themselves in.

So, why then does the current academic discourse focus on the undesirability of such national response? The answer lies in the potential praxis of Member States' responses post-TPD. As [Bilousov and Woolrych](#) suggested in their previous post on this blog, national permits may be offered in the Member States. However, firstly, asylum systems differ from one Member State to another, leading to different treatments of beneficiaries depending

on their host country, as pointed out by [the Meijers Committee](#). Moreover, and intertwined therewith, it would lead to secondary migration, potentially ending in a race to the bottom to avoid being the most attractive Member State given the beneficiaries' rights. Secondly, due to an overburdening of national asylum systems, from one day to another being confronted with hundreds of thousands of asylum applications, periods of irregular residence are nearly inevitable. Even in the scenario of a gradual phase out of temporary protection in which asylum claims are not dealt with all at once but rather in certain groups of beneficiaries, several obstacles would remain: the number of applications would not be reduced, and it prevails being uncertain whether beneficiaries are even eligible for subsidiary protection or refugee status. Thirdly, and connected to the previous point of concern, it is certain that if beneficiaries would be eligible for subsidiary protection under the [Qualification Directive](#), they will not enjoy the same rights as under the TPD, such as access to employment. In other words, with a solution on the national level, even if coordinated by the [Qualification Directive](#), beneficiaries will (1) not enjoy the same standards of rights as they would have under the TPD, and (2) potentially find themselves in a legal limbo due to a slow processing of applications. Following the foregoing considerations, one can thus see an evident undesirability leaving it to the Member States.

A response to these problems must be found at EU level. There are two options: either terminating the use of the TPD and finding another path to a coordinated response after March 2025 or to continue the application of the TPD. I will start with the first option.

If the applicability of the TPD to current beneficiaries was to be simply tossed away, other EU instruments could serve as a substitute. At first sight, this solution seems to have a more permanent character than further extending the TPD. [The Meijers Committee](#) recommends using the [Long-Term Residents Directive](#) (LTRD) and the [Single Permit Directive](#) (SPD). They suggest for example that the time spent in the EU under the TPD could count into the five years required by the LTRD. However, it is important to note that temporary protection is explicitly excluded from the two Directives. Hence, while amendments of these tools are more likely as they are currently pending for revisions, there are major flaws in relation to this proposal.

As beneficiaries of temporary protection are explicitly precluded from the application of the two directives, it is easy to determine that these legal instruments do not intend to cover a large amount of people seeking for refuge. Neither the LTRD nor the SPD share the TPD's rationale. It is beyond clear that the EU legislators intentionally excluded temporary protection from the scope of the two Directives. Removing this exclusion would therefore be objectionable. Even though the LTRD and the SPD are pending recasts, it is questionable whether such a severe adaption would not entirely go against the very rationale behind excluding temporary protection beneficiaries from the instruments' scope.

For the sake of completeness on the suggested solutions disregarding the TPD, [Asscher's Report](#) proposed the creation of a 'Reconstruction Permit' after the cessation of the TPD. This would amount to a new status for beneficiaries. However, an entirely novel status is not desirable. I agree with [the Meijers Committee](#)'s argument that the creation of an such a status is too time-consuming in light of the urgency of the situation. Furthermore, it is questionable which legal basis could be used for a new status.

It is all about perspective: using what we have

As I have disagreed with the suitability of a response on national level and one that discards the TPD, I will now argue how and why the application of the TPD remains possible and desirable in light of its rationale and the precise wording of the relevant provision.

The commonly accepted interpretation of the TPD, or more specifically, its Article 4(2), boils down to allowing only for a single one-year extension of the TPD after a one-year maximum extension following 4(1). Hence, if we take out our calculators, according to this interpretation, the TPD has a maximum duration of 2 years apparent from Article 4(1) TPD, plus one year of prolongation according to Article 4(2). At first, this interpretation makes sense and is credited by the name of the instrument itself: it is a temporary tool. Nevertheless, I will counter this approach and propose an alternative interpretation in the forthcoming section considering the rationale behind the TPD and the literal wording of Article 4(2) itself.

Summarising the foregoing in different words: the crux for not keeping the TPD in its current form to settle the status of Ukrainian refugees is the interpretation of Article 4(2) TPD. Can one read it in a way that allows for endless prolongation of one year at a time, or does it mean that this one-year prolongation is a one-time solution?

Tossing away a suitable tool sounds and is not logical. I argue that the TPD must be extendable in a proportionate way, by interpreting Article 4(2) TPD in line with the TPD's core rationale, which is to accommodate for situations of a mass influx of people arriving in the Union to seek protection. In fact, Article 4(2) TPD only says that the Council may decide after a proposal of the Commission on a one-year extension of the TPD. It is however crucial to note that the literal text of the Article does not at all specify if such an extension is a one-time option only. From the wording of the Article, nothing prevents a repeated extension, meaning that, theoretically, the Council could prolong the TPD's application on a yearly basis. In contrast, Article 4(1) TPD *does* undoubtedly set an explicit maximum time of prolongation, suggesting that the EU legislator did intend to put a limit on the extensions possible under this paragraph. The lack of such a similar maximum time in the text Article 4(2) thus suggests a choice to allow for repeated one-year extensions.

The 'temporary' nature of the Directive is then accounted for by the maximum duration of each prolongation, rather than the number of prolongations the instrument allows for.

The rationale of the TPD, which was clear already from its initial [proposal by the Commission](#), fits the circumstances. An extension would be proportionate if return of the beneficiaries to their home country remains impossible due to the continuation of the war or other unforeseen circumstances following thereto. To accommodate the foregoing worries of prolonging the TPD, the focus should be shifted towards the rationale of the TPD. Determining whether the rationale is still applicable each year seems to be proportionate. Hence, a 'blind' extension of a specified time, such as 10 years, will not be reconcilable with the TPD's rationale, nor the explicit wording of Article 4(2) TPD. Rather, extension based on an ongoing interpretation of the situation and whether the rationale is still applicable, repeated on a yearly basis, would be more suitable. In that way, it is guaranteed to not have arbitrary extensions, as the measuring standards are clear. On the note of avoiding arbitrariness, Article 6(1)(b) TPD provides for an extra safeguard. It allows for the end of temporary protection where the Council or Member States submit so with due respect to the TPD's rationale and fundamental rights, such as 'non-refoulement'. This furthermore shows that the compatibility test with the TPD's rationale is of utmost importance before simply letting the TPD expire.

This interpretation offers several advantages. Most importantly, no amendment of the TPD or another legal instrument is needed to provide a feasible solution post-March 2025. Such an amendment would be difficult anyway, given the ordinary legislative procedure, as enshrined in Article 78(2)(c) TFEU, in combination with the upcoming elections of European Parliament, being a co-legislator, make such amendments less likely. It would be a flexible interpretation, always allowing to assess whether the rationale of the TPD still applies. Such flexible reactions are not new regarding the TPD. The EU has proven that, where the need arises, it can act relatively swiftly, as the activation of the TPD illustrates rather aptly. Admittedly, this excluded the EP, but was adopted by unanimity in the Council, nonetheless. Furthermore, it would not only prevent the overburdening of national authorities but also ensure the rights of beneficiaries and an EU-wide solution, desirable due to an otherwise fragmented landscape of rights for beneficiaries. Recalling the previous section, such a fragmentation also risks beneficiaries to be left in a legal limbo. More importantly, it would not run counter the explicit wish of the legislators in Article 20 of the Directive, passing the task to member states. The TPD would continue to apply and hence, no undesirable 'handing over' is yet necessitated.

Wrap-up

The war in Ukraine might continue even after March 2025. This could leave more than 4 million people in a legal limbo. Therefore, we must find a solution for the time following the current prolongation of the [Temporary Protection Directive \(TPD\)](#), ending in March 2025.

As I have examined, a solution on the national level risks overburdening national authorities and creates vast legal uncertainty. It therefore becomes clear that there must be a solution on the EU level. This could lead into two directions: using or not using the TPD. I have examined both ways and argue that adapting other EU tools, such as the [Long-Term Residents Directive](#) or the [Single Permit Directive](#), or even creating a new residence status, would run counter to their explicit exclusion of TPD beneficiaries, and therefore change the nature of these instruments, while at the same not being time-efficient. Therefore, we must carefully examine the possibility of a continuous application of the TPD. In this light, it is crucial to consider the rationale and suitability of the TPD. In light thereof, I suggest to carefully interpret Article 4(2) TPD in a way that allows for a yearly assessment of the TPD, seeing whether the rationale thereof still fits the situation, rather than a one-time possibility. This offers a new perspective to the current political debates on this issue. It would be illogical to root for the cessation of a useful, suitable tool which is already in place. In conclusion, we should not dismiss the potential that the TPD holds, but carefully interpret the TPD in with its rationale. Why look for something new if the solution lies right before our eyes?