

The Temporary Protection Directive EU's response to the Ukrainian exodus

The 'why', 'who', 'what', 'where' and 'how' of temporary protection

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In response to the massive displacement following the Russian invasion of Ukraine on 4 March 2022, the Member States' Home Affairs Ministers unanimously decided to activate the EU Temporary Protection Directive (TPD). This Directive is a legal framework for large-scale movements dating back to 2001 but it has never previously been used.

To fully understand the legal rules now applying to those fleeing the invasion and the implications for EU countries, including Sweden, it is necessary to first clarify the relevant concepts in question as used in international law and practice and second to discuss both the 2001 Directive and the 2022 Council Decision which gives effect to it.

Mass influx and temporary protection: conceptual issues

Mass movement of people across international borders due to conflict and violence is the one of the most common manifestation of contemporary displacement worldwide. The main question raised when such mass cross-border movements occur, is how responsibility for the displaced persons

should be distributed among countries; do countries bordering the countries in distress have an obligation to admit displaced persons on their territories? If yes, for how long and what rights should the displaced persons be entitled to? A related question is whether other countries -not in proximity to the country in distress- are under any obligation to relieve the pressure from the countries of first reception by, for instance, accepting displaced persons from these countries on their territories?

Although the 1951 Refugee Convention, the principal UN instrument for the protection of refugees, was adopted at a time when Europe was ravaged by mass refugee displacement, its drafters have not sought to provide adequate responses as to how such mass movements should be addressed. In particular, the Refugee Convention is silent on the question of how national procedures should be organised to respond to immediate protection needs in the context of a massive and sudden influx situation and of how solidarity and responsibility-sharing between countries should materialise.

In accordance with the UNHCR Executive Committee (ExCom Conclusion No 100 (LV) 2004), the essential characteristics of 'a mass influx situation' include:

- considerable numbers of people arriving at an international border
- a rapid rate of arrival
- inadequate absorption capacity in host states, in particular the inability of individual asylum procedures to deal with large numbers of claims.

Equally, the concept of 'temporary refuge' or 'temporary protection' which constitutes an integral part of the discussion on mass influx situations lacks a well-established definition under international refugee law. The concept serves as a bridge between immediate protection from *refoulement* - the forcible return of individuals to a country where they are liable to be subjected to persecution - and longer-term solutions. It has been mainly used as an *umbrella* term to denote a comprehensive framework of time-limited protection for a large group of people following a mass influx situation. This protection encompasses both admission to a host state and a minimum set of rights for the people concerned. Most importantly, the provision of temporary protection does not absolve the country of refuge, as well as other states, from the obligation to find a satisfactory long-term solution for those affected in a spirit of solidarity.

A simpler solution

Temporary protection enables states to apply a much simpler process for identifying those in need of protection. Countries avoid lengthy individualised asylum procedures and instead implement a 'group' determination of the need for protection. This significantly speeds up the assessment of protection needs. The conditions under which this is possible are exemplified in the following section.

The EU temporary protection regime

The negotiations between EU states for regulating both admission to temporary protection and solidarity with regards to such protection, culminated in the adoption of the 2001/55/EC Temporary Protection Directive (TPD). The Directive establishes minimum standards for the provision of temporary protection in the event of a mass influx of refugees.

What does "temporary protection" imply?

Temporary protection is defined, for the purposes of the directive, as an **'exceptional' procedure** to provide immediate and temporary protection in the interests of the persons concerned and other persons requesting protection in cases in which there is 'a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation' (TPD Art. 2). Temporary protection under the directive is applicable following a 'mass influx', defined as the 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.' (TPD Art. 2(d)).

The instrument proposes a solidarity mechanism intended to contribute to balance the efforts among Member States in bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism consists of two components. The first is financial and the second concerns the actual reception of persons in the Member States (TPD Arts. 24–6). Solidarity with Member States in the support of their reception efforts is to be shown, first, through financial compensation from the relevant EU funds and, second, if necessary, through the distribution of displaced persons

amongst Member States on a voluntary basis and with their agreement. In particular, the solidarity mechanism is based on the principle of '**double voluntariness**': both the receiving state and the person concerned should agree on the transfer. The directive does not include a specific obligation for Member States to take refugees or asylum seekers from each other. It requires that Member States indicate their capacity for receiving refugees and provides for a negotiation on the number to be received by each state.

The Directive can be criticised for leaving open the possibility that no agreement might be secured among EU Member States to activate temporary protection, even in the event of an mass influx of refugees. Its enforceability can also be challenged since different Member States can have different positions not only on whether the Directive should be activated, but also on the type of burden sharing arrangements. In fact, the Directive does not require states to put forward reasons justifying their decision not to accept temporarily protected individuals at the capacity notification stage (TPD Art. 25).

For the reasons above, the TPD has been deemed as too 'politically unrealistic'¹. This may explain why it has not been activated in 20 years, including during the 2015 so-called refugee crisis, despite calls to the opposite. Instead, an EU relocation scheme to transfer primarily Syrian refugees from Greece and Italy to other Member States was implemented in 2016 and 2017 as a mandatory solidarity mechanism binding under EU law. The Court of Justice of the EU has stated that the exceptionality of circumstances in 2015 demanded a rapid and binding response, which is why the mandatory quota mechanism was deemed as more appropriate than the Directive's solidarity mechanism based on voluntary commitments.²

The activation of the Temporary Protection Directive following the Russian invasion of Ukraine

The potential weaknesses of the TPD, namely the challenge in agreeing on whether a situation of 'mass influx' exists and the lack of a sufficiently firm and mandatory solidarity commitment, did not prevent the EU states to

¹ S Carrera, et al, 'The EU grants temporary protection for people fleeing war in Ukraine Time to rethink unequal solidarity in EU asylum policy' *CEPS Policy Insights* No 2022-09/ March 2022, 2.

² CJEU, Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017 paras 256-257.

activate the directive as a response to the Ukrainian exodus. The Council of the European Union unanimously decided on 4 March 2022, to activate, for the first time, the directive through the Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of the directive. This had the effect of introducing temporary protection in the EU which raises the following questions:

Why was this particular instrument activated now?

The Russian military invasion of Ukraine and the feared implications of the conflict for the EU, including the likelihood of high migratory pressure on the EU Eastern borders, have prompted Member States to take collective action and ensure that similar standards of protection will be applied to those in need. The suitability of activating the temporary protection regime in the EU was justified by the Commission on the basis of three grounds. First, as being in the interest of displaced persons who would enjoy immediate protection in the form of harmonized standards across the Union. Second, as being in the interest of those Member States affected by the mass influx since the simplified procedure that leads to the granting of temporary protection would guarantee that their asylum systems are not overwhelmed. Third, as being in the interest of the Union as the consequences of receiving displaced persons from Ukraine will be distributed fairly across the Union, both because Ukrainian nationals will be able to freely join family and friends already located in several EU countries and due to the possibility of solidarity transfers.³ This third justification invoked by the Commission can be questioned though. The extent to which freedom of movement will lead to fairer distribution in practice remains to be seen.

Who receives protection under the new rules?

The activated TPD introduces temporary protection for three groups of people:

- Ukrainian nationals residing in Ukraine before 24 February 2022;

³ 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, 3.

- Third-country nationals and stateless persons who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and
- Family members of the above two categories of people, under the condition of a family already present and residing in Ukraine before 24 February 2022.

Stateless persons and nationals of third countries other than Ukraine who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a **valid permanent residence permit** issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country of origin, are also protected under the new rules (Article 2(2) Decision). However, the Council Decision activating the directive leaves it up to Member States to decide whether to provide them with temporary protection or other adequate protection under national law. In case Member States are not in a position to determine rapidly whether the person concerned is entitled for temporary protection or adequate protection under national law, the Commission suggests redirecting the person to the asylum procedure.

According to the Decision also Member States are to decide whether to extend protection to additional groups, namely to third-country nationals and stateless persons residing legally in Ukraine on the basis of a temporary residence permit and who are unable to return safely to their country of origin (see Art. 3 Decision and Art. 7 TPD).

In addition, Member States are encouraged by the Commission to extend temporary protection to Ukrainian nationals or third country nationals and stateless persons who benefited from international protection in Ukraine, who fled the country shortly before 24 February.⁴

Finally, where there are reasonable grounds for regarding a person as a danger to the security or the community of the host Member State, this person may be excluded.

⁴ Communication from the Commission on Operational Guidelines for the implementation of the 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 (2022C 126 I/01) 21 March 2022, page 6 and Council Decision (Rec. 14).

What is included in this form of protection?

The TPD foresees temporary protection to last for a minimum of one year, extended automatically by six monthly periods for a maximum of one year. At any time, the Commission may propose to the Council to end the temporary protection, since the situation in Ukraine is such as to permit the safe and durable return of those granted temporary protection or propose that the Council extend the temporary protection by up to one year.

Persons enjoying temporary protection under the 2022 Council Decision implementing the TPD, have the right to a **residence permit** for the entire duration of temporary protection. Documents or other equivalent evidence shall be issued for that purpose. For those yet to be admitted to their territory, Member States shall provide the necessary visas for entry, limiting formalities to a minimum. Persons enjoying temporary protection have a right to receive relevant information in a language that they are likely to understand and in written form.

They also have the right to take up **employment** or self-employment, although EU Member States may give priority to EU citizens and EEA nationals, as well as legally resident third-country nationals receiving unemployment benefits.

When it comes to housing, persons enjoying temporary protection are entitled to suitable accommodation or, if necessary, they should receive the means to obtain housing. In addition, they should receive 'necessary assistance in terms of **social welfare** and means of subsistence, if they do not have sufficient resources, as well as for medical care'. At a minimum, the assistance necessary for medical care shall include '**emergency care and essential treatment of illness**'. Necessary medical or other assistance will also be provided to persons with special needs, 'such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence'.

Persons enjoying temporary protection shall be granted **access to the education system** under the same conditions as nationals of the host Member State' for those under 18 but may confine this to the state education system. Admission of adults to the general education system is optional.

Where in the EU can people seek and enjoy temporary protection?

The question of '*where*' refers not only to which EU Member State offer protection, but also whether the person can choose in which Member State to ask for temporary protection. To respond, it needs to first be noted that the TPD applies to all Member States, except Denmark. According to the European Union Agency for Asylum, the majority of EU countries have taken initiatives to accommodate the high influx of displaced people from Ukraine through legislative measures.⁵ Denmark has adopted special legislation modelled after the EU temporary protection.⁶ Second, it needs to be highlighted that the EU Member States and the Schengen-associated states (Norway, Iceland, Switzerland and Liechtenstein) have waived short-term visa requirements for Ukrainians. This means that Ukrainians have the right to move freely within the Union for a 90-day period and **choose the Member State in which they want to enjoy temporary protection**. Once a Member State has issued a residence permit on the basis of temporary protection, the person benefitting from this protection can still move to another Member State, but they have **no right** to insist that the temporary protection status is transferred. In other words, the second Member State should not request the first Member State to take them back, but it is under no obligation to recognize the status that the first Member State has granted. Rather, a new process would have to be initiated. The person will have to receive a new residence permit based on temporary protection in the second Member State.

How is protection be delivered at a national level with focus on Sweden?

The question of 'how' is perhaps the most challenging one since it refers to the actual implementation at national level of the Council Decision that established the existence of a mass influx from Ukraine and triggered the regime of temporary protection. In a 2007 study about how Member States

⁵ European Union Agency for Asylum, Rapid response by EU+ countries to address the needs of displaced people from Ukraine, Situational Update Issue No 9, 4 March 2022.

⁶ On 16 March 2022, the Danish Parliament adopted a Special Act on Displaced Persons from Ukraine. See European Council on Refugees and [Exiles Information-Sheet---Access-to-territory-asylum-procedures-and-reception-conditions-for-Ukrainian-nationals-in-European-countries.pdf \(ecre.org\)](#) and https://ec.europa.eu/migrant-integration/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive_en

have incorporated the possibility of granting temporary protection (in case this is activated at EU level), various gaps and divergences were identified.⁷

The temporary protection and its consequences in Sweden

When it comes to Sweden in particular, Chapter 21 of the Swedish Aliens Act explicitly regulates the issue of temporary protection. It provides that aliens that are covered by the Council Decision activating the TPD (in this case the Decision in relation to Ukraine), are entitled to a temporary residence permit (i.e. residence permit based on temporary protection *uppehållstillstånd med tillfälligt skydd*). Chapter 21(3) of the Swedish Aliens Act allows the national government to rule that additional categories of persons, other than those indicated in the Council decision, can be granted time-limited residence permits based on temporary protection, if these persons are displaced for the same reason or from the same country or region of origin. Sweden decided to change the time limit for who is covered, so that people who came to Sweden on 30 October 2021 or later, can also apply for temporary protection. Sweden does not grant temporary protection to third-country nationals and stateless persons with permanent residence status in Ukraine as of 24 February 2022 and who are unable to return 'in safe and durable conditions to their country or region of origin'. Still, these individuals can apply for other forms of protection in Sweden.

Relationship between temporary protection and other protection grounds

According to Chapter 21(5) of the Aliens Act, the granting of a residence permit based on temporary protection does not prevent the examination of an application for a permit as a refugee. This means that the person has the right to apply for refugee status. Although Chapter 21(5) of the Aliens Act is limited to refugee status and does not refer to alternative protection (i.e. subsidiary protection in the sense of the EU Qualification Directive), the Migration Board refers to both refugee status and alternative protection status in its Legal Note in relation to Ukraine. Besides, an application for refugee status is to be treated by the national authorities as an application

⁷ Directive 2011/55 Temporary Protection Synthesis [Report PART I \(odysseus-network.eu\)](#) ; See also Study on the Temporary Protection Directive Final Report (EU Commission, 2016) [final_report_evaluation_tpd_en.pdf \(europa.eu\)](#)

for international protection that considering the EU Qualification Directive includes both refugee status and subsidiary (alternative) protection status.

According to Chapter 21(5) of the Aliens Act, the examination of an application for refugee status by a person having a residence permit based on temporary protection, can be postponed only if there are **special reasons** for such a postponement. The national provision further stipulates that if the application for a permit as a refugee is not examined before the termination of the temporary protection, it should be examined as soon as possible thereafter. As of now, the Swedish Migration Board has not provided any further guidance as to how Chapter 21, Section 5 of the Aliens Act should be interpreted. Following the Russian invasion, the Migration Board's legal director **has taken a decision to temporarily suspend the examination of applications** for refugee status in individual cases. The suspension has been justified by the fact that further information on the country of origin would be necessary for a legally binding review.⁸ The suspension of decisions also applies to the refugee status declaration referred to in Section 21 Chapter 5 in the Aliens Act.

As a result, Sweden can decide to process applications for refugee status and status as beneficiary of alternative protection after the end of the temporary protection period (Art. 17 TPD). Postponement of the examination of asylum applications is also allowed by Article 31(4) of the EU Asylum Procedures Directive. However, the latter directive does not allow an unlimited postponement. Its Art. 31(5) stipulates that "in any event" a decision on an asylum application has to be delivered within a maximum time limit of 21 months **from the filing of the application**.

In case applications for refugee status and for status as a beneficiary of alternative protection, are processed and rejected, Sweden must continue to extend temporary protection status to the beneficiaries for as long as temporary protection is applicable in accordance with the decision by the Council.

⁸ Rättsligt ställningstagande RS/004/2022 Tillfälligt skydd, asyl och frågan om verkställighet för personer från Ukraina, 9 mars 2022.

Duration of the permit based on temporary protection and coordination with other permits

According to Chapter 21(6) Aliens Act, the duration of the permit based on temporary protection cannot last longer than the timeframe decided by the Council. As a way to reduce the administrative burden due to permits renewal at the national level, the Commission recommends that Member States grant the residence permit on temporary protection already for two years, knowing that at any time the temporary protection can end in accordance with Article 6(1)(b) of the Directive.⁹

The Swedish Migration Board has stated that the permit extended to beneficiaries of temporary protection due to the situation in Ukraine, will be valid till 4 March 2023 without specifying what a possible extension would look like.¹⁰ In any event, Sweden will have to renew the residence permit for six-month periods twice, if the Council takes a Decision to extend the temporary protection after 4 March 2023. If the Council takes a Decision to end temporary protection before these dates (i.e. 4 March 2023 or any other new date depending on decisions for prolongation), the EU Commission recommends that the residence permits issued should become invalid and, therefore, should be withdrawn.¹¹ According to Chapter 21(6) of the Swedish Aliens Act, a permit based on temporary protection *may* not be valid longer than the time decided by the Council. However, it is not clear whether this necessarily means a withdrawal of a valid national permit. The Swedish Aliens Act does not explicitly include ending of the temporary protection by a Council's decision as a ground for withdrawal of the permit. In addition, granting of a residence permit is a national administrative decision favourable for the individual, which implies that the individual's certainty and security are important considerations when the authorities might consider revocation of this decision. Finally, it needs to be noted that the TPD allows Member States to adopt more favourable standards.

⁹ Communication from the Commission on Operational Guidelines for the implementation of the Council implementing Decision 2022/382, page 10.

¹⁰ Rättsligt Ställningstagande RS/004/2022 Tillfälligt skydd, asyl och frågan om verkställighet för personer från Ukraina, 9 March 2022, 4; see also Rättsligt Ställningstagande RS/003/2022 Uppehållstillståndets längd för personer som omfattas av 21 kap. utlänningslagen, 6 March 2022.

¹¹ Communication from the Commission on Operational Guidelines for the implementation of the Council implementing Decision 2022/382, page 10.

Rights attached to temporary protection in Sweden

According to Article 21(7) of the Aliens Act, an alien with a residence permit based on temporary protection shall be given a permission to work for the duration of the permit. In addition, persons with a permit for temporary protection in Sweden are covered by the Reception of Asylum Seekers Act (*Lag om mottagande av asylsökande*), like asylum seekers.

What does it imply to receive temporary protection in Sweden?

In addition to a **work permit**, aliens enjoying temporary protection have the right to **emergency health care** and **financial support** if needed. Since persons with a permit based on temporary protection are not registered as residents in Sweden, they do not get a Swedish personal identity number, which may negatively affect their access to the welfare and healthcare that regular residents in Sweden are entitled to. Instead, they get a coordination number (*samordningsnummer*) to facilitate their communication with Swedish public authorities. Children have the right to **education and the right to health care as all other children in Sweden**.

Implications and recommendations

The response by the EU to the mass influx of displaced person from Ukraine has been unprecedented. This is exemplified by the activation of the TPD in a way that allows the beneficiaries to decide in which EU Member State to ask for temporary protection. The free choice as to the location of the protection, does not eliminate the premise that the protection is granted by the specific EU Member States, not by the EU. Despite the activation and the regulation of temporary protection at EU level, the actual protection (including the issuance of residence permits, access to the labour market, access to the welfare system) remains a national protection. There are two important implications from this.

First, given the wide divergences between EU Member States in terms of socio-economic development, **secondary movements can be expected**. This means that the beneficiaries of temporary protection with a residence permit in one Member State might choose to move to another Member State. The regulation of these movements is yet to be addressed. Sweden, as much as other EU countries, has a strong interest in how the problems caused by such secondary movements will be solved legally and practically.

Second, at national level **the premise of temporariness causes important challenges**. Based on lessons drawn from other countries who have been applying temporary protection, such as Turkey with respect to Syrian refugees, temporary protection might be a good (and necessary) immediate response. Yet, it is a time-limited response, and it should not continue for more than a reasonable period. In view of the risk of a large group of persons living in limbo, it is crucial for Sweden, to adopt a long-term plan for the time after the temporary protection period. Even if the Russian invasion comes to an end, it is not likely that all beneficiaries of temporary protection can rapidly return to humane living conditions. A long-term plan is necessary. In this plan, the question of integration will be key so that the individuals concerned can fully contribute to their host society.

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