Frequently asked questions received on the interpretation of the Temporary Protection Directive and Council Implementing Decision 2022/382

These FAQs clarify the Commission services' understanding of the Temporary Protection Directive and relevant EU law. The views set out in this FAQ are without prejudice to the interpretation by the Union Courts; the primary reference for interpreting the Treaty is always the case–law of the Union Courts.

I. Scope of Temporary protection

(a) Family Members

1. ***We are faced with cases where TCNs married to UA nationals have arrived without their spouse after having been separated on the way to MS X. Is the TP applicable to TCNs that are not accompanied by their UA spouses?***

Case 1) The non-Ukrainian third country national and the UA spouse are not travelling together and the UA spouse is in the EU

Family members of persons referred to in Article 2(1)(a) and (b) of the Council Decision 2022/382 are entitled to temporary protection, where their families were already residing in Ukraine before 24 February 2022 and provided they have themselves been displaced on or after 24 February 2022, in view of the importance of preserving family unity and to avoid diverging statuses among members of the same family. In cases where non-Ukrainian third country nationals have been separated from their family member(s) holding the Ukrainian nationality, when presenting him/herself to the competent authorities, the non-Ukrainian third country national married to an Ukrainian national should be able to provide that s/he has been displaced on or after 24 February 2022 and documentary evidence attesting family relationship or family unity (and that the family was present and residing in Ukraine before 24 February 2022(see Article 2(4) of the Council Implementing Decision)).

If s/he is unable to provide such document/s upon arrival, the family relationship may be proven by way of obtaining attestations from the Ukrainian authorities (such as UA Embassy) in the Member State of arrival.

If the UA spouse is already benefitting from temporary protection in one EU MS different from the one the non UA family member is enjoying temporary protection in, Member States shall reunite family members.

Case 2) The non-Ukrainian third country national and the UA spouse are not travelling together-and the latter is not present in EU

Family members of persons referred to in Article 2(1)(a) and (b) of the Council Decision 2022/382 are entitled to temporary protection, where their families were already residing in Ukraine before 24 February 2022 and provided they have themselves been displaced on or after 24 February 2022, in view of the importance of preserving family unity and to avoid diverging statuses among members of the same family. In cases where non-Ukrainian third

country nationals have been separated from their family member(s) holding the Ukrainian nationality, when presenting him/herself to the competent authorities, the non-Ukrainian third country national married to an Ukrainian national should be able to provide that s/he has been displaced on or after 24 February 2022 and documentary evidence attesting family relationship or family unity (and that the family was present and residing in Ukraine before 24 February 2022(see Article 2(4) of the Council Implementing Decision)).

If s/he is unable to provide such document/s upon arrival, the family relationship may be proven by way of obtaining attestations from the Ukrainian authorities (such as UA Embassy) in the Member State of arrival.

2. *Case where a UA national holds a residence permit in an EU MS and lived there, whereas the UA spouse lived in UA. Is the holder of the EU MS residence permit considered member of family of the UA resident? Or vice-versa, in which case both would not be eligible for TP in another MS.*

An UA national is entitled to temporary protection ifs/he has been resident in Ukraine before 24 February 2022 and displaced from Ukraine on or after 24.02.2022; as regards family members of an UA spouse living in UA, they must have been displaced from Ukraine on or after 24 February and demonstrate, when presenting him/herself to the competent authorities, documentary evidence attesting family relationship or family unity and that the family was present and residing in Ukraine before 24 February 2022 (see Article 2(4) of the Council Implementing Decision). In this case, the spouse that was residing in an EU MS before 24 February 2022 (holding a residence permit or not) is in principle not entitled to temporary protection in accordance with the Council Implementing Decision neither in her/his own right (as referred to in Article 2(1)(a)) nor as a family member referred to in article 2(1)(c). This does not prevent those Member States who decided to extend the scope to apply more favourable conditions.

The spouse that was residing in UA is entitled to temporary protection pursuant to Article 2(1)(a) provided that s/he was displaced from Ukraine on or after 24.2.22. S/he is not entitled to temporary protection pursuant to article 2(1)(c) (since his/ her spouse already living in one EU MS does not fulfil the criteria to fall under point (a) of the same Article – meaning residing in UA and displaced on or after 24.2.22).

3. *Cases of UA nationals family members who were in MS X with valid legal basis (work permit for example) before 24th of February and to whom temporary protection would not apply but whose family members arrived after 24th of February and now receive temporary protection.*

If the work permit for example ends for the person, should they still receive temporary protection as their family members or is it possible to give a residence permit on the basis of subsidiary protection (in MS X the temporary protection and subsidiary protection have same rights?

This question has been answered above
In accordance with Article 2(1) of the Council implementing Decision 2022/382, Ukrainian nationals or their family members who were in MS X (and not Ukraine) with a valid work permit before 24 February 2022 are not entitled to temporary protection, as it is understood that they were not displaced from Ukraine on or after 24 February 2022.

Once their work permit (in the MS X) comes to an end, they still do not fall within the scope of temporary protection, to the extent they were not displaced from Ukraine on or after 24 February 2022, whether in their own right or as family members under Article 2(1) c) of persons who have temporary protection.

Notwithstanding recital 11 of the Council implementing Decision 2022/382 which indicates that it is "important […] to avoid diverging statuses among members of the same family", Ukrainian nationals or their family members who were not displaced from Ukraine on or after 24 February 2022, and whose work permits have come to an end, can apply for international protection.

4. ***Within the influx of displaced persons from Ukraine, there were recorded situations in which Ukrainian citizens who also held another citizenship appeared before the national authorities. Given that the applicable law (EU Decision 2022/382) does not expressly regulate this situation, in order to avoid an inappropriate application of temporary protection to citizens of safe countries of origin (other than the UA), taking into account that national protection comes first, we consider it necessary to establish the legal situation of the persons concerned, possibly by carrying out an analysis on the possibility of returning in safe and stable conditions to the country whose citizens are (other than the UA).***
In that regard, we ask the COM for clarifications on the situation of double citizenship, that is to say, on the specific way of applying that Decision in such cases and whether the purpose of the Decision would be undermined by carrying out that analysis.

If the Ukrainian nationals at stake fall under the scope of the Council Implementing Decision (Article 2(1)(a)), they are entitled to temporary protection even in the case they hold the nationality from another third country. Return to the country of origin in safe and durable conditions is not a requirement to be entitled to temporary protection for Ukrainian nationals who were residing in Ukraine before the outbreak of the war and who have been displaced on or after 24 February. It is a requirement only for cases falling under Article 2(2) of the Council implementing Decision.

II. Double registration of temporary protection status

5. ***What follow-up should Member States give to such instances where they find out the person is registered in another country (hit) or where they find out the person who they have registered subsequently registers in another Member State (notification).***

Temporary protection is to be enjoyed in only one Member State. In the Member State in which the person does not reside anymore the residence permit should be withdrawn and the ensuing rights expire.

As mentioned in the operational guidelines issued by the Commission on 21 March 2022, a person covered by Council Implementing Decision (EU) 2022/382 has the right to choose the Member State in which they want to enjoy the rights attached to temporary protection as Member States decided to waive the use of Article 11 of the TPD. A Member State has an obligation to provide for the rights in the TPD for as long as the person falls under the scope, regardless of whether the person was previously registered in another Member State; in fact,

a Member State cannot refuse the registration of a person falling under the scope, thus possibly limiting the access to rights to the person in the MS concerned, on the grounds that the person is registered in another MS. At the same time, a person can benefit from the rights attached only in one Member State at a time. This means that if a person is registered in one Member State (for example MS1) and subsequently moves to another MS (MS2), the Member State where s/he moves to (MS2) has to provide the person with all the rights foreseen in the TPD, including registering the person concerned and subsequently providing him/her with a residence permit. The person will benefit from the rights in the second Member State (MS2). The residence permit issued in the first Member State (MS1) and the ensuing rights must expire and be withdrawn in the first Member State, in accordance with the spirit of Articles 15(6) and 26(4) of the TPD.

Member States may only refuse temporary protection (and hence refuse to register or refuse the residence permit) to persons who are not covered by the scope of Directive 2001/55/EC and the Council Implementing Decision.

III. Article 28 TPD - Exclusion from temporary protection

6. ***Article 28 states that Member States may exempt a person from temporary protection for the reasons set out in para. 1 (such as the commission of crimes against peace, war crimes or crimes against humanity, or whether there are serious grounds for considering a person as a threat to the security of the host Member State or a person posing a threat to the society of the host Member State). Q 1. Does this concern both 1) the refusal of a foreign national to benefit from temporary protection and 2) its deprivation? - Q 2. If the above concerns the refusal to grant temporary protection, how should it be dealt with in the face of a massive influx of foreign nationals?***

As Article 28 TPD does not set a time-limit for exclusion, this could come at any point in time, thus either as a refusal or as revocation of residence permit and status. These exclusion decision is subject to the principle of proportionality and the right to appeal, Articles 28(2), 29 TPD.

IV. Article 12 – Access to labour market

7. ***The temporary protection directive is silent as to the exact moment this access should be granted, but it is clear about the fact that the Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities. Is it, for example, from the moment of registration of the person or from the moment the person has been issued a residence permit? Or, do everyone covered by the directive automatically enjoy temporary protection and thus enjoy their rights under the Directive as from the moment they express their wish to be granted protection in a MS?***

As said on page 4 of the Commission Communication of 21 March 2022 on Operational guidelines, *"The Council Decision has introduced an immediate temporary protection for the categories of persons listed in Article 2(1) and (2). There is no application process for temporary protection under national law.*" Hence, the right to temporary protection is immediate. The person concerned, when presenting him/herself to the authorities to avail the rights attached to temporary protection, would only have to demonstrate his/her nationality,

his/her international protection or equivalent protection status, residence in Ukraine or family link as appropriate, as per Article 2 of the Council Decision. Therefore, those who are covered by the Directive automatically enjoy temporary protection and the rights under the Directive.

Indeed, the Directive does not specify the moment from which persons enjoying temporary protection can engage in employed or self-employed activities. One of the objectives of temporary protection is to ensure a rapid process by reducing formalities to a minimum. In the Commission's view this means that, once the person enjoying temporary protection has been registered in the Member State in one way or another, allowing the person to show proof of registration and the granting of temporary protection, s/he has the right to engage in employed or self-employed activities, without having to wait for the residence permit to be issued. If during the issuance of the residence permit, the authorities conclude that the person does not fall under the categories of the Decision, or decide not to be more generous as allowed under the Temporary Protection Directive, they can cancel the registration, thus revoking the right.

V. Another status in addition to temporary protection status

8. ***Could a beneficiary of temporary protection be entitled to enjoy simultaneously an additional authorisation under another national or EU legal framework (e.g. highly skilled workers or Directive 2004/38/CE)? If not, should those authorisations be revoked or the applications suspended until the end of temporary protection?***

In accordance with Article 19 of Directive 2001/55, Member States may provide that temporary protection may not be enjoyed concurrently with the asylum seekers status. This means that persons entitled to temporary protection who apply for international protection may be asked to choose between benefiting from the rights set out in Directive 2001/55/EC or from the rights set out in Directive 2013/33 on reception conditions for applicants for international protection.

There is no other provision of that Directive enabling MS to provide that temporary protection could not be enjoyed concurrently with another status under Union or national law. This means that Member States cannot refuse the benefit of the rights attached to temporary protection on account of the fact that a person benefits from a specific status under Union or national law. As already stated in the guidelines, acquisition of rights under Directive 2003/86/EC, Directive 2004/38/EC or national law of the Member States concerned cannot lead to the loss of temporary protection for those who are entitled to it.

A different issue, which seems to be one raised in the second part of the question asked, is whether persons enjoying temporary protection, in accordance with Directive 2001/55/EC and Council Decision 2002/382, are also entitled to benefit from a different status under instruments of Union or national law in addition to the temporary protection.

This depends on the conditions set out in those instruments.

The Commission is not in a position to reply to such question in respect of conditions set out by legal instruments that are governed only by the national law of the Member States. The question of whether a person enjoying temporary protection can also benefit from another status governed by national law depends on whether that person fulfils the conditions set out

in that national law. However, as stated above, acquisition of rights under national law of the Member States concerned cannot lead to the loss of temporary protection for those who are entitled to it. Therefore, a Member State cannot require a person entitled to temporary protection to renounce to his/her temporary protection status in order to benefit from a national status.

As far as Union law is concerned, the following can be said:

Directive 2004/38: this Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members (as referred to in Article 2, point 2, and Article 3(2) of that Directive) who accompany or join them. Persons who have the nationality of a Member State as well as the nationality of a third country must still be treated as Union citizens. In addition, Member States need to grant the benefits of the rights set out in Directive 2004/38 or in the Treaties to mobile Union citizens and their family members. Rights attached to temporary protection, which would go beyond rights granted to third country family members by Directive 2004/38 (e.g. help for accommodation) should not be refused on account of the fact that they are entitled to free movement under that Directive. Directive 2003/86 (as regard the right to family reunification): pursuant to article 3(2)(b) thereof, this Directive shall not apply where the sponsor is authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status.

Directive (EU) 2021/1883 (as regards conditions of entry and residence of third-country nationals for the purpose of highly qualified employment): this directive does not apply to third-country nationals who are beneficiaries of temporary protection in accordance with Council Directive 2001/55/EC in a Member State[1]. This means that persons enjoying temporary protection in a Member States are not entitled to the rights conferred by this Directive. These persons could benefit from the rights conferred by Directive 2021/1883 if they renounce to the enjoyment of temporary protection and under the condition that they fulfil the conditions of admission laid down in Directive (EU) 2021/1883.

VI. Consequences of return to UA on temporary protection status

9. *Possibility to return to UA without having TP status affected*

Article 21 of Directive 2001/55/EC provides that Member States shall take the measures necessary to make possible the voluntary return of persons either enjoying temporary protection or whose temporary protection has ended. Member States may provide for exploratory visits.

Nonetheless, it is important to differentiate between voluntary return within the meaning of Article 21 of the Temporary Protection Directive (e.g. the person has moved his/her residence back to Ukraine *de lege* or de facto) and short-term visits to Ukraine by persons enjoying temporary protection in the EU.

- **Consequences of short-term visits / short return**

[1] DIRECTIVE (EU) 2021/1883 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC

Persons enjoying temporary protection might need to go back to UA for reasons other than voluntary return before Temporary Protection has ended (family visits, collecting papers or even to rescue their family members). Therefore, in the view of the Commission services, any short return to Ukraine should not be considered by Member States as a decision to return voluntarily, taken in full knowledge, within the meaning of article 21 of Directive 2001/55/EC, justifying to revoke residence permits and to cease to ensure the rights attached to temporary protection.

Furthermore, Ukrainians (and other third-country nationals) who hold residence permits issued by Member States under Article 8 TPD may also exit the EU and travel to third countries. Upon exit and re-entry to the EU, they will be subject of exit and entry checks according to the Schengen Borders Code. At the occasion of these checks, a valid residence permit replaces the need for an otherwise possibly required visa.

Residence permits loose validity if they expire or are withdrawn – for as long as this is not the case, the holder benefits from the above right to travel. There is no rule in the Schengen acquis that would foresee that (qualified) absence from the EU would lead to automatic loss of the permit.

- **Consequences of voluntary return to Ukraine and subsequent return to the EU**

Persons referred to in paragraph 1 of Article 2 or, where relevant, paragraph 2 of Council Decision 2022/382 are entitled to temporary protection for as long as they are present on the territory of Member States within the period of application of such protection in the Union.

In case of voluntary return to Ukraine before the end of temporary protection, the persons concerned cease to be entitled to temporary protection. In practice this means that Member States can revoke the residence permit issued and cease to ensure the rights attached to temporary protection.

In the case of a subsequent return to the EU, persons referred to in Article 2(1) or, where relevant, (2) of Council Decision 2022/382 would, again, be entitled to temporary protection, in accordance with these provisions.

The Commission services note that Article 21(2) of Directive 2001/55/EC provides that, for such time as temporary protection has not ended, Member States shall, on the basis of the circumstances prevailing in the country of origin, give favourable consideration to requests for return to the host Member State for persons who have enjoyed temporary protection and exercised their right to voluntary return. This provision cannot be read as implying that persons who have returned voluntarily to their country of origin could be then prevented from returning to the Union as a whole or would no longer be entitled to temporary protection upon subsequent return to the Union.

This provision indeed covers the issue of return, which is distinct from entitlement to temporary protection, and more specifically requests to a given MS, the “host Member State”, which can be understood as being the Member State where the person concerned initially enjoyed temporary protection. It can be inferred from that provision that such Member State would not have as such an obligation to accept return to its territory (only the obligation to give favourable consideration to requests to that effect). The consequence of a refusal for the

host Member State to accept return to its territory would be that temporary protection should be enjoyed in another Member State where the person concerned travels to when returning to the Union.

Considering that Member States have renounced the application of the rule set out in Article 11 of Directive 2011/55/EC, according to which a Member State shall take back a person enjoying temporary protection in its territory, and that persons entitled to temporary protection can enjoy it in the Member States of their choice, the Commission services consider that it would be consistent that Member States apply the same principle in respect of persons entitled to temporary protection who are returning to the Union, including the "host" Member States where those persons were enjoying temporary protection before leaving for Ukraine.