

In response to the war in Ukraine and the increasing number of arrivals to the EU of war refugees seeking safety, the European Commission proposed that the Temporary Protection Directive (TPD) (2001/55/EC) to be activated. On 04 March, the Council adopted decision to activate the EU Temporary Protection Directive. This is the first time the TPD has been activated since its adoption in the aftermath of the Yugoslav war.

The Council Implementing Decision EU 2022/382 of 4 March 2022 establishes the scope - who is covered by the Temporary Protection Directive and includes some provisions on coordination and monitoring among Member States and European Commission. TPD lists the rights for beneficiaries of temporary protection. In addition to these two binding documents, to better explain and clarify the provisions of the Directive and the Council implementing Decision in the context of granting temporary protection to people fleeing the war in Ukraine, on 21 March 2022 the Commission issued Operational guidelines.

Given that the EU temporary protection scheme under TPD has never been used, there are many legal uncertainties as to its interaction with both national laws and the EU asylum legislation. This document aims at explaining this new framework and its application to LGBTI people and highlights some areas of concern that should be addressed by the Commission and Member States.

1. Scope – who is covered

Recitals 11 – 14 and Article 2 of the Council Implementing Decision defines scope of persons to whom the temporary protection applies. Article 2 (1) defines:

- a) Ukrainian nationals residing in Ukraine who have been displaced on or after 24 February 2022 as a result of the military invasion by Russian armed forces. They will receive temporary protection based on nationality and residence alone.

Unless Member States interpret this provision narrowly, Ukrainians staying in third states should be covered as well, provided their place of habitual residence is in Ukraine.

- b) Nationals of third countries other than Ukraine, who have been displaced from Ukraine on or after 24 February 2022, and who were benefiting in Ukraine from refugee status or equivalent protection before 24 February 2022.
- c) Family members of those persons, where their families were already in, and residing in, Ukraine before 24 February 2022.

Based on Recital 11 of the Council Implementing Decision, family members will also receive temporary protection status to preserve the unity of families and to avoid diverging statuses among members of the same family.

The Council implementing decision leaves it to the discretion of Member States whether temporary protection will be granted to non-Ukrainians or stateless people who can prove a valid permanent residence permit before 24 February on the basis of a valid residence permit issued in accordance with Ukrainian law and who are unable to return to their country of origin. For those persons, member states can choose either to apply this Directive or an adequate protection under their national law. Adequate protection is further defined by the Commission in its Operational Guidelines.

To get temporary protection under this Directive or adequate protection under national laws, this group of persons would bear the burden of proof by presenting the relevant documents in order to show that they fulfil these eligibility criteria, i.e., valid residence permit and inability to return home safely. Applying these conditions may give rise to the examination of documents and other evidence similar to asylum procedures.

This is concerning for many LGBTI people who fled to Ukraine from Belarus, Russia and other countries and were living in Ukraine before 24 February on the basis of a valid residence permit issued in accordance with Ukrainian law and who are unable to return to their country of origin due to high level of persecution of LGBTI people in countries of origin.

Therefore, it is important to call on Member States to apply the directive to its fullest, in relation to who shall be covered by the temporary protection regime. This is particularly important to ensure that vulnerable groups – such as LGBTI people from countries of origin, where SOGIESC is persecuted – are given effective protection. Moreover, . granting them temporary protection would also be to the advantage of the Member State in view of the simplicity of the procedure, thereby further reducing the risk of overburdening the asylum system.

Where Member States still choose to interpret the TDP in a more restrictive manner, people falling outside the scope of the temporary protection should be able to access asylum procedures or any other regularisation procedures if they wish to. Those people should also have access to rights and services provided by the EU asylum legislations.

In cases of non-Ukrainians fleeing Ukraine who choose to be returned to their countries of origin, Member States need to provide access to assistance, accommodation, and essential services (including medical services), as long as they are waiting for their return.

2. Family reunification

As mentioned above, family members of persons referred to in Article 2(1)(a) and (b) of the Council Decision will also be granted temporary protection status. In order to qualify, the family should have already been present and residing in Ukraine before the move. In the case of stateless persons and third country nationals 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 or region of origin, their family members are not entitled to temporary protection or adequate national protection under the Council Decision.

Although the Council Decision does not require that family members of persons referred to in Article 2(2) benefit from temporary protection as provided for in Directive 2001/55/EC or adequate protection under the national law of the Member States, the Commission encouraged Member States to extend the application of temporary protection or adequate protection under national law to family members of those persons. Therefore, when it comes to non-Ukrainian nationals with permanent residence permit in Ukraine, who cannot return to country of origin, protection for them and their family members will vary from one Member State to another.

Regarding same-sex couples in registered partnership or marriage and unmarried same sex couples, the Council decision defines that the spouse of a person referred to in paragraph 1, point (a) or (b), or the unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its national law relating to aliens is considered as a family member.

This means that legally married same sex couples should be treated as a family and receive the same rights as opposite sex married couple in accessing set of rights such as a family reunification and reception.

Unmarried same sex couples can invoke the right to be recognised as a family and family reunification only if the foreigners' law or practice in the Member State treats married and unmarried couples in a comparable manner. Therefore, differences in the treatment by Member States may still arise in this area.

In addition, Article 15(2) of TPD obliges Member States to reunite family members in case they enjoy temporary protection in different Member States, if family members fall under the description of Article 2(1)(a) and (b) of the Council Decision. While doing so Member States should consider the wish of the said family members. Moreover, according to the Article 15(3) of TPD, where the person enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the person enjoys temporary protection shall reunite family members, who need protection if family members fall under the description of Article 2(1)(a) and (b) of the Council Decision.

A first analysis of the transposition of TPD by Member States showed that Bulgaria, Poland and Romania specifically exclude same-sex couples (both married and unmarried) from definition of family members.

Other countries do not specifically include protection for same-sex couples – however, it can be inferred that the countries that provide family reunification for same-sex couples in regular immigration processes, will also include them in the context of TPD.

It should be noted that in the case of LGBTI refugees from Ukraine, these provisions might be interpreted in a less advantageous manner by Member States that discriminate against the rights of the LGBTI people to family life protected by the Articles 7 and 9 of the Charter.

We call on the European Commission to clarify with national authorities to ensure that family reunification rights include same-sex couples and their families. In addition to this, information about the right to family reunification for same sex couples should be provided by Member States.

3. Access to support and healthcare: specific needs of trans and intersex people

The Temporary Protection Directive obliges Member States to protect temporary protection beneficiaries from refoulement and provide them with residence permits and a set of rights. Articles 12 – 14 of the Directive grants temporary protection beneficiaries a set of rights such as access to national labour market, education, suitable accommodation, assistance to social welfare and access to healthcare.

However, the scope of these rights is not clearly defined as in the case of international protection beneficiaries. Member States retain a level of discretion in defining the scope of those rights and are encouraged to go beyond the minimum standards set by the TPD.

In terms of access to medical care, Member States must provide at least for emergency healthcare and essential treatment of illnesses for all temporary protection beneficiaries. Member States must also provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied children or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence. As to whether temporary protection beneficiaries will enjoy equal treatment with Member States' nationals with regards to social security, working conditions, freedom of association and affiliation, education, social assistance and healthcare will depend on the discretion of Member States concerned.

To protect and fulfil the right to health of LGBTI asylum seekers under international law, the European Commission and Member States need to ensure that basic healthcare needs of refugees are met, including trans and intersex specific healthcare. Trans and intersex specific healthcare needs such as expert psycho-social support, continuous access to hormone replacement treatment, or post-surgical care constitute basic healthcare needs protected under international human rights law. For many trans and intersex asylum seekers access to hormone replacement treatment and mental health support is paramount to maintaining their physical well-being and emotional stability.

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