



ecre

European Council
on Refugees and Exiles

TRANSITIONING OUT OF THE TEMPORARY PROTECTION DIRECTIVE

**ECRE'S ANALYSIS OF THE MAIN OPTIONS
AVAILABLE AND PRINCIPLES TO APPLY IN
ENSURING A SMOOTH TRANSITION AFTER
THE TPD**

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INTRODUCTION

February 2024 marks two years since the outbreak of the war in Ukraine. As of December 2023, more than 6.3 million refugees from Ukraine have been recorded globally, among which almost 6 million have registered for Temporary Protection (TP) or similar national protection schemes in the EU and associated countries (EU+).¹

The unprecedented activation of the Temporary Protection Directive (2001/55/EC)² (TPD) has provided an efficient emergency response to address the immediate protection needs of those seeking safety in the EU. This legal tool has allowed rapid access to protection based on registration, provision of socio-economic rights (albeit at minimum standards), and the opportunity for individuals to choose the country of application for protection.

In addition, the use of the TPD has been accompanied by measures such as providing extensive financial assistance to EU Member States (EUMS) and other countries responding to displacement. This funding, largely in the form of grants, has been put at the disposal of the EUMS by the EU, while there are also loans and similar financial modalities available from European investment and development banks. Furthermore, coordinated efforts to support the EUMS have been made within the framework of the Solidarity Platform launched by the European Commission.

In light of the volatile situation in Ukraine, certain flexibility and innovation have also characterised the response, including, for example, allowing pendular movements to and from Ukraine so that people can keep links with family members and maintain property and land. The rapid activation of the TPD has contributed to the effective management of the large-scale displacement from Ukraine, which notably did not involve the time-consuming and politically damaging panic and paralysis which has dominated the EU response to the arrival of refugees in recent years.

The protection regime established by the TPD has been extended until March 2025.³ While it is hoped that the war inducing the displacement ends soon, many analysts foresee evolution towards a long-term war of attrition and a situation of protracted, widespread violence, even if some form of ceasefire or peace agreement is negotiated in 2024, which in itself seems increasingly unlikely. Overall, the course of the war remains highly unpredictable. While the vast majority of Ukrainians prefer to return to the country, it may not be safe for some to do so for a long time; others will seek to return as soon as their regions are safe or even before.

In this context, to ensure continued management of the displacement from Ukraine, whatever its dimensions, provisions already need to be made for what happens after March 2025.

This Policy Paper covers the principles that should apply in managing the situation, and the options available to states and the EU, including assisted voluntary return to Ukraine, extension of temporary protection regimes, asylum applications and other protection statuses, as well as transitioning to work-based permits. It should be underlined that no preference is expressed for a particular option or scenario within the return-stay binary, the purpose is to outline the main available options.

Drawing on ECRE's research and analysis of the TPD implementation, the Policy Paper concludes with recommendations for the political actors involved in the process of developing post-TP options. The scope of the Paper is limited to those covered by the TPD; ECRE has commented elsewhere on other categories of people forced to flee as a result of the war.⁴

1. UNHCR Operational Data Portal, Ukraine Refugee Situation, available at: <https://bit.ly/4aWSnmN>.
2. 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 (TPD), OJ L 212, 7.8.2001, p. 12–23.
3. Council of the European Union, Press Release “Ukrainian refugees: EU member states agree to extend temporary protection”, 28 September 2023, available at: <https://bit.ly/3U50Cac>.
4. ECRE, “The EU’s Response to Displacement from Ukraine: ECRE’s Recommendations”, 10 October 2023”, available at: <https://bit.ly/3U1yHrP>.

PRINCIPLES TO BE APPLIED

In ECRE's view, four key principles should be applied in the development and implementation of exit strategies from the TPD regime:

1/ Ukrainian perspectives

First, it is crucial that the options provided are based on securing the informed consent of the affected, displaced population and that the EU and European states avoid coercive approaches, as far as reasonably possible. Beneficiaries of TP (termed BTPs hereafter) are key stakeholders, however, in addition to the views of individual people from Ukraine, the position of the Ukrainian government is a major consideration for the EU, and the needs and interests of Ukrainian society, including economic, demographic and security factors, come into play. If the options selected disregard the needs and interests of the displaced population and/or the country's authorities, they are less likely to succeed.

2/ A range of options

Second, and relatedly, is the need to maintain a range of options in parallel. These two principles will allow the affected people to respond according to their needs and interests and allow for respect for the principles underlying the idea of durable solutions in international protection. In addition, it is also important to avoid a situation where people panic when faced with – or fearing – that they will be forced into a particular route. This would likely result in people starting to make asylum applications because they feel they have no choice. As set out in the TPD and established in EU and international law, the right to apply for asylum will remain. Nonetheless, avoiding a situation where large numbers of people apply for asylum because they feel they have no other option is important because the likely impact will be significant pressure on or even the collapse of asylum systems in at least some countries.

An additional factor is that the categories of BTPs are diverse. The scope of TP includes not only Ukrainians but also, for example, third-country nationals and stateless persons granted refugee or complementary protection in Ukraine. Due to their status and the specific documents they hold, they may face obstacles in accessing post-TP options created exclusively for Ukrainians. Thus, exit strategies should ensure that no one from these categories is left behind after March 2025.⁵

3/ Striving for European unity

A third principle is the need to attempt to reach a collective approach from European countries, ideally coordinated by the EU institutions with the European Commission in the lead. Effective management of displacement is conditional on a united response, without which the EUMS may lapse into conflict and a competition to do the least, referred to as “the race to the bottom” in terms of protection standards, as the states seek to deflect responsibility elsewhere. Political conflicts over refugee response are both generated by and exploited by anti-EU forces. It is particularly important that division is avoided in this case because it would be exploited by the government of Russia. To avoid discrepancies in the policies related to the exit strategies from the TP status across the EUMS, the European Commission stressed the need for “a coordinated European approach”⁶ to ensure a smooth transition from TP. Depending on the length and the gravity of the war in Ukraine, this could entail either a return to Ukraine or the transition to other legal statuses once TPD ceases to apply.

The need to maintain a collective approach also suggests action should be taken as soon as possible, given that pressures are mounting in some EUMS due to the number of people hosted – the longer the wait, the greater the risk that states act unilaterally in the face of domestic political or public pressure. Strategies should also be developed well before the termination of the TP status and announced and explained to the current beneficiaries to allow for informed decision-making and a consequent smooth transition to another legal status.

While a collective approach is necessary, it should not be at any cost – some of the other principles are more important. If, for example, it is taking too long to reach a collective approach – which currently appears to be the case – or if a collective approach will require too many compromises, then it may need to be sacrificed, for instance in the interests of ensuring security for the people affected.

5. CF “Right to protection”, “Protection Risks Facing Non-Ukrainian Asylum Seekers and Refugees Fleeing Ukraine to the EU”, 27 January 2023, available at: <https://bit.ly/47Qlup4>.

6. Migration Policy Institute, “Ukrainian Displacement in Europe, One Year Later”, 15 February 2023, available at: <https://bit.ly/3HqtZMB>.

4/ Respect for human rights

Finally, whatever options are used, they should be carried out with full respect for the human rights of those affected. Given that besides Ukrainians some categories of third-country nationals are current BTPs, equality and non-discrimination in relation to each BTP in accessing options must be ensured.

OPTIONS FOR TRANSITION OUT OF THE TPD

This section presents a summary of the main options available after the expiration of the TPD regime in 2025. ECRE underlines that the options are not mutually exclusive and that keeping as many options open as possible will likely benefit both EUMS and BTPs.

OPTION 1: (ASSISTED) VOLUNTARY RETURN TO UKRAINE

The results of a recent survey conducted by UNHCR indicate the current intentions to return home for many displaced persons currently enjoying TP in the EU.⁷ The ongoing pendular movements to and from Ukraine performed by BTPs might indicate a possible return trend once the conditions in Ukraine allow for this. Besides the general security situation, the return dynamic is also entangled with the need for inclusive reconstruction of Ukraine and the country's long-term prospects.

According to well-established principles, to serve as a durable solution for displaced people, return should be voluntary and only occur in conditions of safety, dignity and as a sustainable solution.⁸ In line with the UNHCR guidelines, return in safety implies *inter alia* the precondition of "physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood)".⁹ The gradual return to the pre-war place of abode should also be in line with the principle of the best interest of the child (i.e. arranging the departure only after the end of the school year, etc.) as well as the needs of vulnerable groups (e.g. individuals living with disabilities or persons undergoing specific medical treatment).¹⁰

The EU has extensive experience in supporting the return of individuals to their country of origin through Assisted Voluntary Return (AVR) programmes. These programmes include travel facilitation, counselling, and funding for returnees. The experience gained from these programmes should be applied to the case of Ukraine. In close cooperation with the government of Ukraine, and civil society organisations experienced in reintegration assistance to returnees, the return could also be linked to the inclusive reconstruction of the war-torn parts of the country, as well as to the country's ongoing reforms to create adequate, dignified and durable conditions for gradual returns.

Moreover, given Ukraine's EU membership perspective and its inclusion into the accession process, the question of return would need to be linked to the period of pre-accession preparation, during which movement to and from the EU can be either restricted or encouraged, and the eventual accession to the free movement area. In this context, the financial instruments and the policy framework of the pre-accession process will need to be adjusted to accommodate the fact of the ongoing war and the consequent inclusive reconstruction. AVR options available within the EU should be considered and developed in consultation with those directly affected by the war and undergoing the experience of displacement. This is also reinforced by some projections that suggest that a considerable return of Ukrainians is unlikely even once the hostilities are over, indicating that wider incentives may be necessary.¹¹

Finally, it is crucial to maintain the current approach that allows for pendular movement to and from Ukraine without loss of protection status, including the exploratory trips to Ukraine performed by BTPs to assess the situation. These visits allow people to re-connect with the country and their family members, including those fighting, and also allow some maintenance of property and land.

While acknowledging the wide range of positive benefits of the TPD, which has provided an effective response

7. UNHCR, "Lives on hold: Intentions and Perspectives of Refugees and IDPs from Ukraine #4", 6 July 2023, available at: <https://bit.ly/3HrKtEe>.

8. UNHCR, "Handbook on Voluntary Repatriation: International Protection", 1996, available at: <https://bit.ly/3vz4LZN>.

9. Ibid.

10. Child Circle, ECRE, IOM, OHCHR, PICUM, Save the Children, UNICEF, "Guidance to respect children's rights in return policies and practices: Focus on the EU legal framework", September 2019, available at: <https://bit.ly/4b5J1oA>.

11. Bruegel, Policy Brief "Will Ukraine's refugees go home?", 27 September 2022, available at: <https://bit.ly/3SpB8Dd>.

to immediate protection needs, a challenge for the TPD, as for all temporary protection regimes and mechanisms, is its very temporariness. It largely neglects the very real possibility that many BTPs might not be able or willing to return to Ukraine, leaving aside the need to address integration needs and provide long-term assistance. On the other hand, it should be underlined that a premature end of the TPD regime is not likely to enhance the prospect of people returning. Rather, it could lead to panic and cause people to move within the EU and apply for asylum.

OPTION 2: EXTENSION OF TEMPORARY PROTECTION REGIMES, INCLUDING AMENDING THE TPD

According to the TPD, the temporary protection regime created can last up to three years. In the case of Ukraine, that means March 2025, which is the current period of validity. Throughout 2023, ECRE urged extension of the TPD regime until March 2025,¹² given the level of uncertainty people displaced from Ukraine were facing. Whatever the long-term options, the extension of the coverage of the TPD for another year has created some security for the people directly affected, as well as for the states managing the situation. It also allows for planning by the multitude of organisations – and individuals – involved in supporting those displaced from Ukraine, including family members, private hosts and social services.

A debate has now developed among the EUMS on whether and how to further extend the temporary protection regime. When the TPD was drafted and negotiated in 1999-2000, the original proposal had a period of validity of 5 years; this was considered too long by the EUMS at the time, and the compromise settled on 3 years. The first question arising relates to the objectives of the TPD: how long is “temporary” and, thus, for how long should a “temporary” protection status be valid? Five years could already be considered a long-term displacement. A second question is how – in legal terms – the TPD could be extended.

Amending the Directive

The current text of the Directive combined with a literal interpretation would not allow for further extensions, meaning that an amendment of the Directive may be necessary. Among other mechanisms that allow amendment of EU law, this possibility is referred to explicitly in Article 31 of the TPD, which states that, “the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary.”¹³

If the maximum duration of the TP regime is to be extended, using the ordinary legislative procedure to revise the Directive would likely be a time-consuming process. It requires the European Commission’s submitting a proposal to the Council and the European Parliament, followed by the negotiation process to reach an agreement between the co-legislators, and finally the adoption of the new text of the Directive. The process often takes up to three year, however, given the June 2024 European Parliament elections and the varying priorities of the upcoming rotating presidencies of the Council of the EU, the timeline could be stretched even further.

Prolonging the TP regime beyond 2025

Another possible route for prolonging the TP regime beyond 2025, without the amendment of the legal instrument, is to resort to the broader interpretation of its provisions – a possibility widely discussed at the time of writing.¹⁴ More precisely, the idea revolves around Article 4(2) of the TPD, which stipulates that in case the reasons for temporary protection persist, following a proposal from the Commission, the Council may decide by qualified majority to extend temporary protection by up to one year.¹⁵ Whereas the Article talks about the extension for the final third year, which has already taken place with the Council’s Decision to extend the TPD until March 2025, exhausting the full three-year term afforded by the Directive, a broader interpretation of the TPD to enable its extension beyond March 2025 at least for another (fourth) supplementary year might be explored, given the persisting hostilities in Ukraine. In addition, the concepts of *safety* and *dignity* in return apply, which the TPD Explanatory Memorandum defines as “the cessation of

12. ECRE Joint Statement “Extend the Current Temporary Protection Regime for Displacement from Ukraine until 2025”, 19 May 2023, available in Ukrainian and English at: <https://bit.ly/3tY4Oy0>.

13. 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 (TPD), OJ L 212, 7.8.2001, p. 12–23.

14. See, for example, European Law Blog, “What will happen to the refugees and asylum seekers that fled Ukraine? Addressing the threat of legal limbo after temporary protection ends”, 13 December 2023, available at: <https://bit.ly/4b0cXUN>.

15. 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 (TPD), OJ L 212, 7.8.2001, p. 12–23.

the causes which led to the mass influx, possibly a peace and reconstruction process, conditions guaranteeing respect for human rights and the rule of law”.¹⁶

This opportunity might be particularly relevant given the potential delays in decision-making in 2024 following the European Parliament elections and the appointment of a new College of Commissioners. However, it is important to stress that this possible temporary solution, which may raise rule of law concerns, should be examined more closely and evaluated only after the Commission provides the necessary legal basis and justification in its proposal.

Re-activating the TPD

Finally, the re-activation of the TPD is another possibility. It would involve a new Decision of the EUMS, on the initiative of the Commission, to re-activate the Directive for another period of up to three years. The option is not without challenges.

First, the decision would require a high degree of political support across the EUMS, as was the case for the unprecedented activation of the TPD in 2022. Political support is not to be taken for granted given the current context, and in particular the changing position of Hungary, illustrated by its opposition to a new package of financial aid for Ukraine.¹⁷ The change of government in Poland is also relevant, given that the previous government was a closer ally of and able to exert influence over Hungary. Doubts have also arisen in other countries feeling pressure, including Czechia, Ireland and Slovakia. Nonetheless, the decision can be taken by qualified majority even if the unanimity secured – and considered politically necessary – in 2022 is not achievable.

Second, the potential continuation of the TP regime for as long as six years risks creating a situation of protracted “temporariness” and uncertainty of legal status without giving a longer-term perspective to current BTPs. In addition, this step could undermine the effectiveness and success of triggering the TPD as a temporary emergency measure. Here, the example of Türkiye’s TP framework and its implementation can provide some lessons: the Law of Foreigners and International Protection Act’ (LFIP) and the Directive of Regulation on Temporary Protection provide “indefinite temporary residency for Syrians fleeing the civil war without a long-term promise of residency or citizenship rights”, specifying that “temporary protection will not lead to permanent residency after a specified duration of time”.¹⁸ In practice, besides the lack of permanent solutions, in a longer run the beneficiaries of TP also experienced reductions in the provided assistance.¹⁹ This trend is already being observed in a number of the EUMS.²⁰

Therefore, regardless of the technical aspects, the prolongation of the TP regime should be treated with caution, with an effort to maintain its temporary nature. If this option is to be used, it should be put in place with the goal of ensuring continuous access to legal status and rights while longer-term durable solutions for BTPs are developed.

OPTION 3: ASYLUM APPLICATIONS

The TPD is part of the Common European Asylum System (CEAS) rather than an alternative to it. In line with the principles of EU and international law, beneficiaries of TP status retain the right to apply for asylum. Indeed, asylum was viewed as one of the exit strategies from the TPD regime by the drafters of the instrument – either the people covered by the TPD would be able to return or they would apply for international protection via the asylum system.

For this reason, the TPD clearly states the possibility of transitioning from TP status to asylum procedure, more

16. Explanatory Memorandum to the Proposal for a Council Directive 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 C 311E, 31.10.2000, available at: <https://bit.ly/423O2tQ>.

17. Politico, “European Council latest: EU leaders seek ‘workarounds’ after Orbán blocks Ukraine aid”, 13 December 2023, available at: <https://politi.co/48WX7XE>.

18. Rygiel, K., Baban, F., & Ilcan, S. (2016). The Syrian refugee crisis: The EU-Turkey ‘deal’ and temporary protection. *Global Social Policy*, 16(3), p.317. <https://doi.org/10.1177/1468018116666153>.

19. AIDA Country Report, Türkiye, 2023, available at: <https://bit.ly/48HYEkO>; Eren, E.Y. (2019). Is Temporary Protection Eternal? The Future of Temporary Protection Status of Syrians in Turkey”. *Border Crossing*, (2), p.132. <https://www.cceol.com/search/article-detail?id=840696>.

20. For example, the reduced assistance with access to accommodation in Poland (<https://bit.ly/3S3rAwn>) and Ireland (<https://bit.ly/3Ox13H1>), as well as suspended provision of food in Bulgaria (<https://bit.ly/47K4e4J>).

precisely, the possibility “to lodge an application for asylum” is stipulated in Articles 17-19 of the TPD.²¹ Importantly, the TPD allows for an application to be submitted during the period of TP validity, specifying that in cases where the examination is not processed by the end of the TP framework, it still has to be completed. At the same time, the legal provision states that in case of the rejection of the asylum claim, the TP beneficiary should be able to continue enjoying the TP status for the remaining period of its validity.

It is possible that a considerable number of current BTPs might explore this option, especially if uncertainty persists. In 2022, there were 24,710 asylum applications from persons fleeing Ukraine in the EU,²² while the protection rate for those applicants was high, at 90%.²³ This high recognition rate persisted in 2023:²⁴ the latest figures from the EU Asylum Agency (EUAA) show that 90% of the decisions on 1,419 registered asylum applications were positive.²⁵ The figures should be read with caution, however, given that most people fleeing Ukraine have availed themselves of the TPD regime; those who have applied for asylum instead may have a profile that makes it more likely that they are recognised as in need of international protection under EU law. The risk with the asylum route is that many people – potentially millions – may not receive an international protection status and will then be left in limbo, unless national protection statuses can be used (see below).

Nonetheless, a certain number of aspects related to the transition to asylum procedure remain unclear and need timely and detailed elaboration.

First, it is unclear whether a majority of those currently hosted under the TPD would qualify for a protection status in EU law – either for refugee status or for subsidiary protection under EU law. In terms of the latter, subsidiary protection, country guidance from the EUAA would be important to ensure a consistent approach across the EU+.

Second, the question of the country responsible for the asylum application arises. The reading of Article 18 of the TPD gives no direct indication of the EUMS responsible for considering an asylum application. This is accompanied by the decision not to activate Article 11 of the TPD,²⁶ meaning the absence of the obligation on an EUMS to return those who have already registered for protection in another EUMS. Given this situation, one of the possibilities is that current BTPs might lodge an asylum application in an EUMS *other than* the state where they are registered for TP.

Some clarifications are provided in the Operational Guidelines, which state that the Dublin III Regulation should be applied for determining the EUMS responsible for examining the asylum application in accordance with objective criteria, which include in hierarchical order, *inter alia*, the presence of family members and the issuance of residence permits for temporary protection.²⁷

Following these recommendations could create an additional administrative burden, particularly on the EUMS most affected by the ongoing displacement. An alternative would be to suspend the Dublin rules and for responsibility to simply lie with the country where the application is lodged.

An additional question arising in a potential transition from the TP regime to the asylum procedure is the rights to be afforded to the beneficiaries of protection. Article 19 of the TPD prevents the situation of concurrent statuses and, consequently, sets out the need to opt for a single protection regime and related set of rights – either the rights deriving from the TPD or the rights of an asylum applicant. In practical terms, this implies choosing between the diverging approaches in the TPD and the APD to family reunification, access to education, employment and healthcare, and rules on other material reception conditions and benefits. For instance, depending on the modalities of the national frameworks, becoming an asylum applicant in most countries might imply losing the simplified access to the labour market and assistance with private accommodation which are available under the TP regime.

21. 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 (TPD), OJ L 212, 7.8.2001, p. 12–23.

22. Source: Eurostat (migr_asyappctza).

23. According to Eurostat, in 2022 there were 8590 total decisions, out of which 7760 were positive.

24. During the period February - September 2023 there were 8510 applications from Ukrainian nationals (Source: Eurostat, migr_asyappctzm). The decline in registered applications as compared to 2022 can be explained by channelling the applications into the temporary protection tract and/or temporal suspension of asylum registrations lodged by Ukrainians citizens in certain Member States.

25. European Union Asylum Agency, “Latest Asylum Trends – October 2023”, available at: <https://bit.ly/3O8sGFY>.

26. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INITOJ L 71, 4.3.2022, p. 1–16.

27. Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01, 21.3.2022, p. 1–16.

Finally, a *prima facie* approach²⁸ could be recommended by the European Commission, using the possibility of an accelerated asylum procedure, with the fast-tracking of the asylum applications of those currently under the TPD as manifestly founded claims for international protection. It is not obvious, however, that the situation in Ukraine meets the usual criteria for treatment of cases as manifestly founded, which is usually based on reference to the likelihood of gaining refugee status in accordance with the Refugee Convention. Rather, other possibilities for expedited treatment of a certain caseload might need to be invoked.

OPTION 4: PROTECTION STATUSES/RIGHTS TO REMAIN IN NATIONAL LAW

Most EUMS have provisions in national law that allow for granting protection status beyond the refugee status and subsidiary protection status that they are obliged to provide for when they implement EU law. These other statuses often take the form of humanitarian protection statuses, used when a person does not qualify for either refugee or subsidiary protection but is nonetheless considered to be in need of protection. That may be because their life or safety is at risk if they are returned to their country of origin or residence, but the threat does not reach the threshold for persecution or generalised violence. It may also be that for family or health reasons it would contravene their human rights to return them. In 2022, across the EU+, around 65,000 people were granted a protection status under national law. In addition, there are other options available to EUMS, including tolerated stays and the use of the right to remain, which may exist in national law and are usually within states' discretion to grant.

Some of these statuses and mechanisms may be relevant and useful – and indeed appropriate – for people having fled Ukraine. These statuses remain within national law, so it will be for EUMS themselves to decide on their validity and applicability – and the related rules on use – of such statuses. In some cases, states could consider introducing new statuses or guidance on using such statuses for Ukrainian cases. Nonetheless, certain challenges could arise as a result of relying on this option.

First, Europe-wide coordination is difficult, since these statuses exist in the EUMS' national laws. EUMS have a variety of such statuses, and their use is often highly opaque. A reluctance to coordinate is also likely as this characterises matters that exist outside of EU competence, where the EU institutions have no role to play.

Second, the tendency in recent years has been to limit the use of these statuses and, indeed, to remove them from statute. The prime example is Italy, where humanitarian protection statuses were granted in around 40% of asylum cases up until 2017. In 2018, the government severely restricted the availability of these statuses and their use is now far more limited. Although these moves were welcomed or even encouraged at the time, including by other countries and in some cases by the EU, on the basis that the perceived “overuse” of these statuses created a “pull factor”, that approach has been proven to be misguided: the absence or restricted use of such status results in increased irregularity and onward movement.

Thus, for displacement from Ukraine, encouraging and facilitating the use of other protection statuses and related options granting a right to remain would be useful, but it would also run counter to recent trends in asylum policy.

OPTION 5: NEW PROTECTION STATUSES IN EU LAW

To overcome the challenges related to relying on the range of different statuses in national law, an option could be to create in EU law some form of humanitarian protection status applicable to those transitioning out of the TPD.

The idea of a ten-year Reconstruction Permit which could be granted to current BTPs to allow both for maintaining their status in the EU and participating in the reconstruction efforts in Ukraine has been discussed by the European Commission,²⁹ however, it has not materialised in any concrete policy initiative.

Options with a similar rationale could be explored, which might also address the dimension of Ukraine's integration process into the EU. Hence, a new type of pre-accession permit could be developed to address multiple aspects: the need to maintain the legal status of and access to rights by current BTPs, the aspiration to continue maintaining the links in Ukraine and participate in the reconstruction effort, and finally, the necessity to prepare for prospective accession of Ukraine to the EU with the consequent adherence to the free movement area and obtaining direct access to the EUMS labour markets.

28. UNHCR, “Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status”, 15 June 2015, available at: <https://bit.ly/3S3RSyG>.

29. European Commission, Employment, Social Affairs & Inclusion, “EU Commissioners discuss the progress of the integration of people fleeing Russia's invasion of Ukraine”, 5 June 2023, available at: <https://bit.ly/48EQVUw>.

To maintain the EU collective approach, the potential instrument, which could be based on Article 67(2) of the Treaty on the Functioning of the European Union,³⁰ should imply uniform application of common rules, possibly to be reflected in a Regulation, a legal instrument of secondary EU law. Such a pre-accession permit should include some of the elements that make the TPD function effectively, including:) continuous freedom of movement, both within the EU and to and from Ukraine, with the maintenance of the right to travel to Ukraine without the loss of the permit;³¹ and full access to socio-economic rights. The validity of the permit would need to be linked to Ukraine's accession process and the developments and progress within it.

Incorporating those elements into a new legal instrument could provide a longer-term perspective for current BTPs and benefit from the lessons learned in implementing the TPD (see section III).

OPTION 6: TRANSITION TO WORK-BASED PERMITS

An alternative to statuses based on recognition of protection or related human rights concerns is transfer to a legal status based on work. This is already happening in some EUMS, with Ukrainians increasingly granted work permits.³² For example, in line with the amendments to Polish legislation,³³ since 1 April 2023, BTPs have been able to apply for temporary residence permits based on employment or business activity. A more recent example from Italy provides a similar opportunity: the law N.213 of 1 January 2024, besides extending residence permits for temporary protection until 31 December 2024, in its Article 1(396), introduces the possibility of converting residence permits for temporary protection into residence permits for work.³⁴

Prior to the full-scale invasion of 2022, Ukrainians made up the third largest number of third-country nationals in the EU (behind citizens of Morocco and Türkiye), with 1.57 million Ukrainian citizens authorised to stay in the EU at the end of 2021.³⁵ The vast majority were residents on work permits issued under national law (around 1.3 million),³⁶ with by far the largest number issued by Poland (790,070 permits).³⁷ While it is a speculative point due to the lack of research, it is likely that a number of those people were in situations of forced displacement, given the violence taking place in the country since 2014, and that some may have qualified for protection-based statuses.

When scrutinising the options of work-based permits, in the current legal context, the major focus is placed on exploring the possibilities within respective national frameworks since several tools comprising the so-called "legal migration package" developed at the EU level fail to provide a direct path which the BTPs could explore to maintain legal status and access to rights. Several recent examples of revised instruments show the missed opportunities to accommodate persons enjoying TP in the EU within their scope.

EU Blue Card

An important characteristic of the current displacement – and many others – is a significant mismatch between the jobs and the level of education and obtained qualifications among those displaced by the war.³⁸ This issue raises the question of the relevance of the recently recast Blue Card Directive,³⁹ which facilitates access to labour markets for highly qualified migrants. While this could present one of the possible ways for direct transitioning from the TP status, the recast Directive preserved the exclusion of TP beneficiaries from its scope (Article 3). Making current BTPs ineligible for directly applying for a Blue Card, this provision implies that BTPs who consider this option would have to transit to another legal status or protection framework before applying for a Blue Card.

30. European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

31. This measure could address current discrepancies across EUMS regarding the policies regulating 'pendular' movements and their effects of TP status and related benefits. For more information, see ECRE Policy Note "Movement to and From Ukraine Under the Temporary Protection Directive", 13 January 2023, available at: <https://bit.ly/3RXncyY>.

32. This trend has been reported to ECRE, however, no reliable statistics are available at the moment of writing.

33. Internetowy System Aktów Prawnych, "Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz niektórych innych ustaw", 28 January 2023, available at: <https://bit.ly/44A8KkV>.

34. Ministero del Lavoro e delle Politiche Sociali, "Ucraina, prorogati fino al 31 dicembre 2024 i permessi di soggiorno per protezione temporanea", 29 December 2023, available at: <https://bit.ly/48C4q7p>; Camera dei deputati, "Bilancio di previsione dello Stato per l'anno finanziario 2024 e bilancio pluriennale per il triennio 2024-2026" (approvato dal Senato) (1627)", 30 December 2023, available at: <https://bit.ly/3SzcNvV>.

35. Eurostat, "Ukrainian citizens in the EU", November 2022, available at: <https://bit.ly/3vlyZty>.

36. Source: Eurostat (migr_resocc).

37. Ibid.

38. OECD, "The potential contribution of Ukrainian refugees to the labour force in European host countries", *OECD Policy Responses on the Impacts of the War in Ukraine*, OECD Publishing, Paris, 2022, available at: <https://doi.org/10.1787/e88a6a55-en>.

39. Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L 382, 28.10.2021, p. 1–38.

According to the revised framework, highly skilled holders of international protection are eligible to enjoy simplified procedures to access employment and intra-EU labour mobility. Given the modest success of the initial Blue Card Directive of 2009,⁴⁰ partially due to its restrictive scope, the recast Directive could have benefited from the current momentum to advance harmonisation of the EU framework for highly qualified labour migration and to promote further labour market integration of migrants, should it include the beneficiaries of *all* forms of protection. Extending the eligibility scope to the current BTPs could have also contributed to fulfilling time requirements for the EU long-term residence outlined below. Additionally, exploring this and other national labour migration frameworks would allow the EUMS to further tackle their structural labour shortages and demographic challenges.⁴¹

Whereas this framework in its current form does not constitute a directly available option, this does not prevent MS from including BTPs in respective national schemes. Here, recent amendments to Polish legislation represent a positive step forward, as they expand the scope of the Blue Card to BTPs.⁴² Following the amendments, citizens of Ukraine enjoying TP in Poland are eligible for a number of temporary residence permits, including one related to the performance of a highly qualified occupation (Blue Card).⁴³

Single Permit

The transposition of a Single Permit Directive,⁴⁴ which aims to unify the application procedure for work and residence permits for third-country nationals, is another area allowing Member States to improve access to their labour markets and the respective standards. While the framework does not constitute a novel legal pathway in itself, with the BTPs being potentially once again excluded from its scope in the process of the ongoing revision of the instrument,⁴⁵ in case of better transposition, it can align national labour frameworks with the standards of the Directive (*inter alia*, protection from exploitation, right to change employment and to be unemployed). Expanding the eligibility scope to those already in the country would contribute further to accommodating the specificity of the situation of current BTPs.⁴⁶

Long-term EU residence

In EU law, an option that has been discussed but is at risk of being ruled out, is long-term residence status. A recent proposal from the European Commission for the recast of the Directive on EU long-term resident status (LTRD)⁴⁷ lays the foundation for a potential option. In its draft report on the proposal, the European Parliament supports inclusion of current BTPs within the scope of the recast LTRD.⁴⁸ ECRE strongly supports this approach, as explained in its comprehensive analysis of the potential of the LTRD, which concludes that the LTRD recast is vital for providing lasting solutions to different groups of TCNs, including BTPs.⁴⁹ ECRE's recommendations to the co-legislators, among others, point to the importance of expanding the scope of the Directive to encompass beneficiaries of temporary and national protection statuses (as proposed by the EP) and people pursuing studies or vocational training, as well as expanding the eligibility criteria to allow all eligible individuals, not just some, to accumulate qualifying periods of residence in different EUMS.

Although the debate on the Single Permit and Long-term EU Residence statuses are part the legislative proposals currently under discussion, it is crucial not to exclude TP beneficiaries from their scope. While the difficulty of accessing the Single Permit may be related to the need to secure the necessary job offers, both frameworks present an opportunity for a simplified procedure to transit to another legal status should they be available at the time of the TPD expiry.

40. Eurostat, "Residence permits – statistics on authorisations to reside and work", 18 December 2023, available at: <https://bit.ly/48Z7lqx>.

41. OECD, "The potential contribution of Ukrainian refugees to the labour force in European host countries", *OECD Policy Responses on the Impacts of the War in Ukraine*, OECD Publishing, Paris, 2022, available at: <https://doi.org/10.1787/e88a6a55-en>.

42. Internetowy System Aktów Prawnych, "Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz niektórych innych ustaw", 28 January 2023, available at: <https://bit.ly/3O8VkkqA>.

43. SIP, "Who can apply for temporary residence (under the Special-purpose Act) in Poland from 1.04.23 and under what conditions?", 23 June 2023, available at: <https://bit.ly/3Oc1i5U>.

44. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1–9.

45. Proposal for a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast), 2022/0131(COD), 13.06.2023, available at: <https://bit.ly/3ObTyVz>.

46. ETUC, "Position on the recast of the Single Permit Directive (SPD)", 6 December 2022, available at: <https://bit.ly/3OajOiW>.

47. Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast), COM/2022/650, 27 April 2022.

48. Report on the proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast), 2022/0134(COD), 13 April 2023.

49. ECRE Policy Paper "The Potential of The EU's Long-term Residency Directive", 20 October 2023, available at: <https://bit.ly/3vJ1QxX>.

EU Talent Pool

Finally, a recent initiative of EU Talent Pool,⁵⁰ currently in its pilot stage, creates a platform for job matching, aiming to bring together job seekers from non-EU countries and employers in the EUMS. Being one of the deliverables of the EU's New Pact on Migration and Asylum, it aims to attract talent to the EU and support integration in local communities. The Talent Pool is currently based on the voluntary, and so far rather limited, participation of the EUMS. While the proposed Regulation establishing an EU Talent Pool⁵¹ lays a promising foundation for a speedy and efficient mechanism for job matching, there is a need for more EUMS to be connected to the platform. The Talent Pool was piloted in October 2022 to address the needs of those fleeing Ukraine, but there is limited information available publicly on its efficacy.

The statuses described above, deriving primarily from employment, provide an alternative option for current BTPs to maintain their legal status independently of the validity of the TP regime. At the same time, the drawbacks of these options include an increased risk of exploitation, and potentially high dependence on employers, which can result in irregularity, for example, following termination of a contract or due to a dispute.

Other options

Beyond the six different options – or groupings of options – described above, there may be other potential statuses for specific groups of people fleeing Ukraine, such as residence rights based on student status, or long-term rights to remain in national law.

Whereas the employment-based statuses are relevant for those displaced from Ukraine who are active in the labour market, they should be developed in parallel with other options that address the needs of students, the elderly and other groups of people unable to work due to trauma/health issues, carer responsibilities, or other vulnerabilities. Moreover, other categories of BTP, such as refugees, persons granted complementary protection and stateless people, may face problems in obtaining work-based permits due to their lack of documents or other barriers. For example, many do not have passports of their countries of origin, while the possession of such documents is a requirement for residence in certain EUMS, such as Germany and the Netherlands.⁵²

IMPLEMENTATION: TPD AND FUTURE OPTIONS

Whatever options are made available for the post-TPD phase, sound management of the situation requires better implementation than is currently the case, both concerning the current implementation of the TPD and the future implementation of whatever option is chosen. In a number of EUMS, there is a lack of respect for one or more of the provisions in the TPD instrument and related decisions. If these are not addressed, then onward movement, a lack of integration, and social tension are likely to increase. Hosting large numbers of refugees from Ukraine will become politically difficult if local populations feel hostility towards those hosted. As for other refugees and asylum applicants, supporting integration through access to rights is the best way to overcome such challenges.

ECRE's extensive analysis of the implementation of the TPD has identified the following implementation gaps, which should be addressed as a matter of urgency.

First, non-issuance or delayed issuance of residence permits, which clearly violates the TPD, is further aggravated by the lack of access to an effective remedy and clear information about the rights of TP beneficiaries made available in relevant languages and an easily accessible form.⁵³

Second, the lack of administrative decisions on the refusal of temporary protection, problems with narrow family definitions, and different interpretations of freedom of movement by EUMS represent another set of examples of implementation gaps.

50. European Website on Integration, "European Commission launches EU Talent Pool pilot initiative", 10 October 2022, available at: <https://bit.ly/3SoHQcA>.

51. European Commission, Migration and Home Affairs, "Regulation establishing an EU Talent Pool", 15 November 2023, available at: <https://bit.ly/3TZZxk6>.

52. CF "Right to protection", "Infographic and legal note to help refugees eligible for temporary protection in the EU", 14 August 2023, available at: <https://bit.ly/3Uehawt>.

53. ECRE, "The EU's Response to Displacement from Ukraine: ECRE's Recommendations", 10 October 2023", available at: <https://bit.ly/3U1yHrP>.

Third, regarding access to socio-economic rights, ECRE identified the following key implementation gaps: limited access to long-term independent housing; lack of facilitated procedures for recognition of qualifications and available training; barriers to access to education; and limited access to healthcare and social welfare.⁵⁴ ECRE argues that ensuring the inclusion of BTPs in host communities via direct access to socio-economic rights, including access to long-term accommodation has particular potential in terms of facilitating access to other interrelated rights and paving the way for displaced persons to lead independent and dignified lives.

Finally, improving the situation with access to the rights mentioned above with the correct use of EU funds has the potential of creating a win-win situation for both displaced persons and the local population, especially in such areas as housing and healthcare, which, in turn, can help to maintain local populations' support, which is proven to be among the key factors contributing to the success of the response to the displacement from Ukraine.

The lack of certainty and lack of awareness of the options available upon the termination of the TPD-related status can affect the life strategies and the aspiration to commit to integration in host communities. Following the analysis of the conditions of the possible gradual return in the context of Ukraine's post-war reconstruction, this Policy Paper argues for a detailed roadmap of the scenarios for significant numbers of Ukrainians exploring alternative statuses in the EU upon the expiry of the current TPD-related regime. While developing the strategy and plans for the post-TPD period, the EU should use its existing legal tools to ensure long-term prospects for those willing to return and for those who have to stay in the EUMS, including exploring the potential of new statuses. Contributing to the inclusive reconstruction of Ukraine on the one hand and developing the scenarios for those planning to remain in the EU on the other will reduce the uncertainty among current BTPs and facilitate their integration in the host societies.

RECOMMENDATIONS

To the European Commission:

- » Based on the assessment of its legality, put forward a proposal for extension of the TPD regime beyond 2025 or amendment of the TPD as a matter of urgency in order to start the decision-making process within the current legislative period;
- » Ensure inclusive reconstruction and funding policies for Ukraine to facilitate the gradual voluntary return of displaced persons;
- » Develop guidance for EU Member States on the options available to the current Beneficiaries of Temporary Protection (BTPs) upon the expiry of the TPD regime;
- » Explore the options for new protection statuses in EU law, and the possibilities within existing EU asylum law that would ensure smooth and rapid transition to a protection status when relevant for current BTPs.

To the co-legislators on provisions related to the EU long-term residency:

- » Integrate BTPs into the scope of the EU long-term residence permit.

To EU Member States:

- » Allow displaced people access to asylum procedures as provided by the 1951 Convention and ensure that the rights under the TPD are not waived until the final decision on international protection is taken. In the event of a negative decision, TP status should not be affected as long as the TPD-related regime remains active;
- » Develop labour mobility and long-term residency frameworks to address the possible long-term stay of current BTPs based on the respective EU frameworks.
- » Include BTPs in the scope of the existing EU legal migration tools (e.g. EU Blue Card) and those currently under revision (e.g. Single Permit Directive) via the transposition of these tools into the national legislation.
- » Ensure availability of legal statuses beyond those based on employment, addressing the situation of displaced students, persons with specific health conditions, and the elderly.

54. ECRE, AIDA Comparative Report "Access to socio-economic rights for beneficiaries of temporary protection", August 2023, available at: <https://bit.ly/3HrLf46>.



ecre

European Council
on Refugees and Exiles

European Council on Refugees and Exiles

Avenue des Arts 7/8

Brussels 1210

Belgium

T.+32 232 900 40

ecre@ecre.org

www.ecre.org