

# Following the EU Response to the Russian Invasion of Ukraine? The Implementation of the Temporary Protection Directive in Poland

Maja Łysienia\*

*In 2022, upon the unexpected activation of the Temporary Protection Directive (TPD) by the Council Implementing Decision 2022/382, the Member States had to revive the EU law that had not been used for over 20 years. Poland adopted a new law that was aimed at offering extended rights to Ukrainian nationals and their family members. Other persons enjoying temporary protection under EU law were offered general protection available in Poland since 2003. This contribution sets out to answer the question of whether Poland followed the TPD and the Council Implementing Decision 2022/382 in its two-way response to the Russian invasion of Ukraine. The article is based on a comparative analysis of Polish and EU law, doctrinal views concerning temporary protection and available information about domestic practice. It focuses on the following areas of interest: eligibility for temporary protection, residence permits, accommodation, family reunification, returns and measures after temporary protection ends, and remedies. The analysis conducted showed that Polish law on temporary protection is not fully compatible with the respective EU law. In the selected areas of interest, Poland either did not thoroughly follow the Council Implementing Decision 2022/382 or did not meet the minimum standards arising from the TPD.*

*Keywords: temporary protection, implementation, Ukraine, Poland, EU law*

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\* Association for Legal Intervention and Warsaw Bar Association, Poland. Address for correspondence: maja.lysienia@gmail.com.  
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## Introduction

After more than 20 years since its adoption, the 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 (hereinafter, the Temporary Protection Directive), has finally been activated. Despite national asylum systems already being under significant pressure and in spite of many calls to use the EU temporary protection mechanism earlier, the Council invariably repeated that the conditions to activate the directive were not fulfilled (Beirens, Maas, Petronella and van der Velden 2016: 13, 27–36, 138–140; Ineli-Ciger 2018: 158–159). Only the Russian invasion of Ukraine, which began on 24 February 2022, prompted the quick and strong reaction of the EU and Member States. On 4 March 2022, the Council adopted the Implementing Decision (EU) 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 (hereinafter, the Council Implementing Decision). Now, both the Temporary Protection Directive and the Council Implementing Decision constitute a legal framework for the EU temporary protection mechanism intended for ‘persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces’ (as specified in Article 2 of the Council Implementing Decision). The activation of the Temporary Protection Directive challenged the Member States with the task of reviving the EU law that was considered – due to its long-lasting non-activation – ‘increasingly irrelevant’ (Skordas 2022: 1179), a ‘failed instrument’ and a ‘waste of paper’ (Gluns and Wessels 2017: 82–83).

In response to the Russian invasion of Ukraine, Poland adopted the Act of 12 March 2022 on the Assistance to Ukrainian Nationals in relation to the Armed Conflict in this State<sup>1</sup> (hereinafter: the Act on Assistance to Ukrainian Nationals). However, this act does not apply to all persons fleeing Ukraine or even to all persons mentioned in Article 2 of the Council Implementing Decision. Only Ukrainian nationals and some of their family members can benefit from this new and special temporary protection mechanism. Other persons enjoying temporary protection according to the Council Implementing Decision benefit from the general temporary protection mechanism that has been in force in Poland since 2003 (Articles 106–118a of the Act of 21 July 2003 on the Protection of Foreigners in Poland,<sup>2</sup> hereinafter: the Protection Act). In Poland, thus, two different temporary protection mechanisms remain in force in response to the Russian invasion of Ukraine: the ‘special’ one for Ukrainian nationals and some of their family members (under the Act on Assistance to Ukrainian Nationals) and the ‘general’ one (under the Protection Act) applicable to all the other persons enjoying temporary protection under the Council Implementing Decision – i.e. international protection beneficiaries in Ukraine, their family members and permanent residence holders in Ukraine (see also Jaroszewicz and Krępa 2023: 166–167). The status of a person enjoying temporary protection in Poland and the scope of rights associated with this status differ depending on which of those two acts applies (for more, see Łysienka 2023: 19–38).

The Act on Assistance to Ukrainian Nationals and the Protection Act are both intended to implement the Temporary Protection Directive and the Council Implementing Decision in Poland. It is unclear why the Polish authorities decided to create two temporary protection mechanisms in response to the Russian invasion of Ukraine. One of the aims of the Protection Act was to implement the Temporary Protection Directive in Poland (Rada Ministrów 2003; Sadowski 2023: 340). Accordingly, the Protection Act was put into effect immediately after the Council Implementing Decision was issued (Łysienka 2023: 3). Despite this, the Act on Assistance to Ukrainian Nationals was adopted (see, critically, Klaus 2022: 28), supposedly to operationalise the protection at a national level (Jaroszewicz and Krępa 2023: 167) and to provide Ukrainian nationals with a greater scope of protection than under the minimum standards offered by EU law (Golec *et al.* 2022; Grzelak-Bach 2022).

However, the situation of persons enjoying special temporary protection in Poland is not always better than that of other beneficiaries. Moreover, the Act on Assistance to Ukrainian Nationals strays away from the minimum standards of the Temporary Protection Directive more than the Protection Act, as is shown in more detail below.

This article intends to determine whether and to what extent Poland follows the EU law on temporary protection in its two-way response to the Russian invasion of Ukraine. In particular, the article aims at identifying the most pronounced diversions from the Temporary Protection Directive and the Council Implementing Decision that occurred in the respective Polish law until the end of March 2023. To achieve this, it relies on a comparative analysis of the Act on Assistance to Ukrainian Nationals and the Protection Act on the one hand and the Temporary Protection Directive and the Council Implementing Decision on the other. Moreover, it draws from information available concerning the respective practice in Poland and doctrinal views regarding both Polish and EU temporary protection.

### Scope and limitations

This article offers a preliminary view on the divergences between the Polish and the EU law on temporary protection applied in response to the Russian invasion of Ukraine. Conducting an analysis in this regard – especially at this point in time – had its limitations and challenges, as I describe briefly below. They pertained to the quality of the respective EU and Polish laws, the limited academic interest thus far as regards temporary protection and the insufficiency of data concerning the other Members States' practice.

The quality of the EU and Polish law on temporary protection poses a challenge for a comparative study. The Temporary Protection Directive was the first asylum directive adopted in the EU (Skordas 2022: 1178). Its wording often lacks precision and thoroughness (Carrera, Ineli-Ciger, Vosyliute and Brumat 2022: 15–16; Gluns and Wessels 2017: 75, 82; Küçük 2023: 7–8), prompting diverse interpretations of the directive at a national level. In addition, the directive was never interpreted by the Court of Justice of the EU, so any doubts concerning its scope have not been clarified and the Member States were not pushed by the Court to offer a higher standard of protection where needed (as they were with regards to the other asylum directives, see Łysienka 2022: 469–470). Hence, the degree of uncertainty as regards this directive is high. The new Polish law on temporary protection, being written in a hurry in February and March 2022, has also been far from clear. Multiple legislative efforts were required to address the lack of clarity, inconsistencies and gaps that have arisen since its adoption. As of 31 March 2023, the Act on Assistance to Ukrainian Nationals has been amended 15 times. Despite these numerous changes, the Polish law on temporary protection is still ambiguous and defective. Moreover, the comparison of the respective Polish and EU laws is not supported by the fact that the Polish translation of the Temporary Protection Directive is far from perfect too: it differs from the English or French version in few instances.<sup>3</sup>

Furthermore, the lack of activation of the Temporary Protection Directive for over 20 years resulted in limited academic interest in this field. Despite the slowly growing attention in recent years (Ineli-Ciger 2018: 5; Thym 2022), academic views on temporary protection under both EU and Polish law are still limited (for Poland, see Chlebny 2020: 1242–1256). Before the recent Russian invasion of Ukraine, the debate focused mostly on the issue of why the Temporary Protection Directive had not yet been used in practice (e.g. Gluns and Wessels 2017). Since 2022, the doctrine has been predominantly engrossed in questions concerning the directive being finally activated (e.g. Ineli-Ciger 2022), its underpinning and results in discrimination and racism (e.g. Costello and Foster 2022; Kienast, Tan and Vedsted-Hansen 2023; Skordas 2023) and the novelty of the free movement of persons enjoying temporary protection (e.g. Küçük 2022; Thym 2022). Academic

publications scrutinising what the obligations of the Member States are towards persons enjoying temporary protection arising from EU law are, in fact, rare (see Peers 2015: 571–598; Skordas 2022: 1177–1228).

Answers concerning the content of the temporary protection that is required under the Temporary Protection Directive cannot thus far also be found in the Member States' practice hitherto. The EU law on temporary protection has never before been applied. Hence, no earlier practice in this regard exists that could have been scrutinised and compared with the legal situation of persons fleeing the Russian invasion of Ukraine. Furthermore, research concerning the implementation of the Council Implementing Decision and the Temporary Protection Directive in the Member States since March 2022 (e.g. FRA 2022; Nagy 2023; Nordic Council of Ministers 2022; UNHCR 2022) is still in the preliminary stages. Its results hitherto are insufficient to comprehensively answer the question of whether there is a common understanding of the minimum standards offered by the directive to persons enjoying temporary protection.

Taking into account the abovementioned limitations and challenges, this article offers a preliminary view of the scope of incompatibility of the Polish and EU laws on temporary protection. It focuses on the following topics: eligibility for temporary protection, residence permits, accommodation, family reunification, returns and measures after temporary protection ends, and remedies. These areas of interest have been chosen for the analysis because the EU law on temporary protection is the most comprehensible in this particular regard and the ambiguity of the corresponding Polish law is often counterbalanced by sufficient information about the practice. Moreover, the rules concerning the abovementioned subject matters provided for in the Act on Assistance to Ukrainian Nationals and the Protection Act, when compared with the Temporary Protection Directive and the Council Implementing Decision, seem to raise the most prominent controversy. Opinions on the incompatibility of the EU and the Polish law concerning the issues in question have been regularly voiced in the literature (see e.g. Jarosz and Klaus 2023: 27; Klaus 2022: 27–30, 36, 85; Noll and Gunneflo 2007: 17, 53, 55, 68; Sadowski 2023: 350) and by non-governmental and international organisations (Białas and Jagura 2022; ECRE 2023: 2; SIP 2023). These critical views have been scrutinised and confronted in order to determine the scope of divergence between the EU and the Polish law on temporary protection in the selected areas of interest.

## **Implementation of the Temporary Protection Directive in Poland**

### *Eligibility*

The Council Implementing Decision (in Article 2) clearly defines persons who are enjoying temporary protection following the Russian invasion of Ukraine. Temporary protection has been offered only to those 'persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces' – i.e. Ukrainian nationals residing in Ukraine before 24 February 2022; beneficiaries of international protection or the equivalent national protection in Ukraine (hereinafter: international protection beneficiaries in Ukraine) as well as their family members. Additionally, EU temporary protection or adequate national protection must be given to holders of valid Ukrainian permanent residence permits (hereinafter: permanent residence holders in Ukraine), who are unable to return in safe and durable conditions to their country or region of origin. Member States may also decide to extend the temporary protection to other persons.

Meanwhile, the Act on Assistance to Ukrainian Nationals applies only to Ukrainian nationals and some of their family members (Article 1(1) and (2)). Other persons mentioned in the Council Implementing Decision – international protection beneficiaries in Ukraine with their family members, and permanent residence holders in Ukraine – are eligible for temporary protection under the Protection Act (see, critically, Klaus 2022: 28–29).

Special and general temporary protection mechanisms offer dissimilar status and rights to their beneficiaries (for more, see Łysienia 2023: 19–38). Meanwhile, the Council clearly indicated in Article 2(1) of its decision that Ukrainian nationals and international protection beneficiaries in Ukraine fleeing the Russian invasion must be granted temporary protection. Only permanent residence holders in Ukraine are allowed to be given either temporary protection or adequate national protection (in accordance with Article 2(2) of the Council Implementing Decision). Hence, only the situation of permanent residence holders in Ukraine may be differentiated from the situation of the other persons enjoying temporary protection in accordance with the Council Implementing Decision (see, critically as regards this differentiation, Klaus and Górczyńska 2022: 89). International protection beneficiaries should be given the same protection as Ukrainian nationals. This interpretation is confirmed by Recitals 11 and 12 in the preamble to the Council Implementing Decision. Meanwhile, in Poland, international protection beneficiaries in Ukraine are offered the same protection as permanent residence holders in this country, which is different from the temporary protection given to Ukrainian nationals. It clearly runs counter to the Council Implementing Decision (cf. Sadowski 2023: 349).

Moreover, not all family members mentioned in the Council Implementing Decision are covered by the protection offered by the Act on Assistance to Ukrainian Nationals (Klaus and Górczyńska 2022: 90; SIP 2023: 2). This law applies only to the spouses of Ukrainian nationals, with the exception of Polish and EU citizens (see Article 1(2)). The inclusion of third-country nationals (TCNs) who are married to Ukrainian nationals is in accordance with Article 2(4) of the Council Implementing Decision (defining who a family member is, including – as specified in letter (a) – spouses) and Articles 1 and 2(c) of the Temporary Protection Directive (confirming that temporary protection is provided only for TCNs, see also Ineli-Ciger 2018: 151; Skordas 2022: 1185). Notwithstanding, it should not be overlooked that, as expected (Milios 2023: 228), the unmarried partners of Ukrainian nationals and of international protection beneficiaries in Ukraine, as mentioned in Article 2(4)(a) of the Council Implementing Decision, are not eligible for temporary protection in Poland (cf. Klaus 2022: 29; Sadowski 2023: 347–348).

Despite the Council's insistence on the preservation of the family unity (Recital 11 in the preamble to the Council Implementing Decision; Chlebny 2022: 151), the Act on Assistance to Ukrainian Nationals omits other non-Ukrainian family members of Ukrainian nationals mentioned in Article 2(4) of the Council Implementing Decision – i.e. 'minor unmarried children' and 'other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced persons, and who were wholly or mainly dependent' on a Ukrainian national. As explained in more detail below, this omission cannot be rectified by the adoption of the special rules concerning children born in Poland and pertaining to the 'closest family' of Ukrainian nationals who have been granted the 'Pole's Card' (*Karta Polaka*) – a document confirming that the person concerned belongs to the Polish nation (for more on the 'Pole's Card', see Pudzianowska 2021). The Council Implementing Decision does not condition the obtaining of temporary protection due to being born in a Member State or being a family member of a person belonging to a particular EU nation.

Keeping the non-Ukrainian minor children of Ukrainian nationals out of the scope of the special temporary protection mechanism cannot be remedied by the rule that a child born in Poland whose mother enjoys temporary protection there is entitled to legally stay as long as his/her mother has this right (Article 2(1)). The protection guaranteed under the Act on Assistance to Ukrainian Nationals still does not apply to the non-Ukrainian children of a Ukrainian national (or his/her spouse) who were not born in Poland.

The Act on Assistance to Ukrainian Nationals may be understood as applying to the 'closest family' of Ukrainian nationals who have been granted the 'Pole's Card' (Article 1(1)), no dependency is required. However, the rules in this regard are so unclear that different interpretations, both including (e.g. Klaus 2022: 24, 28–29; Kołodziej 2022) and excluding (e.g. Golec *et al.* 2022) such family members from the scope of the

special temporary protection mechanism, are possible. Furthermore, even if the Act on Assistance to Ukrainian Nationals applies to this specific group of family members, it still does not apply to the dependent family members of Ukrainian nationals who have not been recognised as belonging to the Polish nation.

It may be argued that the omitted children and dependent family members are covered by the temporary protection mechanism established under the Protection Act. However, this would result in a situation where some children and family members of Ukrainian nationals are eligible for special temporary protection in Poland, while others have access only to the general temporary protection mechanism. Accordingly, their legal status and the scope of their rights would differ (possibly even within the same family, SIP 2023: 2). It may be incompatible with the Member State's obligation to treat persons enjoying temporary protection in accordance with international law prohibiting discrimination (Recital 16 in the preamble to the Temporary Protection Directive; see also Kerber 2002: 201; Prantl and Kysel 2022). Thus, it must be concluded that the omission of some family members in the scope of the Act on Assistance to Ukrainian Nationals is against Article 2(1)(c) in conjunction with Article 2(4)(b-c) of the Council Implementing Decision (see also Klaus 2022: 28-29; SIP 2022a: 1).

Two more limitations as regards persons enjoying special temporary protection in Poland have been introduced into the Act on Assistance to Ukrainian Nationals – both incompatible with the Council Implementing Decision, albeit one already repealed. First, the law in question initially required that only persons who entered Poland directly from Ukraine were eligible for temporary protection (Article 1(1) and (2)). Meanwhile, it has been declared within the EU that Ukrainian nationals can choose in which country they want to enjoy temporary protection (as confirmed by Recitals 15 and 16 in the preamble of the Council Implementing Decision; see also Carrera *et al.* 2022: 16, 28; ECRE 2023, 1; European Commission 2022a; Thym 2022; Vitiello 2022: 23–24; cf. Küçük 2022, arguing that free choice in this regard is limited). Accordingly, the 'direct entry' requirement was quickly repealed with a retroactive effect (Sadowski 2023: 349).<sup>4</sup> Second, the Act on Assistance to Ukrainian Nationals still requires an entry to Poland to be legal for the person concerned to be eligible for special temporary protection. The Council Implementing Decision does not mention such a requirement; thus, it should be revoked (SIP 2022a: 2). The one counterpoint may be, again, that irregular entrants can benefit from temporary protection under the Protection Act. However, nothing seems to justify the unequal treatment of Ukrainian nationals and their spouses enjoying temporary protection which depends on the legality of their entry to Poland.

Lastly, as expected (Grześkowiak 2019: 212), Poland did not extend the personal scope of temporary protection despite the encouragement to do so expressly provided for in Recital 14 in the preamble to the Council Implementing Decision (Klaus 2022: 30). While it is compatible with EU law, it is worrying that asylum-seekers, students and seasonal workers in Ukraine, as well as people who left Ukraine just before 24 February 2022, have all been excluded from the scope of this protection (Vitiello 2022; see also Carrera *et al.* 2022: 13; Klaus and Górczyńska 2022: 89–90).

### *Residence permits*

Under the Temporary Protection Directive (Article 8), persons enjoying temporary protection shall be provided with residence permits for the entire duration of the temporary protection. A 'residence permit' is defined in Article 2(g) of the directive. Peers (2015: 578) rightly claimed that '(t)hese permits must take the form of the common EU residence permit'. Thus, they should be issued in accordance with the Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

Before the Russian invasion of Ukraine, the Polish law on temporary protection followed this guidance. Persons enjoying temporary protection were supposed to be given a residence card (*karta pobytu*) that

complied with the abovementioned uniform format. However, upon the introduction of the new law in March 2022, persons enjoying temporary protection are no longer given a uniform EU residence permit in Poland (see, critically, Białas and Jagura 2022: 4; Klaus 2022: 403).

Since March 2022, under the Act Protection (Article 110(5–9)), international protection beneficiaries in Ukraine, their family members and permanent residence holders in Ukraine may all request a certificate confirming that they enjoy temporary protection in Poland. It is issued free-of-charge and is valid as long as temporary protection remains in force.

Meanwhile, under the Act on Assistance to Ukrainian Nationals, no residence permits were initially offered to Ukrainian nationals and their family members (Klaus 2022: 36). For four months, they could only acquire written confirmation that they obtained a special personal identification number ('PESEL UKR', under Article 4). This number is given, on request, to all persons enjoying special temporary protection in Poland. Applying for a 'PESEL UKR' is not mandatory; however, access to some rights has been conditional on the acquisition of this number. Notwithstanding, the document confirming the obtention of a 'PESEL UKR' cannot be considered a residence permit within the meaning of Articles 2(g) and 8(1) of the Temporary Protection Directive (HFHR 2022: 4). It does not confirm the person's identity, does not state clearly that the person concerned is allowed to reside in Poland and was not notified to the European Commission as a 'residence permit'. Moreover, in practice, the Polish Border Guard quickly confirmed that persons enjoying special temporary protection in Poland did not hold a residence permit. Some Ukrainian nationals, who had fled after 24 February 2022 and had returned temporarily to Ukraine, then struggled to re-enter Poland, even though they enjoyed temporary protection there (PRAB 2023: 12; SIP 2022b). To re-enter, a valid visa, residence permit or a right to a visa-free travel was required by the Polish Border Guard. Having a 'PESEL UKR', even when confirmed in writing, was not always considered enough (Łysienia 2023: 24–25).

In July 2022, an electronic document – '*Diia.pl*' – was introduced. It entitles Ukrainian nationals and their family members – when holding a valid travel document<sup>5</sup> – to cross the Polish border and travel within the Schengen area for up to 90 days. It is available online for persons enjoying special temporary protection in Poland; however, not all children have been given access to '*Diia.pl*' (Rzecznik Praw Obywatelskich 2023a). This is in contradiction with Article 8 of the Temporary Protection Directive that clearly obliges Member States to 'provide persons enjoying temporary protection with residence permits'. The 'persons' mentioned there must certainly include both adults and children. This interpretation is confirmed by the inclusion of minors in the definition of 'family members' provided for in Article 2(4)(b) of the Council Implementing Decision. Moreover, the lack of a residence permit for children actually deprives their parents of their right to free movement within the EU (unless they decide to leave their children behind). Meanwhile, the Council Implementing Decision clearly confirms that persons enjoying temporary protection have 'the right to travel within the Union for 90 days within a 180-day period' (Recital 16). This right has, in practice, been illusory for some Ukrainian parents enjoying temporary protection in Poland. Only in March 2023 was the law changed to solve the problem of children's limited access to '*Diia.pl*'.<sup>6</sup> However, it remains to be seen how effective the solution provided for in Article 10(1a-1d) of the Act on Assistance to Ukrainian Nationals will be in practice.

Both the '*Diia.pl*' and the certificate issued under the Protection Act were notified to the European Commission as 'residence permits' mentioned in Article 2(g) of the Temporary Protection Directive. They are, however, not the uniform EU residence permits referred to in Article 2(16)(a) of the Schengen Borders Code<sup>7</sup> (European Commission 2022b). Thus, these documents are considered to constitute residence permits under one EU act but not under the other. This is not only counterintuitive but also departs from earlier Polish practice. International protection beneficiaries are granted uniform EU residence permits in Poland (Article 89i (1-2a) of the Protection Act), as required under Article 24 of the Qualification Directive.<sup>8</sup> A 'residence

permit' definition in this directive (Article 2(m)) is the same as that provided for in the Temporary Protection Directive (Article 2(g)). Hence, persons enjoying temporary protection in Poland should be given the uniform EU residence permit so as recognised refugees and subsidiary protection beneficiaries.

### *Accommodation*

Under Article 13(1) of the Temporary Protection Directive, persons enjoying temporary protection must be provided with 'suitable accommodation' or, if necessary, with 'the means to obtain housing'. Under Article 13(3) of the directive, the level of aid may be adjusted according to the ability of an employed or self-employed person to meet his/her own needs. Persons enjoying both kinds of temporary protection in Poland have some access to accommodation. However, this access is not provided in accordance with the directive.

Until January 2023, Article 12(17) of the Act on Assistance to Ukrainian Nationals determined that accommodation for special temporary protection beneficiaries was provided by the regional authorities (*Wojewoda*) for a period of no less than two months (counted from the day of the first entry to Poland) as far as funds allow. The same limitations have been introduced into the Protection Act (Article 112(1a)). Both provisions were formulated ambiguously, although it seems that they were aimed at creating the possibility for domestic authorities to limit access to accommodation to only two months depending on the availability of public funds. Such limitations are not allowed under the Temporary Protection Directive (Klaus 2022: 85, 404–405; SIP 2022a: 8). This conclusion is supported by three arguments. One is that, under Article 13(3) of the directive, the level of aid may be adjusted according to the ability of an employed or self-employed person to meet his/her own needs. This is the only modification as regards the level of aid allowed under Article 13. It has been implemented in the Protection Act (Article 112(4-4f)) but not introduced into the Act on Assistance to Ukrainian Nationals. The possibility of limiting the level or duration of aid depending on the financial capacity of the state was not provided for in the directive. The second argument is that, under the directive, it is clear that persons enjoying temporary protection who cannot meet their own needs must have access to accommodation throughout the duration of this protection. Hence, the limitation of accommodation to two months depending on the availability of public funds provided for in Polish law conflicted with the Temporary Protection Directive. The third argument concerns the Polish authorities' discretion in providing housing to special temporary protection beneficiaries. The temporal limitation as regards the provision of accommodation mentioned above could not be remedied by the fact that the regional authorities could provide housing for Ukrainian nationals beyond the 2-month period. The optional character of Article 12(1) of the Act on Assistance to Ukrainian Nationals (Płonka-Bielenin 2022) constituted an insufficient safeguard from the standpoint of the Temporary Protection Directive (Klaus 2022: 36; SIP 2022a: 8).

In January 2023, the abovementioned rules were changed significantly (Article 12 (17-17f) of the Act on Assistance to Ukrainian Nationals).<sup>9</sup> The Polish authorities were given a full discretion with regards to accommodation for special temporary protection beneficiaries. They are not obliged by domestic law to provide such an assistance at any time; the 2-month obligation has been repealed. If these authorities do offer accommodation, it is provided free-of-charge for a maximum period of 120 days, after which, since March 2023, special temporary protection beneficiaries must, as a rule, contribute to the cost of their living in housing organised by the Polish authorities. Only vulnerable persons and those in a difficult personal situation do not have to pay for their stay over and above these 120 days in the accommodation centres. Thus, on the one hand, upon the amendment of January 2023, the Polish authorities have even more discretion as regards accommodation than before, so the law in question is now even more incompatible with the Temporary Protection Directive. On the other hand, the co-payment obligation can be in accordance with the EU law (cf. Jarosz and Klaus 2023: 27; SIP 2023: 5) but only if it is interpreted with Article 13(3) of the directive in



mind. However, the Polish law does not directly state that the obligation to participate in the costs of living depends on the ability of an employed or self-employed person to meet his/her own needs. The exceptional rule concerning ‘persons in a difficult personal situation’ seems to enable national authorities to apply the law in question in accordance with Article 13(3) of the Temporary Protection Directive but it is at present uncertain how this rule will be interpreted in practice.

The abovementioned incompatibility with EU law has not been removed by the availability of a financial allowance for private persons and companies providing accommodation and food to Ukrainian nationals and their family members (under Article 13 of the Act on Assistance to Ukrainian Nationals, see SIP 2022a: 8). First, this allowance is paid in principle only for 120 days (while temporary protection lasts one year or more). Second, it is not paid if the aid is limited to accommodation (the provision of food is also required). Lastly, it is not paid to persons enjoying temporary protection but on the request of persons or companies accommodating and feeding them. For these reasons, this financial allowance cannot be treated as a ‘means to obtain housing’ within the meaning of Article 13(1) of the directive.

### *Family reunification*

Article 15 of the Temporary Protection Directive affords persons enjoying temporary protection a limited right to family reunification (cf. Kerber 2002: 204). Articles 117–117b of the Protection Act mirror the rules provided for in Article 15 of the directive to some extent (although the ‘best interests of the child’ guarantee is not explicitly mentioned – see also Noll and Gunneflo 2007: 44). Thus, in principle, international protection beneficiaries and permanent residence holders in Ukraine are entitled to reunite with their spouses and children remaining outside Poland as well as with other dependent family members (Chlebny 2022: 151). However, procedural rules in this respect are lacking, possibly making the right to family reunification illusory (Łysienia 2023: 23; SIP 2023: 6).

Meanwhile, the Act on Assistance to Ukrainian Nationals do not provide – in any way – for the right to family reunification (Białas and Jagura 2022: 7; Sąd Najwyższy 2022; SIP 2022a: 11). Moreover, it explicitly states that the rules on temporary protection covered in the Protection Act, including those specified in Articles 117-117b, are not applicable to persons enjoying special temporary protection (Article 2(8)). Hence, Ukrainian nationals enjoying temporary protection in Poland have no right to be reunited with any of their family members (both when those family members are still in Ukraine and when in another Member State). This is clearly incompatible with Article 15 of the directive.

### *Return and measures after temporary protection has ended*

The Temporary Protection Directive states, in Article 20, that ‘when the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23’. Article 21 concerns voluntary returns, Article 22 – enforced returns and Article 23 – residence conditions for sick people and families with minor children attending school. In the literature, it has been highlighted that the possibility to return voluntarily must exist irrespective of whether or not temporary protection has ended (Peers 2015: 592).

The Protection Act affords international protection beneficiaries and permanent residence holders in Ukraine some support concerning voluntary return but only when temporary protection ends. Article 118(1) of the Protection Act states that, upon the end of temporary protection, the Head of the Office for Foreigners (*Szef Urzędu do Spraw Cudzoziemców*) takes the measures needed to enable the return of persons who enjoyed this protection. Moreover, a TCN must be informed about all circumstances that can be of significance when

he or she makes a decision about the return (para. 2). Despite the fact that the voluntary nature of a return has not been explicitly mentioned there, Articles 118(1) and (2) should be understood as implementing Article 21(1) of the Temporary Protection Directive. However, it is only a partial implementation (SIP 2023: 4). First, Article 118(1) of the Protection Act does not refer to ‘respect for human dignity’, while Article 21(1) of the directive states that the ‘Member States shall ensure that the provisions governing the voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity’. Noll and Gunneflo (2007: 17, 53) saw this omission as an infringement of Article 21(1) of the directive. Second, Article 118(1) omits guarantees concerning the voluntary return of persons who still enjoy temporary protection. Third, the measures needed to enable return, mentioned in this provision, are not specified. Thus, it is unknown what assistance in this regard is to be provided in practice when temporary protection ends. Moreover, Article 21(2) of the directive, ensuring the ‘favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to a voluntary return’ has not been implemented at all (Noll and Gunneflo 2007: 55).

While Article 22 of the Temporary Protection Directive has not been explicitly transposed into the text of the Protection Act, the Act on Foreigners of 12 December 2013<sup>10</sup> (hereinafter, the Foreigners Act) – regulating in general enforced returns and humanitarian stays – applies to persons who enjoyed temporary protection. These rules seem to satisfy the minimum standard established in Article 22 of the directive.

In compliance with Article 23(1) of the directive, the Protection Act offers the possibility to grant a temporary residence permit to persons who enjoyed temporary protection but who cannot return to their country of origin due to their medical condition (Article 118(3)). Nevertheless, Poland did not choose to implement the optional rules concerning the extended stay of families with minor children who attend schools (Article 23(2) of the directive).

Meanwhile, the Act on Assistance to Ukrainian Nationals is silent about returns, both voluntary and enforced. While it may be again concluded that the enforced returns are regulated in the Foreigners Act, it is particularly worrying that no guarantees regarding voluntary return have been offered to Ukrainian nationals and their family members who enjoy special temporary protection in Poland. This is obviously in contradiction to Article 21 of the directive (SIP 2023: 4) and has already proved to be very troublesome in practice.

Some Ukrainian nationals and their family members enjoying special temporary protection did return voluntarily to Ukraine and afterwards decided to re-enter Poland. Under Article 21(2) of the directive, requests for the re-entry of persons who enjoyed temporary protection and exercised their right to voluntary return should be considered ‘advantageously, taking into account the factors referred to in the Directive’ (Peers 2015: 593). Despite this, it has been reported that special temporary protection beneficiaries who returned temporarily to Ukraine were, in practice, denied re-entry to Poland. The reasons for these refusals of entry changed over time but the respective decisions were mainly justified by the lack of a visa or residence permit or because the persons concerned exceeded the 90-day period for visa-free movement in the EU (Łysienka 2023: 8–9, 24–26). Initially, as explained above, re-entry might have been denied due to the unavailability of a residence permit for special temporary protection beneficiaries. This problem was partly solved by the introduction of the ‘*Diia.pl*’ in July 2022. However, another controversial rule has remained in force since the adoption of the Act on Assistance to Ukrainian Nationals. Under Article 11(2), persons enjoying special temporary protection who left Poland for more than 30 days lose their special temporary protection status (and ‘*Diia.pl*’). This rule is seen as being ‘at odds’ with the spirit of the Temporary Protection Directive (ECRE 2023: 2). Moreover, some special temporary protection beneficiaries who left Poland for less than 30 days reportedly also lost their status (which is against Polish law; Rzecznik Praw Obywatelskich 2023b). In practice, people whose status was withdrawn sometimes struggled to re-enter Poland. Statistical information provided by the Polish Border Guard confirms that numerous Ukrainian nationals had been denied entry to Poland

despite the ongoing armed conflict in Ukraine (Komenda Główna Straży Granicznej 2023: 5–6, see also PRAB 2023: 12; Rzecznik Praw Obywatelskich 2022; SIP 2023: 3–4). The observed practice of the Border Guard here is quite far from the minimum standard of the ‘favourable consideration to requests for return to the host Member State’ given ‘on the basis of the circumstances prevailing in the country of origin’ mentioned in Article 21(2) of the directive (SIP 2023: 4).

### *Remedies*

Under Article 29 of the Temporary Protection Directive, ‘(p)ersons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned’. Despite its peculiar wording (Carrera *et al.* 2022: 15), this procedural guarantee concerns appeals against decisions issued under Article 28 of the directive (an exclusion from protection on grounds related to national security and public order) and decisions to refuse to reunite a family under Article 15 of the directive. In fact, Article 29 provides for the only procedural rule concerning family reunification that was inscribed into the directive (Peers 2015: 584). Moreover, as many commentators rightly indicate (Kerber 2002: 213; Noll and Gunneflo 2007: 23, 68; Peers 2015: 596–597; Skordas 2022: 1225), Article 29 of the directive must apply also to any other refusal to recognise that a person enjoys temporary protection. Only this interpretation guarantees that a right to an effective remedy, provided for in Article 47 of the Charter of Fundamental Rights of the EU, is sufficiently respected.

In Poland, the right to an effective remedy has been secured concerning refusals of temporary protection on the grounds related to national security and public order. On the one hand, under Article 109 of the Protection Act, international protection beneficiaries in Ukraine, their family members and permanent residence holders in Ukraine may be denied temporary protection in Poland for the same reasons as those mentioned in Article 28 of the Temporary Protection Directive (Noll and Gunneflo 2007: 65). The refusal decision is final within the meaning of the Polish administrative law, which means that there is no right to challenge it before the second-instance administrative authority. However, it can be appealed through the courts, first the Provincial Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), then to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) (Białas and Jagura 2022: 6; Klaus 2022: 401). While the number of levels of decision-making has been limited in comparison with the regular administrative procedure in Poland (where one administrative appeal level is offered, followed by two levels of a judicial decision), this is in compliance with the right to an effective remedy (Łysienia 2022: 457–459). On the other hand, the Act on Assistance to Ukrainian Nationals does not provide for the possibility to exclude from special temporary protection any persons who committed crimes or are considered to pose a threat to national security. Article 28 of the Temporary Protection Directive has not been implemented regarding Ukrainian nationals and their family members fleeing the Russian invasion of Ukraine.

In contrast, persons enjoying temporary protection in Poland have no right to a remedy when they are denied family reunification. Under the Act on Assistance to Ukrainian Nationals, there is no right to family reunification at all. Under the Protection Act, the right to family reunification has been regulated; however, no procedure has yet been established. Admittedly, some technicalities – important for cooperation between the Member States as regards family reunification – have been specified but there is no mention of how to apply for reunification, how it is decided or how to challenge a reunification denial. Thus, it must be concluded that international protection beneficiaries and permanent residence holders in Ukraine have no explicit right to an effective remedy concerning decisions to refuse them family reunification (Noll and Gunneflo 2007: 68).

A refusal to recognise the person concerned as someone enjoying special temporary protection in Poland has been overlooked in Polish law. No clear procedure has been established in this regard. In practice, persons

who have been refused access to special temporary protection have been just sent away from the respective authorities without any proper decision in this regard being issued (Białas and Jagura 2022: 6; SIP 2023: 3). The Act on Assistance to Ukrainian Nationals specifies only that a person can be denied a 'PESEL UKR' if he or she attached an incorrect photo, if no fingerprints has been taken or if an identity document has not been disclosed by the applicant. Even then, the right to appeal has been explicitly excluded (Article 4(16-17) of the Act on Assistance to Ukrainian Nationals). It is uncertain whether a judicial remedy will be available in these circumstances (Klaus 2022: 53; cf. Białas and Jagura 2022: 6). The law in question is silent about the right to appeal when the person concerned is denied a 'PESEL UKR' due to the lack of recognition of his/her temporary protection status. Hypothetically, it may be argued that this non-recognition could be challenged before the administrative courts as the 'other public act or activity'. However, this legal pathway is uncertain and has not been reported to be used in practice. Thus, Ukrainian nationals and some of their family members who are denied recognition as persons enjoying temporary protection in Poland may actually have no right 'to mount a legal challenge' in such circumstances.

The Protection Act does not provide those who were denied access to general temporary protection with any means of appeal. However, under Article 219 of the Code on the Administrative Procedure, there is the possibility to appeal against a decision refusing the issuance of a certificate confirming that the person concerned enjoys general temporary protection in Poland; thus, some remedial pathway does exist in this regard (Łysienka 2023: 12).

### **Conclusions and final remarks**

In this article, the question of whether Poland follows the EU law on temporary protection in its response to the Russian invasion of Ukraine has been answered. In particular, the article aimed to identify the most pronounced divergences from the Temporary Protection Directive and the Council Implementing Decision that occurred in the Act on Assistance to Ukrainian Nationals and the Protection Act up until the end of March 2023.

It has been shown that the Polish law on temporary protection does not fully follow the Temporary Protection Directive and the Council Implementing Decision. Despite many amendments of the respective national laws, the Act on Assistance to Ukrainian Nationals and the Protection Act are still not compatible with EU law. The discordance with the Temporary Protection Directive and the Council Implementing Decision was identified in the following areas: eligibility, residence permits, accommodation, family reunification, returns and measures after temporary protection ends, as well as remedies. The observed inconsistencies may be summarised as follows.

First, not all those mentioned in Article 2 of the Council Implementing Decision have been offered temporary protection under the Act on Assistance to Ukrainian Nationals. The non-Ukrainian children and dependent family members of Ukrainian nationals, as well as Ukrainian nationals and their spouses who entered Poland in an irregular manner, are excluded from the scope of this act. Moreover, unlike Ukrainian nationals, international protection beneficiaries in Ukraine and their family members cannot benefit from the special temporary protection mechanism.

Second, under the Act on Assistance to Ukrainian Nationals, initially no residence permit was offered to Ukrainian nationals and their spouses, which goes against Article 8(1) of the Temporary Protection Directive. This changed only in July 2022, when they were given an electronic document, the '*Dzia.pl*'. However, it is not a residence permit as referred to in Article 2(16)(a) of the Schengen Borders Code. Moreover, not all special temporary protection beneficiaries have access to this residence permit.

Third, access to accommodation for persons enjoying temporary protection in Poland is not provided in accordance with Article 13(1) of the Temporary Protection Directive. At first, it was conditional upon the availability of public funds and could have been limited to two months. Those limitations were incompatible with the Temporary Protection Directive. Since the amendment of January 2023, there is no legal obligation to provide special temporary protection beneficiaries with accommodation; the Polish authorities have full discretion here. Moreover, after 120 days, the person concerned should, with some exceptions, participate in the cost of living in the accommodation organised by the Polish authorities. Depending on the interpretation of these exceptions in practice, the co-payment obligation may be compatible or incompatible with EU law.

Fourth, there are no rules concerning family reunification provided for in the Act on Assistance to Ukrainian Nationals. Thus, Ukrainian nationals enjoying temporary protection in Poland cannot reunite with their family members, in clear violation of Article 15 of the directive. On the other hand, the right to family reunification is regulated in the Protection Act, but the procedural rules are lacking, possibly making family reunification illusory in practice.

Fifth, no rules concerning voluntary returns can be found in the Act on Assistance to Ukrainian Nationals which disrespects Article 21 of the directive. While this provision has been implemented to the Protection Act, it is only a partial implementation. In particular, the respective Polish law omits guarantees concerning the voluntary return of persons who still enjoy temporary protection, nor does it transpose the rules as regards the favourable consideration of requests to re-enter the Member State upon a voluntary return to Ukraine.

Lastly, Polish law offers no right to appeal against a refusal to be reunited with a family member, in breach of Article 29 of the directive. Moreover, the law is unclear concerning access to an effective remedy when a person is considered by the respective authorities to not be eligible for special temporary protection.

Taking into consideration these divergences, one could easily get the impression that the Polish legislators lost sight of EU law when the temporary protection mechanisms were being designed in February and March 2022. The governmental proposal for the Act on Assistance to Ukrainian Nationals (Rada Ministrów 2022) briefly states that this act is in compliance with EU law but does not mention the Temporary Protection Directive and the Council Implementing Decision. Moreover, initially, it did not regulate the relation between the rules concerning temporary protection provided for in the Protection Act and the solutions proposed in the Act on Assistance to Ukrainian Nationals. Article 2(6-8) of the latter act (stating that persons covered by this law are enjoying temporary protection but the Protection Act does not apply to them) was added later on during the legislative proceedings. This addition was arguably aimed at responding to the numerous comments that the relation between the proposed law and the EU law was uncertain (e.g. Konfederacja Lewiatan 2022: 2).

The Polish system, where the two temporary protection mechanisms are available, is overly complicated (Klaus 2022: 28) and lacks clarity and consistency. On the contrary, it was argued that the introduction of the special temporary protection mechanism was needed to provide Ukrainian nationals with greater protection than given by the minimum standards arising from the Temporary Protection Directive. Indeed, the Act on Assistance to Ukrainian Nationals may be seen as constituting more favourable and humane conditions for Ukrainian nationals and their family members (Golec *et al.* 2022; Grzelak-Bach 2022). In some areas, the latter act offers generous rights that are more advantageous than the ones provided for in EU law. However, it cannot be overlooked that, in the areas scrutinised in this article, the Polish law on special temporary protection does not meet the minimum standards guaranteed in the Temporary Protection Directive. This defectiveness undermines Poland's efforts to provide Ukrainian nationals with a greater scope of protection.

The incompatibility between Polish and EU law identified in this article may, for example, simply result from the speed with which the new law was adopted. Since 24 February 2022, Poland has been challenged by the enormous influx of persons fleeing the Russian invasion of Ukraine. Thus, in March 2022, it might have been more important to quickly regulate their stay in Poland than to scrutinise the respective EU law. This may

be even more true if we take into account that the wording of the Temporary Protection Directive is not always clear and up-to-date (Carrera *et al.* 2022: 15–16; Gluns and Wessels 2017: 75, 82) and the comprehensive guidance regarding its scope is lacking. However, the reasons may also be different. Beirens *et al.* (2016: 25) noticed that the generous level of rights offered by the Temporary Protection Directive (cf. Küçük 2023: 16) might have been a motive hidden behind the continuing reluctance of the Member States to activate the directive. Ineli-Ciger (2018: 161) also counted it as the reason for the non-activation. However, in 2022, she did not uphold this opinion (Ineli-Ciger 2022). Notwithstanding, the analysis conducted for this article may suggest that some Member States – even though they agreed to activate the directive in response to the Russian invasion of Ukraine – still consider the level of rights offered to persons enjoying temporary protection to be too high. As a result, they may be trying to limit their obligations arising from the Temporary Protection Directive by adopting national laws that only partially or seemingly follow the respective EU law.

The Temporary Protection Directive was adopted to harmonise Member States' responses to the mass influx of displaced persons. Its prompt activation in reaction to the Russian invasion of Ukraine was indeed 'a much-welcomed step' (Carrera *et al.* 2022: 1). The directive is now applied in the Member States for the first time in its more than 20-year history. How it is implemented is crucial as it will shape the EU temporary protection (or similar) mechanism for years to come. Its implementation is even more important in Member States like Poland where great numbers of persons fleeing Ukraine found shelter. While, indeed, the situation in Member States due to the Russian invasion of Ukraine and the subsequent large-scale influx of displaced persons continues to be 'highly challenging' (European Commission 2022a), this fact cannot be used as an excuse for the continuing non- or incorrect implementation of the EU law on temporary protection. More than a year after the beginning of the Russian invasion of Ukraine, national laws on temporary protection must finally be made to comply with EU law. It is of great importance concerning that the Temporary Protection Directive's revocation and replacement are being now discussed in the EU.<sup>11</sup>

## Notes


1. *Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa* (Journal of Laws 2022 item 583).
2. *Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej* (Journal of Laws 2003 no. 128 item 1176).
3. See, e.g., the Polish translation of Article 13(1) of the Temporary Protection Directive.
4. *Ustawa z dnia 23 marca 2022 r. o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz ustawy – Prawo o szkolnictwie wyższym i nauce* (Journal of Laws 2022 item 682).
5. The Temporary Protection Directive does not provide for the issuance of travel documents (Peers 2015: 585).
6. *Ustawa z dnia 9 marca 2023 r. o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw* (Journal of Laws 2023 item 547).
7. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) (OJ L 77/1).
8. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast) (OJ L 337/9).

9. *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* (Journal of Laws 2023 item 185).
10. *Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach* (Journal of Laws 2013 item 1650).
11. Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the fields of migration and asylum; COM(2020) 613 final.

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No conflict of interest was reported by the author.

### ORCID ID

Maja Łysienia  <https://orcid.org/0000-0001-6916-8707>

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