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NOTE

from: Presidency
to: COREPER / Council
Subject: Initiative for a Directive of the European Parliament and of the Council on the European Protection Order
- State of play

Introduction

1. On 7 January 2010, COREPER took note of the presentation by Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden of the initiative for a Directive of the European Parliament and of the Council on the European protection order¹.
2. The Working Party on Cooperation in Criminal Matters and the Friends of the Presidency discussed this initiative on 4/5 and 25/26 January, as well as on 15/16/17 February 2010.
3. All delegations welcomed the objectives pursued by the initiative and showed a positive and constructive attitude to work on the text. Various delegations entered a general scrutiny reservation on the text. Some Member States also have a Parliamentary scrutiny reservation.

¹ PE-CONS 2/10 + ADD 1 + ADD 2

4. In view of the discussions in the above preparatory bodies, the Presidency would like to inform the Council on the state of play on this file regarding the following issues:

Scope

5. The current legal basis of the proposed Directive is Article 82(1)(d) TFEU, relating to cooperation in criminal matters. This provision was chosen since the aim of the Directive is to facilitate and enhance the protection granted to victims of crime, or possible victims of crime, who move between Member States of the European Union.
6. In some Member States, however, the issue of victim protection is addressed through instruments which are not of a criminal law nature (e.g. instruments of a civil or administrative law nature).
7. Following calls by various Member States at the meeting on 4/5 January 2010, the Presidency asked the Council Legal Service to examine the issue of the legal basis of the instrument and to report on it during the meeting of the Working Party on 25/26 January 2010 ¹. Further to this oral report, it was decided to request a formal written opinion of the Council Legal Service concerning the issue of the legal basis ².
8. The opinion was issued on 17 February 2010 ³, the last day of the meeting of the Working Party on 15/16/17 February. The opinion, which will have to be further examined in the Council preparatory bodies, concludes that Article 82(1)(d) TFEU, and preferably also 82(1)(a) TFEU, may be relied upon as legal basis for the draft Directive, since the European protection order has the objective of safeguarding a person against behaviour of another person which may endanger his/her life, physical or psychological integrity, personal liberty or sexual integrity.

¹ See doc 5480/10, page 3 and footnote 2.

² See doc 5792/10.

³ See doc 6516/10.

9. In the light of the opinion of the Council Legal Service the Presidency considers that the draft directive, which aims at protecting victims throughout the European Union, could and should apply not only to measures adopted in criminal proceedings but also to measures taken in proceedings of another nature, which aim at protecting the life, physical or psychological integrity, personal liberty or sexual integrity of a person.

Relationship with other instruments

10. Some delegations underlined the necessity to clarify the relationship between this (draft) Directive and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions ¹ and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention ².
11. To be noted further that some delegations observed that attention should be paid to the relationship of the current instrument with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (Brussels I Regulation), as well as with Council Regulation (EC) No 2201/2003 of 27 November 2003 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children, repealing Regulation (EC) No 1347/2000 (Brussels II bis Regulation).
12. With respect to the above issues, the Presidency notes that the Council Legal Service in its opinion suggests to introduce provisions in the text according to which the draft Directive will not affect the application of the existing instruments mentioned above, nor the application of the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

¹ OJ L 337, 16.12.2008, p. 102.

² OJ L 294, 11.11.2009, p. 20.

List of measures (Article 4)

13. The current text under discussion provides that a EPO may only be issued when a protection measure has been previously adopted in the issuing State, imposing on the person causing danger one or more of a closed list of measures listed in Article 4¹. The aim of this Article is to guarantee that executing States will not be asked to take action with respect to atypical or unexpected categories of protection measures taken by the issuing State.
14. A number of delegations have asked that the list of possible protection measures be widened or narrowed according to certain particularities of their legal systems.
15. The Presidency is of the view that the current list, which only concerns obligations or prohibitions imposed on a person causing danger not to do something so as to protect the protected person, strikes a good balance between the need to grant the victim an effective protection and the need to take into account the different legal systems of the Member States. Moreover, these types of measures only refer to the decision taken in the issuing State: the executing State has the possibility to take its own measures, e.g. by adapting or by changing the measures laid down in the European protection order, if these are not available in the legal system of the executing State. To be noted also that in some cases, e.g. the measures listed under b) or c), the executing State may refrain from taking any particular enforcement action; it might however be called upon to report a breach of the measure concerned.

¹ The measures currently listed in Article 4 are:

- (a) *an obligation not to enter certain localities, places or defined areas where the protected person resides or that he visits;*
- (b) *an obligation to remain in a specified place, where applicable during specified times;*
- (c) *an obligation containing limitations on leaving the territory of the issuing State;*
- (d) *an obligation to avoid contact with the protected person, by phone, electronic or ordinary mail, fax or any other means; or*
- (e) *a prohibition on approaching the protected person closer than a prescribed distance.*

Powers of issuing/executing State (Article 9bis/10)

16. The question has arisen as to the distribution of powers between the issuing and the executing Member States following the European protection order.
17. Some delegations consider that the executing State should be primarily responsible for the enforcement in its territory of the European protection order and the measures taken on the basis thereof ; reference was made in this respect to the legal situation set out in the Framework Decisions 2008/947/JHA (on probation) ¹, which is an instrument that applies in the post-trial phase.
18. Other Member States considered that the issuing State should keep control of the European protection order and subsequent measures; these delegations made reference to the legal situation set out in Framework Decision 2009/829/JHA (on supervision measures) ², which is an instrument that applies in the pre-trial phase.
19. The suggestion was made to allow using either solution in the draft directive under consideration, since both pre-trial and post-trial situations should be covered.
20. The Presidency expressed however the wish that the instrument should not be made over-complicated. It would, instead, favour a mechanism that is easy and efficient to apply.

Concluding remarks

21. Ministers who would like to make comments on any of the above issues are kindly invited to do so with a view to providing the preparatory bodies guidance for future work on the draft directive.

¹ See notably Article 14.

² See in particular Article 18.