

# CM2308

## COMMENT ON WHAT WILL HAPPEN WHEN THE TEMPORARY PROTECTION SCHEME FOR REFUGEES FROM THE WAR IN UKRAINE ENDS

**JULY 2023**

In April 2023 almost 4 million people who fled the war in Ukraine benefited from the EU Temporary Protection Scheme, which was extended up to 4 March 2024. The Council may decide to extend it for one further year. The EU legislator must start thinking now beyond those dates. Even if the war ends before March 2025, successful return to Ukraine is contingent on reconstruction and stability in Ukraine. Experiences with refugees from the war in former Yugoslavia demonstrate that many refugees will, in fact, not return. Legal solutions must therefore be in place for the moment the temporary protection schemes expires. As explained in this comment, any such solution likely requires amending currently applicable EU law.

In this comment, the Meijers Committee recommends the EU legislator to amend EU law to provide a common solution for temporary protection beneficiaries from Ukraine who after the expiry of the temporary protection scheme want to (temporarily) continue their residence in the EU. Their future residence in the EU should not depend solely on national law or practice in their Member State of residence, which may considerably vary between the Member States. In case the war in Ukraine would still continue in March 2025, the Meijers Committee gives three concrete recommendations. The Meijers Committee also makes specific recommendations to the European Parliament and the Council concerning the position of temporary protection beneficiaries in the recast of the Long-Term Residence Directive (LTR) and the Single Permit Directive (SPD).

# Meijers Committee

Standing committee of experts on international  
immigration, refugee and criminal law

## CM2308 Looking ahead for refugees from the war in Ukraine: what will happen when the current Temporary Protection scheme ends?

### Summary

In April 2023 almost 4 million people who fled the war in Ukraine benefited from the EU Temporary Protection Scheme, which was extended with a second year up to 4 March 2024. The EU Council may decide to extend it for one further year, up to 4 March 2025. The EU legislator must start thinking now beyond those dates. Even if the war ends before March 2025, successful return to Ukraine is contingent on reconstruction and stability in Ukraine. Experiences with refugees from the war in former Yugoslavia demonstrate that many refugees will, in fact, not return. Legal solutions must therefore be in place for the moment the temporary protection scheme expires. As explained in this comment, any such solution likely requires amending currently applicable EU law. This is a further reason why timely decision making is required.

In this comment the Meijers Committee discusses two key questions:

- 1) What are the advantages and disadvantages of extending the temporary protection scheme after the current maximum of three years and of alternative options in EU law for a more durable solution after the end of the current scheme?
- 2) Should a new EU residence status (Reconstruction Permit) be established or should existing EU legal migration and asylum instruments be used and possibly amended?

In view of the temporary and insecure nature of temporary protection, our Committee recommends that although the temporary protection (hereafter: TP) scheme could be extended to apply to new arrivals from Ukraine, persons should not be kept in that regime for a longer period than the maximum of three years. After that period, durable solutions, including residence in the EU, should be available. A common solution should be provided in EU law. It should avoid overburdening national immigration authorities.

For similar reasons, the solution of a Reconstruction Permit suggested by the EU special adviser on integrating persons fleeing Ukraine into the EU, if based on the assumption of forced return once the war ends, is not to be recommended. This would obstruct the integration of refugees from Ukraine and would put them at a significant disadvantageous position compared to other legally residing third-country nationals.

Instead of prolonging uncertainty, the Meijers Committee advises the EU legislator to consider applying, on a group basis, three existing statuses allowing for legal residence under EU law to persons fleeing the war in Ukraine: i) collective asylum based on the Qualification Directive, ii) long-term resident status based on the Long-term Residents Directive and iii) free movement based on the EU Citizenship Directive.

The comment discusses and compares the pros and cons of these three models, without recommending one of them specifically. Our analysis chiefly aims at assisting the EU and its Member States in the upcoming negotiations on the matter.

We do recommend the EU legislator to seriously and systematically consider whether the exclusion of temporary protection beneficiaries from the scope of all EU legal migration directives is still justified. The exclusion is likely to negatively impact the integration of temporary protection beneficiaries and results in unequal treatment with third-country nationals in a comparable situation.

The currently ongoing legislative negotiations on a recast of both the Long-term Residents Directive (hereafter: LTRD) and the Single Permit Directive (hereafter: SPD) should be taken as an opportunity to contribute to durable solutions for persons from Ukraine, instead of categorically excluding them from their scope.

## **Recommendations**

In sum, the Meijers Committee recommends amending EU law to provide a common solution for temporary protection beneficiaries from Ukraine who after the expiry of the temporary protection scheme want to (temporarily) continue their residence in the EU. Their future residence in the EU should not depend solely on national law or practice in their Member State of residence, which may considerably vary between the Member States. The Meijers Committee concludes, that if the war in Ukraine continues in March 2025:

- there should be no general further extension of the temporary protection scheme after the maximum of three years;
- there is no need for a new Reconstruction Permit; three existing EU models laid down in the Qualification Directive since the LTRD and the EU Citizenship Directive offer a more secure and durable status than temporary protection;
- the current temporary protection scheme should continue to apply after March 2023 only to recently arrived displaced persons from Ukraine and to temporary protection beneficiaries with three years of residence unable to switch immediately to another more permanent residence status.

In case the EU Council would decide to end the temporary protection scheme before March 2025 and the current beneficiaries would automatically lose their protection status, the Council should regulate accordingly which EU status would be acquired by the former beneficiaries.

## **Recommendations regarding the pending recasts**

In addition to the common EU solution discussed above, the Meijers Committee makes, with respect to the position of TP beneficiaries in the recast of the LTRD and the SPD, the following recommendations to the European Parliament and the Council:

- delete the current exclusion of TP beneficiaries in both the LTRD and the SPD;
- reduce the residence requirement for the LTR status for beneficiaries of international protection and temporary protection from five to three years;
- periods of residence on the basis of TPD should count for the residence requirement for the acquisition of the LTR status;
- accept the Commission's proposal that the LTR status is lost due to absence from the EU only if that absence exceeds 24 months, at least for beneficiaries of international protection and temporary protection.

## CM2308 Looking ahead for refugees from the war in Ukraine: what will happen when the current Temporary Protection scheme ends?

### 1. Introduction: what is the issue?

The launching and actual implementation of the Temporary Protection (hereafter: TP) scheme for Ukraine in March 2022 has been relatively successful.<sup>1</sup> Member States supported by the EU succeeded in receiving and accommodating more than 4 million displaced persons from Ukraine within a few months on the basis of the Temporary Protection Directive 2001/55 (hereafter: TPD). Few Europeans would have considered this to be possible before February 2022.

Nobody knows how long the war in Ukraine will last. In August 2023, a year and a half will have passed since Russia invaded Ukraine. Those displaced by the war, Member States and the EU should prepare for the situation that the war, the residence of TP beneficiaries and the need for protection will last longer than the maximum of three years provided for in Article 4 of the TPD. The Commission extended the TP scheme to 4 March 2024. The Council may decide to extend it for one further year, up to 4 March 2025. This comment discusses the legal solutions available to the EU beyond that date.

Under the TP scheme, those who fled the war are allowed to live, work and study in the Member State of their choice. Many have taken up jobs, are enrolled in schools or at universities and are learning the language of their Member State of residence. In Germany, for example, during the first half of 2022, already 63,000 TP beneficiaries from Ukraine participated in the official German language and integration course offered and paid for by the government. They made up 44% of the new course participants.<sup>2</sup> With time, they are integrating in the society of that state.

### 2. Will Ukraine TP beneficiaries return or remain?

To return or remain is a dilemma for the displaced persons as well as the host societies. A lesson from earlier large-scale migration movements is that a large share, often the majority, returns, if possible, during the first three years. A considerable minority remains for a wide range of reasons for a longer time or forever. Many of those who fled Ukraine will prefer to remain in the EU to complete a study, to continue (self-)employment, after family reunification or a change in family relations, because they see better prospects for themselves or their children or sufficient accommodation in Ukraine is not available pending reconstruction.<sup>3</sup>

Another lesson from the past is that the return rate tends to be higher if migrants are offered the possibility to make visits and return to their country of origin without the risk of immediately losing their residence rights in the host Member State, thus without losing the possibility of return to the host Member State in case the return is unsuccessful. Article 21(1)

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<sup>1</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022.

<sup>2</sup> BaMF, Bericht zur Integrationskursgeschäftsstatistik für das erste Halbjahr 2022 (inkl. methodischer Anhang) (bamf.de), p. 7.

<sup>3</sup> M. de Hoon, M. Vink, & H. Smeets, A ticket to mobility? Naturalisation and subsequent migration of refugees after obtaining asylum in the Netherlands. *Journal of Ethnic and Migration Studies*, 2020, (46), no. 7, p.1185–1204 at 1199 and A. Leerkes & M. de Hoon, Blijven statushouders in Nederland? WODC-Cahier 2019–13, p. 33. doi: 10.1080/1369183X.2019.1629894.

TPD, which states that Member States “may provide for exploratory visits”, reflects the experience with refugees from the war in Bosnia–Herzegovina (hereafter: Bosnia).<sup>4</sup>

### **3. Post-TP alternatives in the Temporary Protection Directive**

The TPD<sup>5</sup>, adopted in 2001, foresees four alternatives after the automatic loss of the TP status for its beneficiaries at the end of the TP scheme:

- (a) remain with refugee status after a successful asylum procedure<sup>6</sup>,
- (b) voluntary return<sup>7</sup>,
- (c) forced return<sup>8</sup>, or
- (d) other status based on national law<sup>9</sup>.

Additional alternatives, which the EU legislator could not take into account when drafting the TPD, have been developed in the EU legal migration and asylum instruments adopted after 2001. Subsidiary protection, the EU long-term residence (hereafter: LTR) permit and the EU Blue Card for highly qualified workers from outside the EU were unknown in EU law in 2001. These new alternatives might be more attractive to TP beneficiaries and Member States as post-TP status than a national status with different conditions and rights per Member State.

The TPD directive could be amended to extend the duration of the TP scheme beyond the current maximum of three years. In May 2023, Lodewijk Asscher, the European Commission’s advisor for Ukraine, recommended extending the TPD and creating a new Reconstruction Permit for TP beneficiaries from Ukraine for the expected duration of the reconstruction of Ukraine, possibly ten years.<sup>10</sup>

### **4. Two central questions**

In this Comment, the Meijers Committee discusses two central questions:

- 1) What are the advantages and disadvantages of extending the temporary protection scheme after the current maximum of three years and of alternative options in EU law for a more durable solution after the end of the current scheme?
- 2) Should a new EU residence status (Reconstruction Permit) be established or should existing EU legal migration and asylum instruments be used and possibly amended?

Our point of departure is that the TP beneficiaries should be given as soon as possible clarity about their perspectives and residence status after three years of TP and in case the war would end before that time. The perspective of large-scale irregular or tolerated residence with the related application of the Returns Directive should be avoided. It would add to the insecurity of the TP beneficiaries and negatively impact their integration. All refugees among them would be denied their full social and economic rights under the Refugee Convention

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<sup>4</sup> *Supra note 3.*

<sup>5</sup> Directive 2001/55/EC (TPD).

<sup>6</sup> Articles 17–19 TPD.

<sup>7</sup> Article 21 TPD.

<sup>8</sup> Article 22 TPD.

<sup>9</sup> Article 20 TPD.

<sup>10</sup> L. Asscher, Integration of people fleeing Ukraine in the EU, Note to European Commission, May 2023, p. 11.

and the EU Qualification Directive for five years. It would leave the question of what will happen at the end of the Scheme after five years unanswered.

## 5. Asscher's May 2023 Note

The first recommendation of the advisor on Ukraine to the European Commission is:

Provide clarity on what will happen after the TPD. It is clear that even after a second extension of the TPD many displaced persons from Ukraine are unlikely to be able to return home safely. This will create uncertainty and could exacerbate the waiting dilemma described above. It could also lead to divisions within the EU as Member States may be tempted to adopt different approaches. We should reassure displaced persons from Ukraine living in the EU about their status after the Temporary Protection Directive expires. To this end, I would call for a joint commitment with the Ukrainian government to extend the TPD for the expected duration of the reconstruction of Ukraine, possibly ten years. A joint statement between the Ukrainian Government and the European Commission could announce a Reconstruction Permit, to be launched after the second extension of the TPD.<sup>11</sup>

There are two important elements of this recommendation. The first, *explicit*, element is that a solution should be found at the EU level rather than by the application of national immigration policies of Member States. The second, *implicit*, element is that even if the war ends, return depends on the successful reconstruction of Ukraine, precluding a policy of forced return. The Meijers Committee agrees with both elements. We will explain below why we disagree with the recommendation to create a new Reconstruction Permit.

## 6. Common solution at EU level

A solution at the national level would inevitably result in differences in the treatment of former beneficiaries of TP between Member States. National policies, which may aim at shifting responsibilities for TP beneficiaries to another Member State, should be avoided. The current EU policy, which allows TP beneficiaries to move to another Member State to reunite with family members or to find better employment or educational opportunities, has worked surprisingly well. It did not result in large-scale 'secondary' movements after the persons settled in a Member State. Moreover, the EU should avoid TP beneficiaries remaining in the EU but with fewer rights under national rules than they currently enjoy on the basis of the TPD. Further, the end of the TP scheme should not result in periods of irregular or tolerated residence which would harm their possibility to acquire permanent residence status or citizenship of the country of residence.

On the basis of currently applicable EU law, the TP beneficiary will only enjoy legal residence if a formal asylum application is filed before the end of the TP scheme.<sup>12</sup> The absence of a uniform EU post-TP scheme and reliance on national law would significantly increase the risk that former TP beneficiaries will temporarily be without lawful residence, even if a later asylum claim would be successful.

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<sup>11</sup> L. Asscher, Integration of people fleeing Ukraine to the EU: a note to the Commission, May 2023, pp. 11-12.

<sup>12</sup> Art. 9 of Directive 2013/32/EU.

## 7. Exclude forced return

Even though a policy of forced return may seem attractive once the war in Ukraine has ended, it will run into many foreseeable obstacles. First, as recognised in the Asscher report<sup>13</sup> and as is also evident from the current situation in Syria and the former situation in Bosnia, the possibility of return requires stability and reconstruction in Ukraine. Second, depending on the outcome of the war, parts of Ukraine may be (permanently) occupied by Russia. Third, former TPD beneficiaries may resist forced return by bringing an asylum claim, potentially resulting in large numbers of procedures. Under refugee law, cessation of protection is only possible if the change of circumstances is of significant and non-temporary nature.<sup>14</sup> Fourth, former TPD beneficiaries who have established family life or strong social networks in a host Member State may resist forced return before a court by invoking their right to private and family life. This may also result in large numbers of procedures. Fifth, the threat of forced return of part of those who came from Ukraine will not assist the integration of those who remain. Sixth, the visa freedom of Ukraine citizens will reduce the effectiveness of forced return. Seventh, the record of previous policies of large-scale forced return employed by Member States is overall quite poor. The forced return of almost 200,000 refugees from the War in Bosnia between 1999–2001, after many years of tolerated stay in Germany (*Duldung*) was widely criticised at the time and is an example not to be followed.

## 8. Lessons from the War in Bosnia

The experience with the reception of refugees from the civil war in Bosnia in the 1990s illustrates various policy options available to receiving states. Approximately 600,000 Bosnian citizens fled to the EU, of which 350,000 to Germany, where a large group of immigrant workers from Yugoslavia had settled in previous decades. In relation to the total population of the receiving countries, the number of Bosnians in Sweden was higher than in Germany. In Austria and Denmark, the numbers were not far below the German level (respectively 11, 12.4 and 15.4 per 1,000 inhabitants; 21,6 per 1,000 in Sweden). Most EU Member States concerned initially granted only temporary stays based on extended visas or temporary residence permits instead of refugee status. Sooner or later, it was decided to grant these asylum seekers permanent residence or refugee status: Austria 66,000, Sweden 53,000, Denmark 27,000 and the Netherlands 24,000.<sup>15</sup>

In Germany, the federal coalition government and the Länder governments were unable to agree on a similar solution. An estimated 50,000 Bosnian refugees moved from Germany mainly to the USA (in a special resettlement programme), Canada, Australia and other EU countries. Less than 5% received a German temporary residence permit. The stay of 80% was only tolerated (*"Duldung"*). They were de facto excluded from the labour market and had no right to family reunification. The three main justifications for this policy were: their protection need is only temporary; the high financial costs of reception and the refugees should contribute to the reconstruction of the newly independent states after the end of the war.

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<sup>13</sup> *Supra note 11.*

<sup>14</sup> Art. 16(2) of Directive 2011/95/EU.

<sup>15</sup> J. Oltmer, „Geduldet“ und „rückgeführt“, Schutzsuchende aus den postjugoslawischen Kriegen der 1990er-Jahre in Deutschland, Bundeszentrale für politische Bildung, Januar 2023, "Geduldet" und "rückgeführt" | Regionalprofil Südeuropa | bpb.de, Bericht der Beauftragte der Bundesregierung für Ausländerfragen, September 2002, p. 69–72, P. Goetze, Flüchtlinge aus dem ehemaligen Jugoslawien in Europa seit 1991, in: K. J. Bade/P. C. Emmer/L. Lucassen/J. Oltmer (Hg.), Enzyklopädie Migration in Europa. Vom 17. Jahrhundert bis zur Gegenwart, Paderborn 2007, S. 578–585 and K. Koser, Germany: Protection *for* Refugees or Protection *from* Refugees?, in: Joanne van Selm (Hg.), Kosovo's Refugees in the European Union, London/New York 2000, S. 24–42.

Germany successfully pressed for clauses on return in the Dayton Peace Agreement signed in December 1995. In three subsequent shifts, the *Duldung* was no longer extended and the Bosnians were obliged to return, either ‘voluntary’ with some financial support and under threat of expulsion. In the years 1997–1999, almost 200,000 Bosnian war refugees (were) returned on the basis of a German–Bosnia readmission agreement signed in 1996; 11,000 were expelled with the use of force. Persistent severe criticism of this return policy resulted in regularisation campaigns (*Altfallregelungen*) in 1999 and 2001 for the remaining 30,000 Bosnians, mainly older, traumatised or disabled persons.<sup>16</sup> Negative appreciation of the failure to agree on a common EU policy for the reception of refugees from the war in Bosnia and from the subsequent war in Kosovo was the main reason for the adoption of the TP Directive in 2001.<sup>17</sup>

#### 9. Is extension of the TPD after three years desirable and sufficient?

The advice of Asscher that, after the second one-year extension of TP from March 2024 until March 2025, temporary protection should be further extended, possibly for ten years, at first sight, has the appeal of simplicity. As with the first activation of the TPD scheme, such an extension has collective effect for the whole group. It does not require individual decision-making. National immigration authorities already have experience with the recent first extension of protection for more than 4 million registered TP beneficiaries. The extension would require some changes in Articles 4–6 of the TPD.

Upon closer inspection, this solution has several serious disadvantages:

- It is a temporary solution only. The question of what will happen after 5, 8 or 10 years of temporary protection remains unanswered or is left to the national law and policies of Member States.
- For many years, the persons concerned will remain uncertain about their long-term perspective. Will they be allowed to stay or not? This uncertainty will neither assist their integration in the Member State nor their capabilities to support the reconstruction of Ukraine.
- This uncertainty will not stimulate TP beneficiaries to become self-supporting or more fully economically active and, thus, increase the costs of reception and social assistance and social security.
- The temporariness of their residence is reinforced by the provision in the TPD that the Council at any time during those years with a qualified majority can end the TP scheme, if it considers “the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection”.<sup>18</sup>
- If the TPD regime is simply extended without altering other parts of EU law, TP beneficiaries will remain excluded from the benefits of all legal migration directives. They are, explicitly or implicitly, excluded from the personal scope of all seven EU legal migration directives, i.e., the Family Reunification Directive (FRD), the Long-term Residents Directive (LTRD), the Blue Card Directive (BCD), the Single Permit Directive (SPD), the ICT-directive, the Students and Researchers Directive and the Seasonal Workers Directive. This would put beneficiaries of TP at a significant disadvantageous position compared to other third-country nationals.

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<sup>16</sup> *Supra note* 15.

<sup>17</sup> Recital 6 of the TPD.

<sup>18</sup> Article 6 TPD.



- Further prolongation of the TPD would exclude the beneficiaries also for more than three years from the rights and benefits attached to the refugee status in the Refugee Convention and the EU Qualification Directive (QD).<sup>19</sup> The level of rights granted in both instruments to beneficiaries of international protection are clearly higher than the level of rights in the TPD. Of course, a beneficiary of TP may at any time file an asylum application to try to acquire refugee status or subsidiary protection. This would incentivise many TP beneficiaries to bring an asylum claim, as many Bosnians successfully did in the Netherlands in the 1990s. But the outcome of the asylum procedure is unknown and, in many Member States, pending that often lengthy procedure the claimant will lose his or her rights under the TPD and, consequently, be treated as an asylum seeker with far less rights. In case the asylum request is turned down, the applicant is entitled to the TP rights again for the remainder of the period of protection.<sup>20</sup>

Prolongation of the TPD after March 2025 could be helpful in case the war continues at that time. New arrivals from Ukraine could be received and supported on the basis of the TP scheme.

If the current exclusion of persons with TP from the legal migration directives would be abolished, a short extension of the TPD could be justified to allow the protected persons to comply with periods of lawful residence which in certain directives are a condition for acquisition of a status or of certain rights. This limited extension could also help TP beneficiaries to fulfil the residence requirement for a national permanent residence status.

A limited extension of the TPD after March 2025 could in our view be justified, but only to complement other EU or national measures opening perspectives to a more secure and more prolonged residence status. Any extension of the TPD beyond the current maximum of three years should be accompanied by other changes in existing EU instruments on legal migration and asylum. This would fit with the current setup of the TPD: after at most three years of uncertainty, a durable solution should be granted. While there may be good arguments in favour of extending the TPD as long as the war in Ukraine continues, especially for new arrivals, individual TP beneficiaries should not be kept within that regime for more than three years.

## **10. Should existing EU instruments on legal migration and asylum be amended?**

Would it be necessary to create a new status for beneficiaries of TP after the expiration of the three years of the TPD, such as the Reconstruction Permit proposed by Asscher? Or could an existing EU status suffice? The use of already existing statuses has apparent advantages: it avoids the need for long legislative negotiations to agree on a new status and a new legislative instrument. Time-consuming and costly instructions of immigration officials, lawyers, judges, and NGOs in Member States would be avoided. It also avoids further complexity of EU migration and asylum law. Moreover, any status that is less favourable than statuses enjoyed by other third-country nationals in a similar position is susceptible to legal contestation.

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<sup>19</sup> Article 17(1) TPD.

<sup>20</sup> Article 19 TPD.

In the next paragraph, we consider three possible statuses already existing in Union law: the Qualification Directive 2011/95 (QD), the long-term resident status of Directive 2003/109 and the rights of mobile EU citizens under Directive 2004/38.

### 10.1. International protection on the basis of the Qualification Directive 2011/95

The QD codifies the acquisition and loss of two statuses: refugee status and subsidiary protection status and the rights attached to them. Both statuses provide their holders considerably stronger rights and a more secure residence status than temporary protection under the TPD, including in respect of access to housing, social security, and healthcare.<sup>21</sup>

The obvious disadvantage of granting either status to current TP beneficiaries is that, according to the settled case law of the Court of Justice “every decision on whether to grant refugee status or subsidiary protection status must be based on an individual assessment (...), which aims to determine whether, in the light of the applicant’s personal circumstances, the conditions for granting such a status are satisfied (...).”<sup>22</sup>

A requirement to make individualised status decisions in hundreds of thousands of cases will likely overburden the administrative capacity of national immigration services in Member States hosting significant numbers of TP beneficiaries, such as Poland, Germany or Italy. But it would also create a considerable additional burden in other Member States, many of which already struggle to handle claims of other asylum-seekers within applicable time limits. The task of making individual decisions in more than 70,000 asylum cases would be asking for chaos in an already overburdened immigration service.

Use of the QD to collectively grant subsidiary protection to all TP beneficiaries from Ukraine would therefore require amending the directive, with a view to reducing administrative burdens. One solution, as proposed by the European Parliament during the ongoing negotiations on the Crisis and force majeure Regulation<sup>23</sup>, would be to allow Member States, in situations of large numbers, to apply *prima facie* international protection to a group of asylum seekers specified by the Commission.

From the perspective of a displaced person, the official recognition of his or her international protection status may be an advantage. On the other hand, the protection provides fewer rights and less security of residence than the LTR status discussed below. According to the provisions on cessation in the QD, protection status is lost in case the refugee “has voluntarily re-established himself or herself in the country which he or she left” or “because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist” and for beneficiaries of subsidiary protection “when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.”<sup>24</sup> It follows that, even if all TP beneficiaries are granted refugee or subsidiary protection status on a *prima facie* basis, their

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<sup>21</sup> For a systematic analysis of the differences, see E. Guild and K. Groenendijk, The impact of war in Ukraine on EU migration, *Frontiers in Human Dynamics*, Section Refugees and Conflict, Volume 5 of 2 June 2023, <https://doi.org/10.3389/fhumd.2023.1189625>

<sup>22</sup> CJEU 4 October 2018, C-652/16, *Ahmedbekova*, ECLI:EU:C:2018:801, point 48.

<sup>23</sup> COM(2020) 613 final; see amendment 12 in European Parliament, draft report to the LIBE Committee on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum, no. C9-0308/2020.

<sup>24</sup> Article 11(1)(a) and Article 16(1) QD.

continued residence in part depends on external circumstances. Because the Member States are competent to decide on cessation of status, there is a risk of diverging Member State approaches.

In contrast, the LTR status would only be lost if the holder is absent from the EU for more than a full year. If the long-term resident returns to the EU before the end of that period, even for a short visit, he can be absent from the EU for another year.<sup>25</sup> In this respect retaining or losing the status depends almost completely on the behaviour of the person concerned. The international protection status based on the QD, on the other hand, may be lost due to circumstances outside the individual's control and is in practice often in the hands of the authorities of the host Member State.

Bringing TP beneficiaries within the QD regime does have the advantage that, unlike the LTRD, acquisition of status does not depend on having stable and regular resources and sickness insurance.<sup>26</sup>

## 10.2. The long-term resident status of Directive 2003/109

A third country national with five years of continuous lawful residence in a Member State, with sufficient income, health insurance and, in certain Member States after having complied with integration measures, is entitled to the EU long-term residence (hereafter: LTR) status.<sup>27</sup> That status entitles to equal treatment with nationals in a wide range of fields, i.e. employment, education, recognition of qualifications, freedom of association, social security, social assistance and tax.<sup>28</sup> The status is permanent and can only be withdrawn in case of fraudulent acquisition, conviction for very serious crimes or absence from the EU for more than a year.<sup>29</sup> Illness, lack of income or other economic reasons are no longer a ground for expulsion. This provision opens possibilities for long visits to and stays in Ukraine to test the possibilities of return. Since 2011, beneficiaries of international protection can acquire the LTR-status in addition to their protection status.<sup>30</sup> In 2020, the European Commission proposed to reduce the required residence from five to three years for beneficiaries of international protection.<sup>31</sup> The EU Council discusses this proposal as part of a general recast of the LTR directive proposed by the Commission in April 2022<sup>32</sup> (see par. 12.1 below).

From the perspective of a TP beneficiary the LTR-status has considerable advantages over the TP status. The LTR-status provides more rights and, as explained in the previous paragraph, also more security of residence than the protection statuses of the QD. An additional advantage is that the LTR status also provides a conditional right to mobility to another Member State.<sup>33</sup> This right is more limited than the freedom of EU citizens to migrate from one Member State to another. The QD does not provide for intra-EU mobility, which is one of the reasons for beneficiaries of international protection to additionally apply for LTR-status. The prohibition of refoulement remains in force. A LTR may at any time file an

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<sup>25</sup> CJEU 20 January 2022, C-432/20, *Z.K./Landeshauptman Wien*, ECLI:EU:C:2022:39.

<sup>26</sup> Art. 5 LTRD.

<sup>27</sup> Articles 4 and 5 LTRD.

<sup>28</sup> Article 11 LTRD.

<sup>29</sup> Article 9 and Article 12 LTRD.

<sup>30</sup> Directive 2011/51 of 11 May 2011, OJ 2011 L 132/1-4.

<sup>31</sup> COM(2020) 610, Article 71.

<sup>32</sup> COM(2022) 650.

<sup>33</sup> Article 14-23 LTRD.

application for asylum and Member States remain bound to their obligations under Article 33 Refugee Convention, Article 3 ECHR and Article 4 EU Charter of Fundamental Rights with regard to third-country nationals with LTR-status.

Disadvantages of this model are: if the current income and integration conditions remain in force, a large share of the (former) TP beneficiaries would, thus, in practice be excluded. Maintaining these conditions would also require individual decision making, resulting in a massive additional caseload. The pending recast could be used to solve the issue of the prolonged presence of more than 4 million TPPs from Ukraine. The current status of the recast will be discussed in par. 12.1. below.

### **10.3. The residence and equal treatment rights of mobile EU citizens under Directive 2004/38**

A third model could be to grant free movement rights once a TP beneficiary has completed three years of residence based on the TPD in a Member State. A new chapter could be inserted in the TPD stipulating that a third-country national who has three years of residence as a TP beneficiary will be treated as a Union citizen who is in another Member State with the rights enjoyed by mobile Union citizens on the basis of Directive 2004/38. They would receive the same free movement rights as citizens of EFTA countries. This would de facto introduce partial free movement between the EU and Ukraine, but only for those Ukraine nationals and other third-country nationals with close links to Ukraine who have first resided three years on the basis of temporary protection in a Member State.

A clear advantage of this model is that the status is acquired by the TP beneficiary automatically after three years. No application and individual decision making is required. The national authorities have knowledge of the date of the first registration of the person and thus could issue the document certifying the new status after three years.

The residence rights would continue as long as the former TP beneficiary fulfils the same criteria as Union citizens (i.e. employment, self-employment, provision of services, study or sufficient independent means). As for Union citizens, a part-time job would be sufficient to qualify for the status, as long as the employment is “real and genuine”.<sup>34</sup> After five years with this status, the former TP beneficiary would qualify for permanent residence status under Article 16 of Directive 2004/38.

This residence right would not be lost in case of return to Ukraine but could be relied on again after a prolonged residence in Ukraine, as is the case for Union citizens who do not lose their free movement rights after a return to the Member State of their nationality. This would incentivise efforts to return and build a new life in Ukraine.

This right to free movement in the EU will not be extended to all 42 million citizens of Ukraine but applies only to those who have resided for three years on the basis of the TPD in a Member State. It would fit the EU promise to Ukraine of future EU membership, which would in the long-term involve free movement of persons for all Ukrainian citizens.

A disadvantage of this model is that persons who due to their age, health, war trauma or other personal circumstances are unable to work and cannot sustain themselves, are de facto

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<sup>34</sup> CJEU 23 March 1982, C-53/81, *Levin*, ECLI:EU:C:1982:105 and CJEU 4 February 2010, C-14/09, *Hava Genc*, ECLI:EU:C:2010:57..

excluded, just like Union citizens in similar circumstances are excluded from free movement. A special provision in the new chapter of the TPD could deal with this issue, granting these former TP beneficiaries more rights than mobile Union citizens.

The rules in Directive 2004/38 protecting Member States against mobile EU nationals becoming an unreasonable burden on the social assistance system of the host Member State (e.g. Article 14(1) of that directive) would also apply to former TP beneficiaries. As long as the Council has not decided that the situation in Ukraine is such as to permit the safe and durable return (Article 6(2) TPD), the former TP beneficiary cannot be returned to Ukraine on grounds of reliance on public assistance.

The rules on family reunification of Directive 2004/38 would also apply. The scope of family members entitled to reunification is somewhat wider than those entitled to reunification in Article 15 of the TPD. However, since March 2022 in most cases, family reunification only requires registration of the family member as a TP beneficiary in the Member State of residence.

This model would require an extension of the TPD for those TP beneficiaries who have not yet resided for three years in a Member State. Once the Council decides to end the TP scheme or the maximum duration has been reached, new entries are no longer registered but the TP scheme would continue for those already having TP status until they have acquired another more durable status.

## **11. The three models compared**

The content of the 'Reconstruction Permit' proposed by Asscher is not specified in his report to the Commission. If it is intended to be only a new name for the extension of the TP scheme for more than three years, possibly for seven more years, we refer to the pros and cons discussed in par. 9 above.

The three other models discussed in par. 10 have in common that all three can be decided on by the European Parliament and the EU Council, the latter with a qualified majority, on the basis of Article 78(2)(a)-(c) or Article 79(2)(a) and (b) TFEU.

Another common element of all three models is that they may cover both Ukraine citizens and other third-country nationals who benefit from the Council's Implementing Decision of March 2022, irrespective of whether the latter are covered by the mandatory clause in Article 2(2) or the optional clause of Article 2(3) of that Decision.<sup>35</sup> It would not be necessary to repeat the difficult discussion about differences in the treatment of Ukraine citizens and other third-country nationals who fled Ukraine.

In the first model (international protection and the second model (LTR-status) the status is acquired only upon application by the third country national and a decision by the competent national authority on that application. In the third model (granting equal rights as mobile EU citizens) the free movement rights are acquired automatically (de jure) once the conditions are fulfilled. That option avoids large scale decisions in individual cases.

The three models are not mutually exclusive but could be used to complement each other. The free movement model of par. 10.3 could be complemented by granting subsidiary

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<sup>35</sup> Implementing Decision (EU) 2022/382 of 4 March 2022, OJ L 71/1-6.

protection (model of par. 10.1) to those TP beneficiaries unable to qualify for the free movement right because their health status or age does not allow them to find employment. Alternatively, the latter category could also retain TP status if the duration of the TPD is extended. The LTR-status (par. 10.2) could likewise be complemented by either the QD or a partial extension of the TPD only for those who are unable to comply with the income requirement of the LTR Directive.

## **12. Pending recast of LTRD and SPD**

In April 2022, the European Commission published proposals for a recast of the LTRD and the SPD. The latter directive does not establish an EU residence status. It only codifies the rights of third-country nationals who are employed in a Member State in accordance with EU or national law. Currently, TP beneficiaries are excluded from the personal scope of both directives. The Commission's proposal left this exclusion unchanged. Apparently, both proposals were prepared long before the unexpected sudden activation of the TPD in March 2022.

The two pending recasts offer an opportunity to adapt both directives to the new situation. The European Parliament in its reports on both recasts formulated amendments concerning the position of TP beneficiaries. Considering the Council's negotiation documents on the two recasts<sup>36</sup>, the representatives of Member States, at least until May 2023 were not aware of the relevance of the two recasts for the current and future position of war refugees from Ukraine.

### **12.1. The recast of the LTR-Directive**

Three issues are of special relevance for TP beneficiaries: the length of the residence requirement for acquisition of the LTR-status, whether residence as TP beneficiary counts as legal residence for the LTR-status and when the status is lost due to long absence from the EU.

Currently, five years of continuous lawful residence are required for obtaining LTR status.<sup>37</sup> The European Parliament in 2021 in a resolution asked for a reduction to three years.<sup>38</sup> In 2020 the Commission proposed to reduce the five years to three years for refugees and beneficiaries of subsidiary protection.<sup>39</sup> That proposal did not cover TP beneficiaries.<sup>40</sup> The Commission did not include this proposal in the 2022 recast of the LTRD. The European Parliament in its report on the recast sticks to its previous position that three years should be the general rule.<sup>41</sup> The Czech EU Presidency included the Commission's proposal to reduce the required residence to three years for beneficiaries of international protection in the discussion on the recast. The Swedish Presidency in a discussion paper of June 2023 explicitly asked Member State to express their views on this proposal.<sup>42</sup> Probably, the five-

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<sup>36</sup> See in the register of Council documents under 2022/134(COD) and 2022/131(COD).

<sup>37</sup> Article 4(1) of Directive 2003/109.

<sup>38</sup> Resolution of 25 November 2021, 2020/2255(INL), P9-TA(2021)0472, point 14 and recommendation 9..

<sup>39</sup> COM(2020) 610, Article 71.

<sup>40</sup> The Commission at the same time proposed to repeal; the TP directive, thus, abolishing the TP status, in Article 14 of its proposal for a Crisis-Regulation, COM(2020)613 of 23 September 2020, p.33.

<sup>41</sup> The text for Article 4(1) proposed in Amendment 49 of the report A9-0145/2023.

<sup>42</sup> Council document 10522/23 of 20 June 2023, p. 3..

or-three-years issue will be one of the main points of contention in the forthcoming trilogue. In case the European Parliament is unable to convince the Council to accept the general reduction to three years, TP beneficiaries will in practice only benefit from the recast if the limited reduction (only refugees and subsidiary protection beneficiaries) proposed by the Commission in 2020 is accepted as a compromise *and* the scope of the clause is extended to also cover TP beneficiaries. This solution would still require an extension of the TPD regime beyond three years to allow for an uninterrupted transition from TP to LTR-status.

The second issue is whether residence as TP beneficiary counts as legal residence for the LTR status. Whether under the current LTR Directive lawful residence on the basis of the TP status is taken into account for the calculation of the required five years is disputed in the academic literature.<sup>43</sup> In June 2023 the Swedish Presidency noted that only residence explicitly excluded in Article 4(2) LTRD, i.e. residence as a diplomat or on the temporary grounds of Article 3(2)(e) of that Directive are excluded.<sup>44</sup> We support this reading of Article 4(2) that the exception of that clause to the general rule of Article 4(1) should be interpreted restrictively and not be extended to other categories. Residence on the basis of the TP Directive in this view counts as lawful residence for the LTR status.

The Commission in its recast proposed to take the full period of residence into account, but only if the third-country national concerned has acquired another residence permit which will enable him/her to be granted EU long-term resident status. The European Parliament proposes to delete this condition.<sup>45</sup> According to the Swedish Presidency compromise for the negotiation mandate of the Council lawful residence as beneficiary of TP will be taken into account for the five years.<sup>46</sup> As a consequence of that new rule in the mandate (and of the Commission's proposal) a former TP beneficiary would only qualify for the LTR status after having acquired a residence permit for employment, study or family reunification and after two more years of residence on the basis of that permit. Moreover, this will require individual decisions by immigration authorities and provide an additional hurdle for the acquisition of the LTR status. During the TP scheme, the beneficiary is entitled to live, work and study without a residence permit for employment or study and to reside after family reunification. Due to the exclusion of TP beneficiaries from the scope of all legal migration directives, s/he cannot rely on those directives to acquire such a permit before the end of the scheme. After the end of the TP scheme s/he will depend on the national law and policy for a residence permit to continue his lawful stay in the Member State residence unless EU law provides otherwise.

The third issue concerns the loss of the LTR-status due to absence from the EU. Here the Commission had proposed to increase the current period of 12 months of absence to 24 months, bringing it in line with the loss of the permanent residence right of mobile EU nationals if they are absent from the host Member State for a period exceeding two consecutive years.<sup>47</sup> The Swedish presidency first proposed that the LTR-status would be lost "in the event

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<sup>43</sup> Steve Peers takes this view it counts: <https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html> [accessed 9 July 2023]. Daniel Thym takes the opposing view: <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>.

<sup>44</sup> Discussion paper of 20 June 2023, Council document 10522/23.

<sup>45</sup> The text for Article 4(5) proposed in Amendment 52 of the report A9-0145/2023.

<sup>46</sup> Article 4(3a) in Council document 105628/23, p. 24.

<sup>47</sup> Article 16(4) of Directive 2004/38.

of absence from the territory of the Union for a total period exceeding 24 months within a five year period.”<sup>48</sup> This proposal would clearly reduce the legal certainty created by the Court of Justice in *Z.K./Landeshauptman Wien* in which it was held that the physical presence of a long-term resident of only a few days would interrupt the possibility of revoking LTR status.<sup>49</sup> In June 2023, the Swedish Presidency proposed to reduce the 24 months to 18 months.<sup>50</sup> The proposed rule would be difficult to administer and would create uncertainty both for the immigration authorities and for the LTR third-country nationals. It would reduce the possibility to return and come back (the Council’s often professed wish to allow circular migration) with Ukraine for former TP beneficiaries.

The LTRD can only serve as a viable solution for permanent residence for beneficiaries of TP from Ukraine if the residence requirement for this group is reduced to three years and the full period of lawful residence as TP is taken into account. Requiring former TP beneficiaries to first acquire another (temporary) residence permit, would create an additional large administrative caseload for immigration authorities. It would put TPs from Ukraine at a significant and very poorly justified disadvantage compared to third country nationals who enjoy protection under the Qualification Directive. It is also unreasonable considering the exclusion of TP beneficiaries from all legal migration directives during the years the TP scheme is in force.

## 12.2. The recast of the Single Permit Directive

In the Council documents on the recast of the SPD, there is not a single mention of the four million TP beneficiaries from Ukraine. In the negotiation mandate adopted by the Council in June 2023, TP beneficiaries remain excluded from the scope of this directive, as are other beneficiaries of protection in accordance with international obligations, national law or the practice of a Member State.<sup>51</sup> The effect of this exclusion is that TP beneficiaries employed in Member States are not entitled to the enhanced rights which are granted in Article 11 of the SPD to legally employed workers from third countries. Employed TP beneficiaries can only rely on one single and rather general sentence in Article 12 TP Directive, reading: “[t]he general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.”

The European Parliament paid more attention to the position of war refugees from Ukraine. In its report for the negotiations with the Council adopted by the LIBE Committee in March 2023, the clause in Article 3(2)(f) of the proposal excluding TP beneficiaries is explicitly deleted.<sup>52</sup>

The Commission, the Council and the Parliament all three should seriously and systematically consider whether the exclusion of TP beneficiaries from the scope of all EU legal migration directives is still justified by taking into account the negative effects of this exclusion on integration of TP beneficiaries, the obstacles it creates for persons from Ukraine to

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<sup>48</sup> Proposal for a new text of Article 9(1)(c) LTRD in Council document 8549/23.

<sup>49</sup> CJEU 20 January 2022, C-432/20, *Z.K./Landeshauptman Wien*, ECLI:EU:C:2022:39.

<sup>50</sup> Art. 9(10)(c) in council document 10528/23.

<sup>51</sup> Article 3(2)(f) and (h) SPD in the General Approach adopted by the JHA Council 8 June 2023, see Council document 9474/23 of 17 May 2023.

<sup>52</sup> EP document A9-0140/2023 of 13 April 2023. The European Parliament voted in favour of inter-institutional negotiations on 19 April 2023



temporarily return, the disadvantageous position of TP beneficiaries vis-à-vis refugees and subsidiary protection beneficiaries, and the disadvantageous position of TP beneficiaries vis-à-vis other third-country nationals who are legally employed in a Member State.

### 13. Conclusions

Now already, many TP beneficiaries live in uncertainty about the need and possibility of continued residence in the EU. In both scenarios of the war in Ukraine ending and continuing after March 2025, this uncertainty will continue. Many will prefer to postpone return until the situation in Ukraine has become stable and their individual prospects clear. The lesson from the past (Bosnia, Kosovo, Iraq) is that return policies, including voluntary returns, are most effective if the law is tailored to the needs and choices of individual refugees instead of enforcing choices upon them. Both when the war continues and ends, Ukraine is unlikely to be equipped for a sudden massive, forced return of hundreds of thousands or millions of its nationals. Timely creation of clarity about their possibilities to remain in the EU or to come back after a temporary return to Ukraine may assist TP beneficiaries in making their choices.

As a consequence of either the expiration of the temporary protection regime after three years or an earlier Council Decision, millions of TP beneficiaries will automatically lose their residence rights on the basis of the TPD, unless they file an asylum application before the end of the scheme. Since TP beneficiaries are excluded from all legal migration directives, their only avenue to acquire a subsequent residence status under current EU law is by filing an application for asylum.

The Meijers Committee concludes, that if the war in Ukraine continues in March 2025:

- there should be no general further extension of the temporary protection scheme after the maximum of three years;
- there is no need for a new Reconstruction Permit; three existing EU models laid down in the Qualification Directive, the LTRD and the EU Citizenship Directive offer a more secure and durable status than temporary protection;
- the current temporary protection scheme should continue to apply after March 2023 only to recently arrived displaced persons from Ukraine and to temporary protection beneficiaries with three years of residence unable to switch immediately to another more permanent residence status.

In case the Council would decide to end the TP scheme before March 2025 and the current TP beneficiaries would automatically lose their protection status, the Council should regulate accordingly which EU status would be acquired by the former TP beneficiaries. The general reference in the current Article 20 TPD would be clearly insufficient at that time as well.

The Meijers Committee makes the following recommendations to the European Parliament, the Council and the Commission with respect to the position of TP beneficiaries in the recast of the LTRD and the SPD:

- delete the current exclusion of TP beneficiaries in both the LTRD and the SPD;
- reduce the residence requirement for the LTR-status for beneficiaries of international protection and temporary protection from five to three years;
- periods of residence on the basis of TPD should count for the residence requirement for the acquisition of the LTR-status;

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- accept the Commission's proposal that the LTR-status is lost due to absence from the EU only if that absence exceeds 24 months, at least for beneficiaries of international protection and temporary protection.