



EUROPEAN PROTECTION ORDER: ANALOGIES AND DIFFERENCES WITH THE SPANISH PROTECTION ORDER

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Abstract. The author makes a comparative conceptual analysis of the two Victims Protection Orders from both a jurisdictional and procedural approach, and highlights how the scope of the Spanish protection order is more concrete than the European Protection Order, because the first is to consolidate means of defense and protection against violence in the family. Directive 2011/99 of the European Parliament and Council of 13 December 2011 is applied to protection measures taken in criminal matters for the protection of victims in general, although obviously the European Protection Order is to ensure victims have judicial protection in a common area without internal frontiers in any EU Member State.

SUMMARY: 1. Introduction. - 2. Concept and Scope. - 3. Competency and content. - 4. Procedure. - 4.1. Broadcast procedure. - 4.2. Execution procedure.

1. Introduction.

There is no doubt that the active protection of the criminal victims in the EU has an important relevancy, collected in the Decision 2001/220/JAI, the same which has been review by the resolution of the Council of June 10th 2011, on the standing of victims in criminal proceedings.

This one has been recently published in D.O.L 315 of November 14th 2012, as Directive 2012/29/UE of European Parliament and European Council of 25 October 2012, establishing minimum standards about rights, support and protection for criminal victims and replacing the framework Decision 2001/220/JAI of the Council.

According to the Stockholm program ([1]), judicial cooperation and the mutual recognition in criminal matters within the European Union should be extended to all types of judicial resolutions that can depend on the legal, criminal or administrative system, as Recital 3 of the "Directive 2011/99/UE of the European Parliament and the Council of 13 December 2011" says ([2]).

This program calls the Commission and member states to examine ways of improving the law and practical measures of supporting the victim protection, offering special measures of protection to the victim. So much so that in the European parliament resolution of February 10th 2010, on equality between men and women in the European Union, the proposal to establish and European order of victims protection was endorsed, so that in the common area protection to an individual of a Member State is ensured without space limitations, and he or she can move to any other Member States ([3]).

Therefore, according to the European protection order, the standards for the protection measures adopted under the law of a Member State - i.e. State of Issue - can be extended to another Member State in which the person under protection decides to reside or stay -i.e. be in Status of Implementation -, ensuring an effective protection between protection orders dictated by a different authority to a criminal court.

The important point of the directive is that for the first time it is regulated the European law of protection of any kind of victim, and that there is no need to change national systems in order to adopt protection measures. Furthermore, according to the directive, there is no need to modify national criminal laws to execute an European protection order.

If you look at the protective order that applies in the Spanish criminal proceeding, you can see how the idea and the principle of this order have been to fill the gap that existed in the Spanish penal system while solving on the civil and criminal actions in the coordination between civil and criminal jurisdiction (Magro Servet V [4]).

Since, in 2003, the Spanish legislature established the Order of protection conferred the victim of violence, a comprehensive statute for safekeeping, which includes both civil and criminal injunctions under Article 544 ter, and other measures assistance and social protection established by Constitutional Law 1/2004, Integral protection Measures against gender Violence (Gallego Sánchez G. [5]).

2. Concept and Scope.

The "European protection order" is a resolution adopted by a judicial or equivalent authority of a Member State in relation to a measure of protection, under which a judicial or equivalent authority of another Member State taking the measure or measures under its own national law to maintain the protection of the protected person. And the scope of which allows a judicial or equivalent authority of a Member State which has adopted as state-run-a protective measure designed to protect a person against a criminal act of another person which may endanger your life , physical or psychological integrity and dignity and personal liberty or sexual integrity, dictating a European protection order allowing a competent authority of another Member State as state-run-for

maintaining the security of the person in the territory of that other Member State, by a criminal or suspected criminal offense under national law of that Member State ([6]).

If we go to the Spanish criminal procedure, we observed that the protective order, comes under Article 544 for victims of domestic violence, and Article 62 of the LO 1/2004 for victims of domestic violence, although the concept protective order can be inferred from their respective legal regulation to meet would be given by "a judgment which establishes an objective situation of risk of domestic violence or domestic violence, for their protection during the pendency of a criminal by crime or misdemeanor (Delgado Martin J. [7])."Establishing for this, appropriate protection measures for victims (Pérez Gines C.A [8]).

It is clear, therefore, that the scope of the application of the Spanish Protective Order is more specific, these instruments build shelter and protection against violence on victims in the family, to be more specific scope than the European protection order, as 2011/99/UE Directive of the European Parliament and of the Council applies to protection measures taken in criminal matters for the protection of victims in general and not only is referred to as family violence happens with the protection order in criminal proceedings Spanish.

As Lainz Rodriguez says. "The Community legislature, ..., ... disregard the origin of a European protection order, worrying only ... that ... serve to establish a safety circle for the victim" (Rodríguez Lainz J.L. [9]).

Therefore, the directive on the European protection order, applies to protection measures for victims or potential victims of crime, but not to measures for protection of witnesses, no measures covering not same type taken in civil matters.

3. Competency and Content.

Given the different scope that has both protection orders, it is clear that what affects competition and content, the result is different. Well, the regulation of the European Protection Order Directive 2011/99/UE, relates:

- The designation of competent authorities in Article 3.
- The intervention of a central authority in Article 4.
- The issue of a European protection order in Article 6.
- The form and content of a European protection order in Article 7.

Meanwhile the protection order in criminal proceedings Spanish, the normative basis on:

- Article 544-ter of the LECr.
- Article 62 of the Organic Law on protection measures of gender violence (LVG).
 - In-Law 27/2003 of 31 July on the order of protection for victims of domestic violence.

The power to issue and recognize a European protection order, is given by the binding of each EU Member State to inform the Commission the authority or authorities are competent court manages its national law, in accordance with Directive either decision that Member State, which is one that has taken a protective measure that forms the basis for issuing a European protection order, or of performance, that would be one who has been transmitted that European protection order with forecast appreciation.

Importantly, such a European protection order is a criminal resolution adopted by the issuing State under national law. By which is imposed on a person causing danger prohibitions or restrictions of Article 5 of the directive, which is the content of the European protection order.

With optional character sets the possibility of intervention by a central authority to assist its competent authorities for the administrative transmission and reception of European protection orders, so that communication, consultation and exchange of information can be made with the help of that central authority or authorities designated by the Member State concerned. State has to notify the European Commission of information on them, as these indications shall be binding on all the authorities of the issuing State.

Bottom line material powers within the European protection order is the issue of the European protection order, as the competent authority of the issuing State, shall take into account the period in which the protected person is to remain in the executing State, logically addressing the importance of the need for protection.

But the question that could be raised by issuing a European protection order that is, whether the authority should always be judicial or other administrative authority, because he cannot forget that the content of the order will necessarily contain prohibitions or restrictions on freedom of movement of causing danger.

Because the endangered person whose protection intended by issuing the order may submit an application to the authority or the issuing State or execution. Thus the request for authority will require instance entreaty-Article 6.2 of the Directive, by the protected person, whose protection was adopted at the time by the issuing State (Rodríguez Lainz J.L. [10]).

The protection order Spanish criminal proceedings, in the aspect of competition is completely different, as it will be the judge in the court guard or surveillance on women's bodies to agree, based on motifs from strong evidence of commission crime or offense against life, physical integrity or moral, sexual freedom and liberty or security risk objective situation. Thus the adoption of the measure will issued by a judicial, administrative ever, which is a respect for the principle of equal parts, but obviously is a restraining order affecting the Spanish domestic legislation ([11]).

This means that the protection order is an order of Spanish judicial authority issued, of its own motion or at the request of one of the victims

mentioned in Article 173.2 of the Criminal Code, and after hearing the victim, the offender and the prosecution.

The content of the European protection order is further developed in Article 7, which should come motivated, due to the special legal and social protection order all over the safety of the victim may bring within the broad spectrum of freedom, security and justice that it is framed in the European judicial area, since the directive 2011/99/UE the European Parliament and of the Council of 13 December 2011, carries, in order: - the material realm, - the structure, - the recipients, and the connections of the standard rules regulating the order.

It is therefore essential that the legal act containing the protection measure that melts in the European protection order, the summary of facts and circumstances leading to the imposition of the protection measure in the issuing State, the prohibitions or restrictions on the person causing danger, including the identity, nationality and contact details of the person causing danger, as a means to enforce the protection measure ([12]).

For its part, the content of the protection order in criminal proceedings Spanish is different because it offers the characteristic features of an injunction and offers also considering an ordinance to protect the victim, since the protective order victims of domestic violence Article 544 ter, has a marked content by criminal provisional measures, provided for in LECr, measures of civil nature, a link to care and social protection, right of permanent information and conditions for participation of victims in hearing ([13]).

Mean that the content of the protection order in criminal proceedings Spanish is more complete than the European protection order, it comprises the following steps:

- The care order, since that order, have the effect of welfare measures and social protection of Article 544 of the LECr, especially those relating to the rights of women victims of violence, of Title II of the Act 1/2004, of comprehensive protection measures.

- The civil order-with-like temporary custody of child or children, subject to joint custody or not, with visitation to attribute the use of the family home in favor of the victim, alimony, etc.

- The order criminal prohibition approach, communication in any form, and that its failure would result in commission of a crime of breaking even can remember rising criminal and pretrial detention ([14]).

4. Procedure.

Although Article 5 of the directive 2011/99/UE check the requirements prior to the competent authority can agree on a European protection order, we cannot ignore the importance of the procedure in order for that order, will issue the Article 6, the transmission procedure of Article 8 State measures

implementing Article 9, the grounds for non-recognition of a European protection order Article 10, as the notification occurs in breach of Article 12, the reasons for the suspension of Article 14 measures and the priority of the recognition of a European protection of Article 15.

As a result, there is a procedure for issuance and enforcement of other European protection order, which then will refer briefly.

4.1. Broadcast Procedure.

There is no doubt that the purpose of this order is to ensure the adoption of protective measures for life, liberty and security of all victims affected by any development you a criminal, processed under the legislation of the state of origin. These measures, be imposed on the person causing danger, such as the directive itself states in Article 2, is the natural person who has imposed one or more of the prohibitions or restrictions referred to in Article 5 .

That is, by the decision of the authority of the issuing State budget requires that previously agreed a measure of protection to the national law of that State, but come referred:

- A ban on entering certain localities, places or defined areas where the protected person resides or frequent.
- A prohibition or regulation of any contact with the protected person, including by phone, email or postal mail, fax or any other means.
- A prohibition or regulation on approaching the protected person closer than that to the extent indicated.

Fundamental criterion for issue by the issuing State European protection order is to protect the person, resident or decides to reside, stay or decide to stay in another EU Member State, as the competent authority will issue the warrant European protection, you must know the length of stay or residence in the executing State, where, logically, will take place the enforcement proceedings. Obviously, as we have said, this issue of the order, require the application of the person to be protected with the competent authority of the issuing State or the executing State. So you cannot remember to trade.

Important difference with regard to the protection order in criminal proceedings Spanish, is that this European protection order, the right to be heard and to challenge the protection measure for the person causing danger is limited to national law the issuing State, were not anticipated both procedural rights to use them ([15]).

If the measure of protection, obviously, contains one or more of the prohibitions contained in Article 5 of the Directive, which regulates the need for prior existence of a protection-; especially relevant right information protected person-and victim-accredited, not only for purposes of filing with the basic conditions, but also, and this can be useful, as this before leaving the territory of the issuing State.

As for the shape of the European protection order, as indicated in Annex I of the Directive 2011/99/UE besides identifying the personal circumstances of the protected person and the person causing danger, the summary of the facts and the circumstances that led to the imposition of protective measures by the issuing State and the possible technical device that one or the other may have to be under control for the purpose of compliance with the protective measures imposed by European Protection Order guaranteed by the issuing State ([16]).

The issue procedure, which respects the current protective order, would cover:

a) An initial Phase 1 application for the order, which under the provisions of Article 544 of the LECr ter.3, the application may be filed with the forces and state security bodies, such as the National Police, Civil guard and local police, who will forward it immediately to the competent judge. Although it is also possible to submit to the Legal Aid Service ([17]) of the Bar or in their delegations and to the Prosecution, the offices of attention to victims, social services or dependent care institutions of public administration.

Since, such entities must inform the victim of the possibility of making the application and submitting the means to do so (Garcia Ortiz L. [18]).

b) A process of adoption of the order, in which the judicial authority after receiving the application, call the victim, the applicant, the alleged offender and the public prosecutor to an expedited hearing, which must take place no later than 72 hours, and held the audience settled by the judicial authority as appropriate self about the application, and content validity of the measures.

To appeal against that order of dismissal reform and if there is no appeal, or direct appeal.

4.2. Execution Procedure.

With respect to the European protection order, pursuant to the provisions of Article 9.1 of the Directive, the executing State may implement protective measures according to their own internal law in order to ensure the protection of the victim, followed by the executing State's recognition of the applied order, as required.

Protective measures to be adopted by the competent authority of the executing State and that should have the biggest possible match to the extent agreed by the issuing State must therefore be at least equal.

Article 9.3 of the Directive, is based on the duty of communication that should exist between the two states for the purpose of the measure agreed and implemented, with a warning to the person causing danger to the legal consequences that would result in noncompliance because Articles 11 to 13 of the directive governing legal questions that might arise in the event of non-

compliance, where there is a principle of subsidiarity between the EAW and the extent of protection afforded by the issuing State (Rodríguez Lainz J.L. [19]).

Not to forget the importance for the full realization of a European protection order is made in the Directive Regulation, Article 10 in what concerns "Reasons for non-recognition of a European protection order", amendment and revocation of a European. Where there is important work to be performed by the competent authority of the executing State, as there are up to nine grounds for refusal of a European protection order, such as: order incomplete not meeting the requirements of the prior existence of a -protective measure of double criminality exception-principle non bis in idem-immunity-prescription-person responsible for the act or conduct giving rise to the adoption of the measure-forum reitae in the commission of the offense.

All this is complemented with the duty to inform the issuing State and the protected person.

Also within the execution procedure, under Article 14 of the Directive, is the suspension of the measures taken by the State of enforcement, based on a European protection order, are cases where the protected person resides no longer in the territory corresponding to the executing State, or by temporary, which as you know, has any security measures, it appears that their Law has expired, or was produced some alleged modification of the agreed measures, and finally when after recognition of a European protection order, was transmitted to the executing State a judgment within the meaning of Framework Decision 2008/947 / JHA, or a decision on supervision measures, according to the Council framework Decision 2009/829/JHA ([20]).

In Spain, the protective order, Article 544 ter, with great flexibility regulates protective measures. So, the enforcement proceedings would be given by the service and enforcement of the protective order. Having to order immediately notified to the parties, the victim and the public authorities responsible for the adoption of protective measures agreed, which is necessary for administrative coordination.

You should also inform the victim permanently on the procedural status of the offender and prison.

This protective order shall be entered in the Central Registry for the protection of victims of domestic violence ([21]).

REFERENCES

[1] DO C, 4 May 2010, p. 1.

[2] DO L 338, 21 December 2011, p 2.

[3] Ensuring that any citizen of the EU may move about and reside freely and legitimately in any territory of a Member State, under Article 3, paragraph 2 of the European Union Treaty and Article 21 of the Founding Treaty of the European Union.

- [4] Servet Magro, Monograph on gender violence, V "Solutions for gender violence inflicted on women in the Spanish society." La ley, Madrid 2005, pp. 131-135.
- [5] Gallego Sanchez. G. "Violence against women in the European Union, 2011/99/UE Directive: *the European Protection Order*" in www.elderecho.com, Tribune Section, 29.03.2012. p. 1.
- [6] Articles 1 and 2.1 on the European protection order in OJEU L 338, 21.12.2011 in 2011/99/UE Directive, 13 December 2011.
- [7] Martin Delgado J., "Organic Law of Integral Protection Measures against Gender Violence" 1st ed. Colex, Madrid, 2007, pp. 196-199.
- Domestic violence is considered violence against women in a couple, especially ones who live with the offender and are therefore particularly vulnerable victims. Domestic violence is also referenced to the victims described in Article 173.2 of the Criminal Code, such as victims of home violence and assisted violence.
- [8] As Gines Perez. CA wrote to conceptualize the term of protection order, "precautionary measures for a woman, child, elderly or abused, to be respected, should be taken and case sensitive tutelage should be provided by justice and respective authorities" in Gines Perez. CA, "The Protective Order". Law and Criminal Procedure Paper No. 24/2012. Part 2, Doctrine Section, BIB 2010\1524, p. 49. Aranzadi, Pamplona, 2010.
- [9] In seeking the true legal nature of the European protection order. Lainz Rodriguez. J.L., "The European Protection Order" in Law Journal, No. 7854, Doctrine Section, May 9, 2012. p.3, digital edition www.laley.es.
- [10] We are faced with the idea of extraterritoriality, says Rodriguez Lainz in loc cit supra, pp.4 and 5, where he talks about principles, as necessity, proportionality and uniqueness of the measure which is one of the factors to be considered when deciding on the competent authority to issue the order.
- [11] Although this has proved ineffective regarding the protection of victims in cases of domestic violence when the cause has been archived. It would be necessary that the social, psychological and police services continue protecting victims of domestic violence, even after the complaint file including a protective measure, or the acquittal of the alleged assailant. As evidenced by the latest victim abused and murdered recently, May and June 2012 - El Mundo, June 6, 2012, national edition, p. 16, "The CGPJ requests to attend and protect the battered even if the case is archived "
- [12] State of supervision is different to the State of enforcement as informed by the European Protection Order. Article 7, K, Directive 2011/99/UE in OJEU. L38, 21.12.2011, p. 8.
- [13] For more on gender violence refer to Article 62, LOVG citing article 544-ter, LECr.
- [14] More examples in act n. 102/2011, May 6, Provincial Court of Jaén (Section 3). JUR \ 2011 \ 341536, in www.westlaw.es.
- [15] As we will explain in Spanish protective order, the judicial authority, after receiving the request for the order, also calls the alleged assailant, who may seek the jurisdictional act, as agreed, the alleged offender, as necessary, when the jurisdictional act is issued, is considered wronged.
- [16] Regarding the transmission procedure, Article 8 indicates how to proceed with the transmission of the order in case the Execution State is not competent or the competent authority in the other State is unknown.
- [17] The European Protection Order may state whether free legal aid has been granted by the issuing State to the protected person or the person causing danger, article 7 letter

i) Directive 2011/99/UE.[18] Garcia Ortiz. L., "Judicial measures of protection and safety for victims in the comprehensive law. Issues arising from its implementation and integration with the rest of precautionary measures provided in the order "in Judicial Law Papers, IV, General Council of the Judiciary. Madrid 2006. And "Gender violence: A comprehensive Protection Act, implementation and study of the problems with development", pp. 75-85.

[19] Rodriguez Lainz. J.L. sup. op. cit., p.7.

[20] Both Framework Decisions respond to acts adopted under Title VI of the EU Treaty, the first concerning the application of the mutual recognition principle of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, the second on the application between Member States of the European Union, to the mutual recognition principle for substituting detention with supervision measures. DOL 337, 16.12.2008, 11.11.2009 and 294 DOL.

[21] Article 544 ter.10. of LECr states that "The protection order will be registered in the Central Registry for the Protection of Domestic Violence and Gender Victims."