



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal to the Council for a Joint Action
based on Article K.3(2)(b) of the Treaty on European U
concerning temporary protection of displaced persons

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Introduction

1. In the years since the Second World War, the countries which now constitute the European Union have often been called upon, either collectively or individually, to take in and welcome people from third countries who for various reasons have been in need of international protection. While the refugee protection regime set up by the Convention relating to the Status of Refugees of 28 July 1951 was initially created to deal with those displaced as a result of that war, the tradition thus created served to protect many other individuals.
2. The large-scale movement of people fleeing the conflict in the former Yugoslavia and attendant dangers to which it gave rise, have added a new dimension to dealing with these conflict situations. For the first time after World War II, Europe was directly involved with forced population movements which are not comparable to the previous refugee crises neither in terms of quantity nor in terms of quality:
 - the number of people involved far exceeds any comparable mass movement towards Western Europe (five times as many as the 200 000 who fled Hungary in 1956);
 - the people concerned do not necessarily meet the conditions to qualify for refugee status under the terms of the Geneva Convention;
 - the situation in the great majority of Western European host countries has changed significantly. Those which are members of the European Union are not only committed by the Single European Act to creating an area without internal frontiers; but are also bound by the Treaty on European Union to regard asylum policy and policy regarding nationals of third countries as "matters of common interest".
3. One response adopted by practically all Member States to the challenge constituted by people escaping from the conflict in the former Yugoslavia was to offer, on an autonomous basis, special arrangements to make possible accelerated decisions on temporary admission, thus avoiding or postponing the full procedures needed for the purpose of asylum applications.

Although adopted on a wider scale and by a greater number of states than ever before in the case of the Yugoslav crisis, this "temporary protection" formula was not completely new. It had been offered, for example especially by Austria, to the 200 000 persons fleeing from Hungary. In 1968, the same applied to people fleeing the Soviet invasion of Czechoslovakia. More recently, Albanian refugees were, initially, admitted into Italy on a temporary basis. And several European countries took in Vietnamese boat people and Tamils from Sri Lanka.

4. Although the Geneva Convention does *ipso facto* not exclude recognition of refugee status for whole groups of persons, Western European States have been reluctant to make use of this possibility. Similarly, Article 1C of the Convention which explicitly refers to the possibility of withdrawing the refugee status is seldom applied in European States, as it may require lengthy procedures for the examination of individual cases.

Temporary protection as an institution, therefore, has the advantage of offering immediate and flexible protection to individuals in need. Such timely protection is exceedingly important in situations where individuals are fleeing areas of conflict a situation which has unfortunately become increasingly common. Though temporary protection schemes are not meant to replace the institution of asylum, they can, nonetheless, offer immediate humanitarian protection to larger groups of people who have been forced to flee from their homes and country.

Additionally, temporary protection is, by definition, limited to the time during which the conditions in the country of origin do not allow a safe and dignified return of the individuals involved. A status that is intended to end when the situation in the regions concerned has substantially improved will make it possible to reallocate resources to other individuals in need.

5. Temporary protection within the EU differs from one Member State to another in particular with regard to the different legal positions and rights which are offered to the beneficiaries. The first and most striking difference between the Member States relates to the actual status of the individual covered under temporary protection schemes. In a few Member States such individuals are treated in a way comparable either to asylum seekers or to recognized refugees; or, in some cases, to nationals of the Member State. Other Member States fall well short of such high levels of hospitality and social protection. Consequently, the range of rights the individual has, or the extent of assistance offered to him or her upon arrival, varies. In some Member States, there is the possibility of taking up employment, thus making it possible for an individual to support himself and his or her family. In others, beneficiaries of temporary protection regimes must rely on social welfare for several years.
6. Furthermore, there is a need for increased cooperation, since the first Member State to declare the application of its temporary protection regime is likely to become a particular magnet as long as other Member States have not done so. Similar but opposite considerations apply when it comes to bringing the arrangements to an end. A common approach would influence some of the factors determining the destination of persons in need of international protection.
7. It therefore appears that, in order to limit the unintended consequences of divergent temporary protection regimes, some level of approximation as between national policies and practices, together with increased cooperation needs to be achieved amongst the Member States in order to allow for an equitable sharing of responsibility. The importance of attaining such comparable policies will manifest itself especially with respect to the realization of the free movement of persons as foreseen in Article 7a of the Treaty Establishing the European Community.

8. One very relevant and fundamental characteristic of temporary protection is that it is not a right established by any international instrument: States grant it as an autonomous act, and for the most part national legislation is carefully worded to keep it that way. The proposed joint action does not seek to introduce a new right to seek temporary protection in addition to the existing right to seek asylum. This approach is realistic and takes into account the history of temporary protection in Europe, and stresses the exceptional character of any temporary protection regime. Indeed, if a right to seek temporary protection does not exist, the right to seek asylum remains essential.

People who are temporarily displaced from their country of origin are protected in the Member States of the European Union by the European Convention on Human Rights, the European Social Charter and other applicable international conventions in the field of human rights. Hence they enjoy certain rights with respect to housing, education, personal inviolability etc. In this context the protection against "refoulement" provided by Article 33 of the Geneva Convention and Article 3 of the European human rights convention is to be regarded as essential. It is, however, of great importance to restate those minimum rights in the framework of a joint action for the coordination of the regimes of temporary protection of the Member States, so as to avoid distortions in the streams of displaced persons who would otherwise flow to those states where they would seem to have the most rights.

Although the proposed joint action is of a binding nature, its provisions relate solely to a common approach of Member States when opening up and phasing out a temporary protection regime and to the minimum rights to be granted to its beneficiaries. As long as the Council has not decided to open up a temporary protection regime, Member States remain free to adopt adequate measures for persons in need of international protection on an autonomous basis.

II. Commentary on the Articles

Article 1

10. Article 1 proposes definitions for a number of key concepts used in the draft joint action. Strictly speaking, the term "temporary protection regimes" covers all arrangements other than those involving admission as a refugee under the Geneva Convention or admission on humanitarian grounds. However, temporary protection has been deemed an appropriate response to mass influxes of persons seeking refuge abroad, *most* of whom are not Convention refugees but refugees in a wider sense. Thus, the definition of "persons in need of international protection" has been drawn up in rather broad terms, to cover not only situations where mass influxes have occurred, but also cases when it becomes clear that they cannot be avoided. This would allow anticipatory action. The categories listed have been inspired by those laid down in UNHCR's 1994 Note on International Protection (UN Doc. A/AC.96/830, para. 47).

Article 2

11. Article 2(1) contains a transitional clause, which provides that the joint action does not apply to persons admitted as beneficiaries of temporary protection regimes before its adoption. The aim of this provision is to avoid interference with existing situations by imposing different rights on persons admitted on the basis of purely national decisions.

Temporary protection is normally granted to well defined groups of persons in need of international protection. Regardless of the criteria for determining those groups, the implementation of a temporary protection regime must not entail any discrimination with regard to its beneficiaries. Therefore, Article 2(2) contains such a provision, which corresponds to the principle laid down in Article 3 of the Geneva Convention, and is also in line with the Commission communication on racism (COM(95) 653 final, point 2.3.7).

Article 2(3) contains an important provision: Member States remain free to grant a more favourable status to persons in need of international protection. The joint action should be regarded as containing minimum standards.

Article 3

12. This joint action is based on the assumption that there is a need for increased cooperation with regard to the introduction of a temporary protection regime for specific groups. Geographical proximity or historical ties will continue to exercise a determining influence in the choice of destination by persons seeking international protection. However, as has been seen in the context of the crisis in the former Yugoslavia, if such persons have a choice between seeking temporary protection in a Member State which has introduced a full temporary protection regime or in a Member State which has not done so, that is likely to have a significant influence on their choice, because of the differing degrees of legal security involved.

Article 3 does not exclude the possibility of a Member State applying temporary protection in individual cases without a specific decision of the Council. In some Member States, exceptional leave to remain is an important instrument to deal with a variety of cases. The proposal solely relates to mass influx situations, where there is a risk of distortionary effects on a significant scale.

13. Article 3(1) states that when opening a temporary protection regime the Council is to examine whether adequate protection can be found in the region of origin. In this context, "region of origin" is to be understood as relating to neighbouring countries.
14. Article 3(2) refers to the establishment of the potential groups of beneficiaries of temporary protection. It does not in itself define the groups of potential beneficiaries, since that will depend on each individual situation. Definitions which appear precise would be misleading in this respect, not only because they would not be applicable under all circumstances, but also because they could give the impression of seeking to introduce a new criterion in addition to those set out in the Geneva Convention. Furthermore, as pointed out in the general considerations,

the proposed joint action is not intended to create new individual rights. However, some guidelines can be found in earlier work at the EU level, in particular in Point 1(a) of the Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, adopted by the Council on 25 September 1995¹, which identifies the following categories:

- persons who have been held in a prisoner-of-war or internment camp and who cannot otherwise be saved from a threat to life or limb;
- persons who are injured or seriously ill and for whom medical treatment cannot be obtained locally;
- persons who are, or have been, under a direct threat to life or limb and whose protection in their region of origin cannot otherwise be secured;
- persons who have been subjected to sexual assault provided that there is no suitable means for assisting them in safe areas situated as close as possible to their homes;
- persons who, having come directly from combat zones, are within the borders of their countries and cannot return to their homes because of the conflict and human rights abuses.

15. Accordingly, Article 3(2) does not determine the duration of the temporary protection regime. This period will be determined by the Council for each specific situation. It will in each case clearly indicate the date by which the temporary protection regime will expire. Nevertheless, the Council may decide to extend that time limit in accordance with Article 4, first indent.

Article 4

16. The purpose of Article 4 is, first, to establish the conditions for the Council being kept as well informed as possible of the developments in the country of origin. In order to ensure continuity, responsibility for producing the situation report concerned is attributed to the Commission. In carrying out that task, the Commission will rely on a number of external sources for help, in particular of course the Member States, but also international organizations and non-governmental organizations. Internal sources could, for example, be the Commission's own delegations in relevant host countries outside the EU.

A yearly review of the situation in the country of origin seems reasonable to allow for consistent and sustained monitoring of events and of the application of the temporary protection regime by Member States. This does not preclude the possibility for the Commission to produce short-term reports whenever necessary. If such evaluation reports are to be useful in enabling the Council to take its decision on the extension, adjustment or phasing out of temporary protection

¹ OJ No C 262, 7.10.1995, p. 1.

regimes, they must be submitted at least six months before the end of the period set by the Council under Article 3. The Council will have to make a decision at least three months before the end of that period, so that all the relevant practical steps can be taken.

17. Article 4, first indent deals with the situation in which, at the end of the period defined in accordance with Article 3(2), the situation in the country of origin does not yet allow for a safe return under humane conditions of all or part of the beneficiaries. In such cases, the Council is to revise its initial decision on the opening of the temporary protection regime. Such revision may entail a simple short-term extension of the existing time limit, if for example there are strong indications that the need for protection is likely to disappear in the near future. A revision may also involve a partial or complete redefinition of the categories of people benefiting from the temporary protection regime.
18. Just as it is important to cooperate from the beginning of the application of temporary protection by Member States, the return of temporary protection beneficiaries needs to be well coordinated, in order to avoid confusion arising from each Member State negotiating directly with the country of origin and with the international organizations concerned. Article 4, second indent deals with the situation where a "safe return under humane conditions" has become possible.
19. The term "safe return under humane conditions" should be regarded as equivalent with other notions used in that context, as for example "safe, dignified and humane return", or "return in safety and with dignity" (the latter one being used and defined in the *UNHCR Handbook on Voluntary Repatriation: International Protection*, Annex 5, Geneva 1996). In Annex Seven to the Dayton Peace Agreement on Refugees and Displaced Persons, "safety" has been defined as return "without risk of harassment, intimidation, persecution, or discrimination, particularly on account of ... ethnic origin, religious belief, or political opinion" (General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, Article 1, para.2). The concept of "safe return under humane conditions" involves, at least, the following elements:
 - the *right to return* freely to the homes of origin;
 - *safety*, including physical and legal safety;
 - *non-discrimination and respect for other fundamental human rights*, as for example freedom of movement, respect for family life, freedom of opinion and religion, property rights, etc.;
 - in order to provide for the basic needs of returnees and to enable them to reintegrate, *assistance and shelter* may also be a necessary element, often requiring international aid;
 - repatriation may also require an effective system for *monitoring* the reintegration process, through the establishment and functioning of domestic and international mechanisms for the protection of returnees' human rights.

All these elements will need prior agreements between the parties involved. In the event of a decision taken by the Council to phase out the temporary protection regime in accordance with Article 4, second indent, agreements between the countries of origin and the European Union, in cooperation with UNHCR, will be appropriate.

20. The final paragraph of Article 4 emphasizes the preference to be given to voluntary return, since this is by far the least complicated and most humane option. National administrations will not have to deal with "last-minute" asylum applications and the persons concerned can draw up their own return plan. Cooperation with UNHCR, IOM and other relevant organizations is needed, as those organizations have developed relevant return programmes in the past.

Article 5

21. With regard to the question raised in Article 5, it should be kept in mind that one of the very purposes of the joint action is precisely to create the conditions for an effective sharing of the responsibility with regard to mass influxes of persons in need of international protection. Article 5 reflects the content of the Council resolutions on burden-sharing which foresee the possibility of taking measures based on solidarity if one or more Member States are particularly affected by mass-influxes. Such measures may for example take the form of financial compensation and/or, if that is not sufficient, a fair allocation of the persons who are fleeing from the crisis regions.

Article 6

22. Article 6 relates to the residence authorization to be delivered by Member States to the beneficiaries of the temporary protection regime under the decisions referred to in Articles 3 and 4.
23. Articles 7, 8 and 9 set out a number of minimum rights relating to status to be accorded in the context of temporary protection regimes. Distortionary effects can arise if there are major differences between temporary protection regimes in so far as some of the basic rights of beneficiaries are concerned. It is, therefore, proposed that Member States adopt a common stand on these rights. The Articles are couched in general terms to make it clear that modalities will have to be laid down in national legislation and may differ accordingly. As the proposal is framed as a joint action, these provisions are not intended to create individual rights and are, therefore, not *self-executing*.
24. Not all Member States currently grant all the rights mentioned in these Articles. However, consistent with the philosophy of the 1991 work programme and the 1994 Commission Communication on Immigration and Asylum Policies, a comparable level of social rights should be provided for. The underlying consideration in this respect is that the greater the similarity between the measures adopted by the Member States, the less the pull factors will influence the choice of destination by those seeking protection.

Article 7

25. In most Member States, there is no *right* to family reunification, but exceptions are made on a case-by-case basis. In general, family reunification is offered to the spouse and the minor and unmarried children of individuals who have been granted protection, although in a limited number of cases, such as Austria, Spain and Portugal, extended family members - such as dependent parents - may also be granted protection.

Article 7 proposes a right to family reunification, but limits this right to the nuclear family. It leaves it up to Member States to lay down the conditions for admission of dependent family members who do not belong to the nuclear family. Since temporary protection can last over a period of several years, it would cause a significant encroachment on family life if the right to family reunification were not extended to beneficiaries of temporary protection regimes. Moreover, Article 10 makes it possible to suspend the examination of asylum applications of beneficiaries of temporary protection. Among them, therefore, there may be refugees who would normally have had an immediate right to family reunification, once their refugee status had been recognized.

26. Article 7(2) reflects the often unstable situation in the country of origin. Although beneficiaries of temporary protection have to provide the best evidence they can about the status of their family members, it may not always be possible to obtain the necessary certificates which would have been required under normal circumstances.

Article 8

27. The granting of permission to engage in gainful activity to temporary protection beneficiaries is a somewhat more controversial issue and the extent to which it is granted seems to be inversely proportional to the number of individuals protected. Generally, there are three distinct situations with respect to access to the job market with increasing levels of flexibility:
- In two countries, Denmark and Greece, such a possibility does not exist and in two others, Germany and the Netherlands, there is an initial waiting period after which work permits may be issued;
 - In a number of countries, access to the job market is contingent on the issuance of work permits which are generally valid for a period of one year, but are usually renewable throughout the period of protection;
 - In some countries, such as Portugal, Spain, Sweden and the United Kingdom, the rights of the temporary protection beneficiaries are comparable to those of nationals, including the right to collect unemployment benefits as is the case in Finland and Luxembourg.
28. Not all Member States currently grant permission to engage in gainful activity to beneficiaries of temporary protection. This situation may lead to secondary movements of persons admitted under a national temporary protection regime *from* a Member State which does not grant the right to employment *to* another

Member State where such a right exists. Another reason to allow beneficiaries to engage in gainful activity is to prevent them being drawn towards a "black" labour market. Furthermore, taking into account the nature of temporary protection, it would be difficult to justify any distinctions made between beneficiaries of temporary protection and nationals or refugees under the Geneva Convention, when it comes to employment conditions, remuneration and social security. The term "gainful activity" is to be understood as covering employment as well as self employment. Accordingly, the term 'social security' should be understood as defined in Article 24(1)(b) of the Geneva Convention.

Article 9

29. In general, individuals granted temporary protection are received in reception facilities which, in the majority of Member States, are already being used for the reception of asylum seekers. It appears, however, that private or community housing is also available and allowed in the majority of the Member States. Accommodation in reception facilities is financed and administered by the recipient states, and in a minority of countries, such as Sweden, private housing may also be subsidized by the state. Only in one Member State, the United Kingdom, is there no system of reception. Initially, most Member States now provide special housing facilities to beneficiaries of temporary protection, but if their stay exceeds a certain period of time, more permanent housing accommodation is normally offered. Article 9(1) reflects this.

30. As with access to employment, the Member States' policies range between allowing no access to welfare benefits (Italy) to allowing the protected individuals an access comparable to that of nationals (United Kingdom, Finland). In the majority of Member States, individuals are allowed access to the health care system. In some Member States where individuals have limited access to welfare benefits, assistance in cash or in kind is provided for their daily sustenance.

The sentence concerning welfare benefits is carefully worded, leaving it up to Member States to determine the modalities in the light of the normally temporary nature of the admission of beneficiaries of temporary protection, and in the light of the individual possibilities for beneficiaries to provide for their own subsistence. According to Article 8, beneficiaries taking up employment will enjoy social security rights as Convention refugees.

31. The educational services available to beneficiaries of temporary protection vary in accessibility and comprehensiveness. Usually, some degree of access to the local education network is guaranteed and there are projects which offer language training to protected individuals. In a few countries, such as France and Portugal, there are no initiatives on the part of the state. In the majority of countries, minor children have access to primary education, as is the case in Belgium, Germany, Italy, the Netherlands and Spain. Also, in a significant number of countries, such as Austria, Denmark, Luxembourg, Sweden and the United Kingdom, individuals under temporary protection have the same claim to education facilities as recognized refugees.

The right to education is a fundamental human right laid down in Article 2 of Protocol 1 to the European Convention on Human Rights. It is, therefore, normally granted to all beneficiaries of temporary protection in the compulsory education age bracket. Other forms of (extended) public education should also be open to beneficiaries of temporary protection, since this would make it possible for them to acquire the necessary skills for their further development, either in the host country or subsequently when they return to their country of origin.

Article 10

32. The importance of the right to seek asylum has already been stressed in the chapter on general considerations. Article 10 reflects that idea, while enabling the suspension of examination procedures for as long as temporary protection is offered and, in any event, for no longer than a maximum period of five years.

Article 11

33. Article 11 contains a number of exclusion clauses, which are directly derived from Articles 1(F) and 33 of the Geneva Convention.

Article 12

34. Whereas the joint action provides the general rules applicable to temporary protection regimes and some minimum rights relating to the status of its beneficiaries, the establishment and phasing out of such regimes can thus be decided by the Council as an implementing measure of this joint action. Qualified majority is needed in order to ensure the effectiveness of the proposed coordination mechanism with regard to the establishment, the revision as well as to the phasing out of the temporary protection regime.
35. Any decision to apply temporary protection in cases of new mass influxes would seem to come clearly within the category of the "principal aspects" of third pillar activities referred to in Article K.6 and would therefore require consultation of the European Parliament, even if there is no specific mention of this in the joint action. However, consultation should not hamper rapid decision-making. Article 4 gives the European Parliament the possibility to express its views and make recommendations on the basis of the report prepared by the Commission.

It is, however, suggested that, in addition to the cooperation referred to in the last paragraph of Article 4, Member States should seek the opinion of UNHCR when deciding to establish, revise or phase out the temporary protection regime. The General Assembly of the United Nations has consistently asked UNHCR to deal with mass influxes of persons in need of international protection, even if they are not necessarily refugees. UNHCR's assistance would help to ensure proper coordination with action of a more global nature, and would take into account the role that temporary protection may play in the context of a comprehensive strategy.

36. In view of the importance of the measures implementing the joint action, it is suggested that they be published in the Official Journal.

Article 13

37. In order to preserve the concept that these regimes are indeed intended to be temporary, it is necessary to address the question of how long the temporary status can be allowed to last before a decision is taken on converting it into something permanent. This question is being examined by the international community and it is one on which the European Union could take a lead. Therefore, it is recommended in Article 13 that Member States should examine that question if, five years after the initial decision to set up a temporary protection regime, a safe return under humane conditions of the persons concerned is still not possible. The examination should focus on the possibility of introducing longer-term measures for beneficiaries of temporary protection.

Article 14

38. In order to give immediate effect to the present joint action, which is justified by the urgency required in situations of mass influx, Article 14 provides for the entry into force of the joint action on the day of its publication in the Official Journal. This provision is logical since the joint action does not in itself create individual rights.

