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# EU responses to Ukrainian arrivals – not (yet) a blueprint

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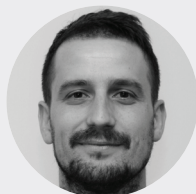
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# Executive summary

In her recent State of the Union speech, European Commission President von der Leyen stressed that the EU's responses to Ukrainian arrivals were not to be considered an exception. Rather, they were to be used as a "blueprint" going forward.

Undoubtedly, applying lessons from these responses to inform decision-making around other groups of refugees too would benefit EU decision-making processes in this area and, more importantly, strengthen the protection standards provided. But how much scope is there for doing so? And what is politically realistic?

This paper argues that overly optimistic projections are, for the time being, misdirected. We review the discussions surrounding the activation of the Temporary Protection Directive (TPD) and highlight how, in spite of the generally positive response, previous political sticking points re-emerged in the process. We also consider the bigger picture, long-term implications of activating the TPD. In this context, several potentially positive impacts, including increased trust and a sense of reinvigoration around migration files, can be considered. Even there, however, initial discussions within the EU institutions would suggest that longstanding national positions, particularly around secondary movements, remain entrenched.

# Introduction: A historic move

As millions of refugees crossed EU borders in the weeks and months following the Russian invasion of Ukraine, the EU's swift activation of the Temporary Protection Directive (TPD) was hailed by many as a welcome and historic move. Historic, because it was the first time that this Directive – an instrument devised over 20 years ago and already declared moribund by the New Pact on Migration and Asylum – had been activated. Historic, most importantly, in that it represented a seismic shift from business as usual in EU migration policies.

In no less than seven days following the outbreak of the war, EU member states showed themselves, through the unanimous decision to activate the TPD, willing and able to provide a unified response to the immediate needs of Ukrainian refugees. This was in sharp contrast to the bickering and high emotions that often characterise the debates and decision-making in this area.

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In contrast to this seven-day timeframe, seven years have now passed since the high refugee arrival numbers in Europe over the course of 2015-16 and the ensuing collapse of the Dublin system witnessed at the time.<sup>1</sup> EU institutions are still debating how to arrive at a more equitable and resilient responsibility-sharing system for refugees.

The European Commission's first reform proposals in this context, from 2016, soon ran into political deadlock. They were replaced by a set of new, comprehensive proposals in the New Pact on Migration and Asylum presented in the autumn of 2020.

So far, these new proposals have not been able to bridge the divides between the different positions in the debate either. That is, the divides between, on the one

hand, the states calling for a more structural form of responsibility-sharing over refugees, including through mandatory relocation quotas and, on the other, those vehemently opposing it. The former group is composed mostly of Southern EU member states, while the latter comprises the Visegrád four countries, but also, among others, Austria.

Against this background, the swift response in the context of the Ukrainian refugee emergency was broadly welcomed. Commentators were quick to point out that it could signify a turning point, the potential start of strengthened unity within the EU on questions relating to asylum and migration management more generally.<sup>2</sup> Similarly, and more recently, in her State of the Union address Commission President von der Leyen highlighted the importance of continued progress on the reforms, stressing at the same time that Europe's actions "towards Ukrainian refugees must not be an exception. They can be our blueprint for going forward".<sup>3</sup>

But what scope is there to use these policy responses as a blueprint going forward? Several operational avenues can certainly be considered – and are touched on in this paper – including most notably expanding the model of 'free choice' accorded to Ukrainians.<sup>4</sup> What is lacking, however, and this is the main focus of this paper, is the political will to do so.

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In the first section we review the discussions surrounding the activation of the TPD and its immediate impact. We highlight how, despite the generally positive response, previous political sticking points around responsibility-sharing have very clearly re-emerged in the process. A second section zooms out and reflects on the longer-term implications of activating the TPD. In this context, several potentially positive impacts, including increased trust and a sense of reinvigoration around migration files, are open for consideration. However, even there, early discussions within the EU institutions indicate that there is little scope for overly optimistic projections.

# Selective EU unity in activating TPD

As thousands, and then millions, of Ukrainians crossed EU borders in the days and weeks following the Russian invasion, EU discussions swiftly turned to how to address their needs most effectively and, linked to this, how to promote EU solidarity with the countries receiving the highest arrival numbers, such as Poland and Hungary. In activating the TPD, responses were found on both counts.

When looking at the details of that activation, however, the selective, restrained nature of those responses becomes clear. Two elements are significant. The first one concerns the free choice model offered to Ukrainian refugees, enabling them to choose the EU state in which they want to enjoy temporary protection, to avoid reigniting controversial discussions over relocations and responsibility-sharing. The second one relates to the limited personal scope of the temporary protection provided and the ‘double standards’ that can be identified in this context.

To begin with, in relation to responsibility-sharing, it is worth noting that despite offers to that effect by other EU member states, Hungary and Poland refused to accept solidarity measures premised on the transfer, or relocation, of Ukrainian arrivals. As one commentator put it, their opposition to such relocations was informed by the “wrong reasons”.<sup>5</sup> That is, by opposing relocations Hungary and Poland wanted to avoid creating a political precedent that could undermine their otherwise staunch opposition to relocation schemes in the larger discussions surrounding asylum reforms.

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Instead, and also because of this opposition, a decision was made, through the activation of the TPD, to reinforce the free movement rights of Ukrainian refugees so that they could ‘self-relocate’.<sup>6</sup> To be sure, Ukrainians already enjoyed a right to move freely across the EU for a period of up to 90 days. Beyond that, the Council Decision to activate the TPD made it clear that member states would not send back persons who already enjoyed temporary protection status in another state.<sup>7</sup> In other words, it was made explicit that Ukrainians offered temporary protection were free to move onwards, even after having already received a temporary protection status in a member state.

The instalment of such a model of free choice signals a strong departure from the usual Dublin framework. The latter emphasises the responsibility of the state of first entry and penalises onward, secondary movements of asylum-seekers. According to one academic, the new model could be regarded as no less than a “Copernican revolution” in EU asylum law.<sup>8</sup>

The reasoning behind its adoption, however, was certainly not linked to a Copernican revolution in EU asylum law and policy overall. Rather, by enabling such a free choice-model, and as the text of the Council Decision states, the aim was to facilitate, in a more organic way, a “balance of efforts” between member states. In that way EU institutions sought to avoid re-opening toxic discussions around relocation quotas in the context of the larger debate about asylum reforms, or linking those discussions to the situation of Ukrainian refugees.<sup>9</sup>

In short, there are no grounds to consider the free choice model offered to Ukrainian refugees as the start of a broader paradigm shift in EU asylum law. In actual fact it was the strong attachment to pre-existing paradigms and earlier political sticking points that explain its adoption.

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That is not to say that potentially positive experiences with such a free choice model may not lead to a rethink further down the line. Several experts are currently considering such options.<sup>10</sup> For example, people may organically choose to move to places where they have a strong(er) network. This could then strengthen their inclusion prospects, which is ultimately also in the interest of hosting states. The prospects for these scenarios, and the extent to which they link to potential longer-term impacts, are discussed in the section below.

A second element to highlight in the discussion surrounding the TPD’s activation relates to the restrained nature of the welcoming approach.

In a general sense, many commentators have highlighted how in the context of the 2015-16 high arrival numbers, there were several calls to activate the TPD as well. This was, at the time, considered politically disadvantageous. Among other concerns, member states feared that this kind of activation would create a ‘pull effect’ among refugees seeking to flee the Syrian conflict.<sup>11</sup>

In a more specific sense, it is worth highlighting that the personal scope of the TPD, i.e., to whom it applies, was narrowed following discussions in the Council. The original Commission proposal to activate the TPD had foreseen that it would apply to all those fleeing the war – Ukrainian and non-Ukrainian nationals alike.<sup>12</sup> This was opposed in the Council by Poland as well as several other member states.<sup>13</sup> The final Council decision instead stipulates that the TPD applies to non-Ukrainians *only* if they enjoyed a protection status in Ukraine, or were able to show that they could not return home in a

safe and durable way.<sup>14</sup> Consequently, member states are now free *not* to apply the TPD to all other third-country nationals fleeing the conflict.

The EU's double standards in this respect have been widely analysed and justifiably criticised.<sup>15</sup> For our analysis, this differential treatment highlights that the activation of the TPD cannot, as yet, be considered to signal a change in the general political thinking among member states about asylum, covering other groups of protection seekers too.

## Zooming out: The longer-term implications

When looking at the potential longer-term implications of the response to Ukrainian arrivals, two considerations can be examined. The first links to the notion that the experience of having reached, swiftly and unanimously, a decision to activate the TPD is in itself valuable. After years of deadlock within the migration and asylum debates, this positive experience may instil a new sense of trust and ownership among member states and across EU institutions around these files.

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The second consideration relates to the possibility of the free-choice model provided to Ukrainian refugees to inform renewed discussions on free movement rights for refugees generally, as briefly touched on above. This could help reduce the political attachment to the Dublin principle of allocating responsibility, in most cases, to countries of first arrival. This, in turn, would also help general responsibility-sharing discussions moving forward. However, and as this section explains, the first signals coming from current discussions connected to these two potential longer-term implications do not allow for an overly optimistic outlook about these longer-term prospects either.

On the first point, several observers have highlighted that the successful activation of the TPD can and should be leveraged to restore a sense of constructive dialogue and compromise-building in the context of broader EU asylum debates.<sup>16</sup> Their perspectives appeared to already become reality as in mid-June 2022 the word was out that the French EU Presidency had forged an agreement

among a majority of member states around a new, temporary solidarity mechanism.<sup>17</sup>

This new mechanism, in short, is meant to complement earlier agreements within the Council around the Screening and Eurodac proposals.<sup>18</sup> It would be active for one year, is premised on voluntary contributions, and focuses on showcasing solidarity through relocations, although providing financial or operational assistance is also possible.

The agreement around this mechanism was, like the activation of the TPD, dubbed to be of “historic” importance.<sup>19</sup> It had been years since positive news on solidarity and responsibility-sharing debates came out of the Council. However, the importance of this progress should also not be overstated.

First, the mechanism's operational value would remain limited. As mentioned, it would initially be in place for only one year. It would function exclusively on the basis of voluntary contributions, and, in addition, it is non-legislative. All these elements would thwart its predictability, enforceability and its general ability to provide structural solutions.

Further, and more importantly, with the exception of the Czech Republic, which took over the EU Council Presidency after France, all countries associated with a strong opposition to solidarity mechanisms, particularly in the form of relocations, withheld their support. This includes, notably, the other Visegrád countries (Slovakia, Hungary and Poland) as well as Austria. The Austrian Minister of the Interior, Gerhard Karner, for instance, expressed his disagreement by stating that he was “absolutely against sending the wrong message to people smugglers”.<sup>20</sup>

In other words, the agreement reached to date is only partial. It has not (yet) managed to bridge the main political fault lines across member states who hold opposing views around responsibility-sharing. Accordingly, and more generally, this does not (yet) allow for a positive outlook on the longer-term impact of the TPD's activation on broader EU debates around asylum

reforms. If anything, the failure to forge a Council-wide consensus around a new solidarity mechanism shows how earlier political divisions remain firmly entrenched.

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Moving to the second point, several experts are currently contemplating the potential positive impacts that could result from widening the free movement regime now available to Ukrainian refugees to other groups. Perhaps this could lead to a departure from the Dublin principle of allocating responsibility for asylum-seekers (mostly) to countries of first arrival, and penalising onward secondary movements.<sup>21</sup>

Also on this point, however, first signals do not allow for positive forecasts. Rather, in the weeks and months following the activation of the TPD, a retrenchment of the positions on the importance of tackling secondary movements could be witnessed, particularly among Nordic and Western EU countries.

To begin with, in May 2022 the six states that have continuously re-extended internal border controls since 2015-16 enacted such re-extensions again.<sup>22</sup> As before, the reasons for doing so related predominantly to countering secondary movements.<sup>23</sup> Given that such controls have been continuously re-extended since 2015, this state of affairs could be considered ‘business as usual’.

## Conclusion: Not (yet) a blueprint

The EU’s response to Ukrainian refugee arrivals, through the activation of the TPD, signals a welcome change from the typically fraught decision-making processes in this area. Undoubtedly, adopting lessons from this response to inform decision-making on other groups of refugees would be very beneficial, both for the EU decision-making dynamics in this area and, more importantly, for the protection standards provided. Unfortunately, in spite of Commission President von der Leyen’s call to use these responses as a “blueprint”, political realities, particularly in the Council, point in a different direction.

However, it is worth noting that only two weeks earlier, on 26 April 2022, the EU Court of Justice ruled the constant re-extension of such checks to be unlawful, unless new reasons for doing so were adduced.<sup>24</sup> The long-expected judgment certainly caused political reverberations and was the subject of immediate discussions within the Council and Commission. In this light, the conscious re-extension of border checks by these six states, only a few weeks after the CJEU’s ruling, can be considered as a very deliberate reinforcement of their position on the importance of tackling secondary movements.

In addition, it is worth highlighting that the recent French solidarity mechanism, discussed above, features further testimonies to the continued importance that Nordic and Western member states in particular attach to tackling secondary movements. Among others, the agreement states that the signatories commit to take stock of, *inter alia*, the “effective prevention of secondary migratory flows (notably by Dublin)”. This stocktaking would be one of the elements defining whether the mechanism is to be prolonged after its first year. Similarly, the agreement also underscores the importance of “maximizing cooperation to tackle secondary migratory flows by increasing the pace of Dublin transfers”. In short, also in relation to the second set of longer-term considerations, recent developments signal, at least for the time being, a continued strong attachment to previous political positions.

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As the above analysis has shown, the discussions surrounding the activation of the TPD, while evidently constructive, also indicate the re-emergence and continued attachment to the earlier political dividing lines around solidarity.

There is more scope for positive considerations when looking at the longer-term impact of the Union's response to arrivals from Ukraine. More specifically, first, the experience of having swiftly and unanimously agreed on the TPD's activation may instil a new sense of trust and ownership around the migration and asylum files within the Council. However, as the French EU Council Presidency's much-lauded agreement on a new solidarity mechanism shows, earlier divisions remain firmly entrenched. Those states that in the past opposed solidarity contributions, particularly through relocations, remain unconvinced.

Second, the free movement regime offered to Ukrainian refugees has been welcomed by commentators as a potentially useful template that may inspire more liberal free movement rights for refugees generally. However, also in that context, first signals from within EU discussions highlight a continued attachment to countering onward, secondary movements. This can be observed, for example, in the renewed extension of internal border checks by six Nordic and Western EU countries, or in the emphases on secondary movements within the new French solidarity mechanism.

None of this means, of course, that a more favourable climate could not emerge in future, for instance when the benefits of enabling free choice for refugees from Ukraine become more apparent. Neither does it mean that avenues other than the ones considered in this paper cannot be explored. At the operational level, for example, mechanisms used to enable a coordinated response on Ukrainian arrivals, such as the Solidarity Platform, could be used as a model for operational coordination in future. Nevertheless, at the level of general political and policy thinking, the call to use the EU's response to Ukrainian refugees as a blueprint may remain, for the time being, unanswered.



- <sup>1</sup> REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013.
- <sup>2</sup> Venturi, Emily, Vallianatou, Anna Iasmi (2022), "[Ukraine exposes Europe's double standards for refugees](#)", London: Chatham House.
- <sup>3</sup> von der Leyen, Ursula, 2022 [State of the Union Address by President von der Leyen, European Parliament](#), 14 September 2022.
- <sup>4</sup> Parusel Bernd, Varfolomieieva Valeriia (2022), "[The Ukrainian Refugee Situation: Lessons for EU Asylum Policy](#)", Stockholm: Swedish Institute for European Policy Studies.
- <sup>5</sup> Woollard, Catherine (2022), "[Editorial: Ten Points for Ten Point Ukraine Plan – Let's Make it Count!](#)" Brussels: European Council on Refugees and Exiles (ECRE).
- <sup>6</sup> 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, OJ L 71, 4.3.2022.
- <sup>7</sup> See Recital 15 of the Council Implementing Decision (EU) 2022/382 of 4 March 2022, *ibid.* See also 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, OJ C 1261, 21.3.2022.
- <sup>8</sup> Peers, Steve, "[Temporary Protection for Ukrainians in the EU? Q and A](#)", *EU Law Analysis*, 27 February 2022.
- <sup>9</sup> See also Thym, Daniel, "[Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'](#)", *EU Migration Law Blog*, 7 March 2022.
- <sup>10</sup> See e.g., Shachar, Ayelet, (2022), "[Expanding Protection: Global Lessons from the Ukrainian Refugee Crisis](#)", New York: *Canergie Council for Ethics in International Affairs*; Neidhardt, Alberto-Horst (2022) "Beyond Relocations? Intra-EU mobility for refugees", Kiel: Mercator dialogue on Asylum and Migration (MEDAM).
- <sup>11</sup> See e.g. İneli Ciğer, Meltem, "[5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022](#)", *EU Migration Law Blog*, 7 March 2022.
- <sup>12</sup> European Commission, Proposal for a COUNCIL IMPLEMENTING DECISION establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection COM/2022/91 final, 2.3.2022.
- <sup>13</sup> Barigazzi, Jacopo, "[EU hails 'historic' deal to protect Ukrainian refugees](#)", *Politico*, 3 March 2022.
- <sup>14</sup> Council Implementing Decision (2022), *op.cit.*
- <sup>15</sup> See e.g.: Abdou, Leila Hadj, Pettrachin, Andrea, "[Explaining the remarkable shift in European responses to refugees following Russia's invasion of Ukraine](#)", *LSE Blogs*, 9 March 2022; and, in follow-up, Abdou, Leila Hadj, Pettrachin, Andrea, Crawley, Heaven (2022) "[Who is a refugee? Understanding Europe's diverse responses to the 2015 and the 2022 refugee arrivals](#)", Bolzano: Eurac Research.
- <sup>16</sup> See e.g. Martini, Lorena Stella (2022), "[Movement to action: How Russia's war on Ukraine could reshape EU migration policy](#)", Berlin: European Council on Foreign Relations.
- <sup>17</sup> French Presidency of the Council of the European Union (2022), "[First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism](#)", 22 June 2022.
- <sup>18</sup> This was particularly at the demand of Southern EU member states who made agreements on these latter files conditional on progress around responsibility-sharing too. European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final, 23.9.2022 and European Commission, REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final, 23.9.2020.
- <sup>19</sup> Liboreiro, Jorge, "[Major progress' as EU gives fresh push to stalled migration pact](#)", *Euronews*, 20 June 2022.
- <sup>20</sup> *Schengen Visa News*, "[France Pushes EU States to Take in Asylum Seekers From Frontline Countries](#)", 13 June 2022.
- <sup>21</sup> Shachar (2022), *op.cit.* and Parusel, Varfolomieieva (2022), *op.cit.*
- <sup>22</sup> This relates to Austria, Denmark, France, Germany, Norway and Sweden. See De Somer, Marie (2020), "Schengen: Quo Vadis?" *European Journal of Migration and Law*, 2(2), pp. 178-197.
- <sup>23</sup> European Commission (2022). Member States' notifications of the temporary reintroduction of border control at internal borders. Available at: [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en). Last accessed: 10 October 2022.
- <sup>24</sup> Judgements of 26 April 2022, *NW v Landespolizeidirektion Steiermark and NW v Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20. See for a discussion: Cebulak, Pola and Morvillo, Marta, "[Schengen Restored](#)", *Verfassungsblog*, 5 May 2022.

## NOTES

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