

ISSUANCE AND TRANSMISSION OF THE EUROPEAN PROTECTION ORDER IN THE EUROPEAN UNION. CRITICAL OPINIONS. *DE LEGE FERENDA* PROPOSALS

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Abstract

The objective of this study is to examine the provisions of Directive 2011/99/EU concerning the procedure for issuing and transmission of a European protection order. The examination highlights the need for a previously ordered protection measure, under which it may issue a European protection order at the request of the person seeking protection. Along with the conducted examination there were identified also depositions that may cause some malfunctions into practice, which is why there were formulated some de lege ferenda proposals, which may be considered by the European legislator. We highlight here the proposal that regards the need, within the procedure for issuing a European protection order, to ensure the right to defense to the protected person and to the person representing a danger. The paper can be useful to both academics and practitioners and also to the European legislator, in terms of operating the necessary changes.

Keywords: protected person; person representing a danger; protection measures; the issuing State.

JEL Classification: K14; K33

1. Introduction

As highlighted recently in the doctrine, “the enhanced danger is determined by increasing transnational crime and thus the need to prevent and combat more effectively in an organized framework at global level has prompted the adoption of international zonal, regional and global instruments, in order to unify the efforts of the world countries.”²

Thus, one of the most important legal instruments of this kind (if not the most important) is the United Nations Convention against Transnational Organized Crime, together with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against illegal trafficking of migrants by land, air and sea (both additional to the Convention), adopted in New York on 15 November 2000 and ratified by Romania by Law no. 565/2002.³

At EU level, the assumed objective, namely to ensure an area of freedom, security and justice area imposed also the need for a legislative framework meant to contribute to improving the activity of judicial cooperation in criminal matters between Member States.

In this context, Romania's accession to the European Union from 1 January 2007 resulted in a number of new obligations imposed by the system of organization and functioning of the Union, obligations mainly focused on the need to promote an important contribution to achieving a European area of freedom, security and justice.⁴

In these circumstances, the main problem was identified as being the mutual trust in the judicial systems of other Member States, and therefore recognition and enforcement of criminal judgments imposing custodial sentences or measures involving deprivation or non-deprivation of liberty or other types of judgments.

At the same time, the Stockholm Programme - An open and secure Europe serving and protecting citizens⁵ highlighted among the instruments of implementation of this multiannual program, mutual trust.

Given this aim, it was insisted on the fact that mutual recognition should extend to all types of judgments and decisions of a judicial nature, which could be, depending on the legal system, of criminal or administrative nature.

Regarding the victims of crime, including terrorism, by the Program it has been established that “People who are most vulnerable or who find themselves in particularly exposed situations, such as persons

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² Boroï, Alexandru & Rusu, Ion, *Cooperarea judiciară internațională în materie penală, Curs master/International judicial cooperation in criminal matters, Master Course*, Ed. C.H. Beck, Bucharest, 2008, pp. 1-2.

³ Boroï, Alexandru (coord.), Rusu, Ion & Rusu, Minodora-Ioana, *Tratat de cooperare judiciară internațională în materie penală/Treaty of judicial cooperation in criminal matters*, Ed. C.H. Beck, Bucharest, 2016, p. 5.

⁴ *Ibidem*, p. 7.

⁵ Published in OJ C 115 of 04.05.2010, p. 1.

subjected to repeated violence in close relationships, the victims of gender-based violence or persons who are victims of other types of crimes in a Member State, other than that of their nationality or residence, require special support and legal protection. It is required an integrated and coordinated approach to victims, in the sense of the conclusions of the Council on a strategy meant to ensure the rights of people who are victims of crime and to improve their support.”¹

Based on these findings, the European Council calls on the Commission and the Member States to:

- examine ways of improving legislation and practical support measures for protection of victims and to improve the implementation of the current instruments;
- offer better support to victims by other means, possibly through existing European networks that provide practical help and bring proposals to that effect;
- to consider whether to create a unique comprehensive legal instrument on the protection of victims by bringing together Directive 2004/80/EC of 29 April 2004 relating to compensating the crime victims and Council Framework Decision 2001/220 / JHA of 15 March 2001 on the status of victims in criminal proceedings, based on an evaluation of the two instruments.²

Thus, in a common area of justice without internal borders it is necessary to ensure that the protection provided to an individual in a Member State is maintained and continued in any other Member State in which the person in question moves or has moved.

Against this background it was adopted Directive 2011/99 / EU of the European Parliament and of the Council of 13 December 2011 on the European protection order³.

The European legislative act applies *the protection measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger his life or physical, psychological and sexual violence, for example by preventing any form of harassment and dignity or personal liberty, for example by preventing abductions, tracking purposes of harassment and other forms of indirect coercion, and which aim at preventing new criminal acts and reduce the consequences of previous criminal acts*⁴.

Starting from its definition, the European protection order is issued under a protective measure taken earlier, in order to protect a potential victim (who may be a victim of crime or even a witness) on the territory of a Member State other than the State where it was ordered the protection measure.

In this paper, we have examined the provisions of the European legal instrument framework (Directive 2011/99 / EU) regarding its objectives, defining some phrase, its form and the procedure of issuing and transmitting the European protection order.

Also during the examination we have identified also some provisions in judicial practice that can cause numerous dysfunctions that can have a negative influence in the activity of judicial cooperation in criminal matters between Member States.

In order to support the European legislator from the perspective of improving the legal framework, in addition to critical opinions we have formulated some *de lege ferenda* proposals.

The work is an absolute novelty, since this topic has not been examined in the specialized literature.

2. Objective, definitions, the designation of competent authority

The *objective* of the European legal instrument under consideration is that of establishing a set of legal rules allowing a judicial authority (or any equivalent of the judicial authority) of a Member State, which has been ordered protective measures in order to protect a person against a criminal act of another person which may endanger his life, the physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order to allow a competent authority of another Member State to continue the protection of the person in the territory of that Member State, following criminal conduct, or alleged criminal conduct, in accordance with the law of the issuing State (art. 1 of Directive 2011/99 / EU).

In order to avoid interpretations which are not in accordance with his will, and to not repeat some normative terms within the adopted legislative act, the European legislator has defined the following expressions as follows:

¹ The Stockholm Programme - An open and secure Europe serving and protecting citizens, p. 10.

² *Ibidem*, p. 10.

³ Published in the Official Journal of the European Union L 338/2 of 12.12.2011.

⁴ Directive 2011/99 / EU, Preamble, par. 9, p. 3.

(1) *European protection order* - means a decision, taken by a judicial or equivalent authority of a Member State in relation to a protection measure against which a judicial or equivalent authority of another Member State takes appropriate measure or measures under their national legislation to further ensure the protection of the protected person.

(2) *measure of protection* - means a decision in criminal matters adopted in the issuing State in accordance with national law and procedures by which one or more of the prohibitions or restrictions referred to in art. 5 shall be imposed on a person causing danger to protect a person protected by a criminal act that might endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity.

(3) *protected person* - means a natural person benefiting from the protection stemming from a protection measure adopted by the issuing State.

(4) *The person causing danger* - means a natural person to whom there were imposed one or more of the prohibitions or restrictions referred to in art. 5.

(5) *issuing State* - means the Member State in which it was adopted a protection measure underlying the issuance of a European protection order.

(6) *Executing State* - means the Member State which has submitted a European protection order, for its recognition.

(7) *state supervision* - means that the Member State to which it was transferred a judgment within the meaning of article 2 of Council Framework Decision 2008/947/JHA¹, or a decision on judicial surveillance measure under article 4 of Council Framework Decision 2009 / 829 / JHA.²

In order to execute a European legal instrument and to ensure effective cooperation and operation between Member States, each State shall inform the Commission on the judicial authority or authorities or their equivalent, under their national law that are competent to issue and at the same time to recognize a European protection order issued by a competent authority of another Member State.

This information is crucial because it will be made available to Member States, which will be used to provide direct cooperation between judicial or equivalent bodies in terms of transmission, recognition and enforcement of a European protection order.

3. The need for a protection measure into the national law, the appeal to a central authority

Under art. 5 of the European legislative act under examination, a European protection order may only be issued based on the existence of a protection measure issued earlier, and imposing on the person causing danger one or more of the following prohibitions or restrictions:

a) a prohibition from entering into certain localities, places or defined areas where the protected person resides or visits;

b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail means, fax or any other means; or

c) a prohibition or regulation on approaching the protected person to a distance smaller than the established one.

So the general rule envisaged for the issue of a European protection order is the existence of a protection measure adopted earlier to the request of issuing the order.

The establishment of this rule was imposed due to the need to identify the reasons for which the protected person asks issuing the order, an identification which is performed in the course of an investigation, after which it is decided taking firstly a measure of protection.

In order to assist the competent authorities, each Member State may designate a central authority for this purpose, which can transmit or receive by administrative means, a European protection order or other official correspondence.

If it resorts to such means, all communications, consultations, exchanges of information, inquiries and notifications between competent authorities may be achieved with the support of the central authorities of the Member State concerned.

¹ Council Framework Decision 2008/947 / JHA of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions with a view to supervising probation measures and alternative sanctions was published in OJ C 337 of 16.12.2008, p. 102.

² Council Framework Decision 2009/829 / JHA of 23 October 2009 on the application between Member States of the European Union, the principle of mutual recognition based on the decisions of supervision measures as an alternative to detention, published in OJ L 294 of 11.11.2009, p. 20.

4. The issue of a European protection order

A competent judicial authority (or its equivalent) may issue a European protection order at the request of the protected person, if it decides to reside or already resides in another Member State, or when the protected person decides to stay or already stays in another Member State, other than the State where it was ordered one of the protective measures referred to above.

Besides the need to fulfill the general conditions mentioned above, the competent authority of the issuing State shall take into account, inter alia, the period or periods in which the protected person intends to stay in the executing State and the seriousness of the need for protection.

The protected person may submit a request to issue a European protection order, either to the competent authority of the issuing State or the competent authority of the executing State. If the request is made to the executing State, it transmits it to the issuing state.

Under the procedural aspect, we mention that before issuing a European protection order, to the person causing the danger it should be given the right to be heard and the right to challenge the protection measure (but only if that person has not benefited of these rights within the procedure resulted at the issuance of the protection measure).

After issuing a protection measure containing one or more of the prohibitions or restrictions referred to above, the judicial issuing authority or its equivalent shall inform the protected person, in accordance with its national law, on the possibility of requesting the issuance of a European protection order, if this person decides to leave in another Member State, and on the procedure to be applied in the case of such a request. In this case, the competent judicial authority shall advise the protected person to submit an application before leaving the territory of the issuing state. The application can be introduced by a guardian or representative.

If the above mentioned application was rejected, the competent authority of the issuing State shall inform the protected person on any possible appeal, which can be used by the person concerned.

5. The form and content of the European protection order

The European Protection Order will be issued in accordance with the model set out in Annex 1 of European legislative act, and it includes the following information:

- a) the identity and nationality of the protected person and the identity and nationality of the guardian or representative if the protected person is a minor or is legally incapacitated;*
- b) the date from which the protected person intends to reside or stay in the executing State and the period(s) of stay, if known;*
- c) the name, address, telephone number and fax number and e-mail of the competent authority of the issuing State;*
- d) the identification (e.g. through a number and date) of the legal act containing the protection measure on the basis of which the European protection order is issued;*
- e) a summary of the facts and circumstances which led to the adoption of the protection measure in the issuing State;*
- f) prohibitions or restrictions imposed by the protection measure underlying the European protection order, the person causing danger, their duration and the indication of the penalty, if any, for infringement of any ban or restriction;*
- g) the use of a technical device, if any, that has been provided to the protected person or the person causing danger as a means of enforcing the protection measure;*
- h) the identity and nationality of the person causing danger, as well as his contact details;*
- i) where such information is known by the competent authority of the issuing State without requiring further inquiry, whether the protected person and/or the person causing danger has been granted free legal aid in the issuing State;*
- j) where appropriate, a description of other circumstances that might affect the assessment of the danger that the protected person confronts;*
- k) an express indication, where applicable, that a judgment within the meaning of art. 2 of the Framework Decision 2008/947/JHA, or a decision on surveillance measure within the meaning of art. 4 of Council Framework Decision 2009/829/JHA, has already been transferred to the State of supervision, when it is different from the State of execution of the European protection order, and the identification of the competent authority of that State regarding the enforcement of such judgment or decision (art. 7 of Directive 2011/99 / EU).*

In terms of procedural competent judicial authority (or its equivalent) it shall fill in the form set out in Annex 1 of the examined European legal instrument with the specified information.

6. The transmission procedure

After being issued the European protection order it shall be transmitted to the competent authority of the executing State by any means which leaves a written record, to enable the competent authority of the executing State to establish its authenticity. All official communications shall be made directly between the involved judicial (equivalent) authorities.

In the event that the issuing authority knows no authority that will recognize and enforce the European protection order in another State, the latter authority shall check, including through the contact points of the European Judicial Network, the national member of Eurojust or the national coordination system, Eurojust.

In the event that the authority receives a European protection order from the executing State it has no competence to recognize it, that authority will send the order to the competent authority without delay and inform the competent authority of the issuing State about this situation.

7. Critical opinions and proposals *de lege ferenda*

The first critical opinion that we formulate regards the absence of provisions aiming at ensuring the right of defense within the procedure of issuing the European protection order in the State of issuance.

This applies to both the need to ensure the right to defense both for the protected person and the person causing danger for the protected person.

We appreciate that ensuring the rights of defense of the two categories of persons, it is necessary to supplement the provisions of art. 6 of the examined enactment with a new paragraph, where it is provided expressly the obligation of the judicial body competent to receive and approve or decline the request of the protected person, to ensure the defense by an attorney for both the protected person and the person causing a danger.

Another opinion concerning the procedure for transmitting the European protection order, which, according to art. 8, par. (1) of Directive 2011/99/EU it can be achieved by any means which leaves a written record, in order to enable the competent authority of the executing State to establish its authenticity.

We appreciate the legislator must establish a concrete way of transmitting correspondence between judicial authorities of Member States, the means to be used also for other transmissions, as applicable for the: European arrest warrant, judgments of deprivation of liberty, the European evidence warrant, etc.

8. Conclusions

Through the conducted research we have regarded the examination of the European legal instrument governing the European protection order at EU level, particularly with regard to the objective pursued by the European legislator, the issuing and submission procedure for such a document.

On the other hand we have insisted in highlighting the issuance procedure, noting that the European legal instrument grants almost absolute priority to the internal law of the issuing State.

At the same time, we emphasize that the European legislative act explicitly stated the need for issuing a European protection order to be achieved only under the conditions where the issuing State has already adopted a protective measure imposing the person causing danger one or more of the prohibitions and restrictions stipulated expressly in the text.

As a general conclusion we can say that by adopting this regulation, the European legislator ensured the protection of certain categories of persons in the European Union, by requiring to the persons who pose a danger to comply with certain measures.

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