

THE EUROPEAN PROTECTION ORDER IN THE LIGHT OF THE LAW NO 151/2016 IMPLEMENTING THE DIRECTIVE 2011/99/EU

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ABSTRACT

LAW NO 151/2016 REPRESENTS THE LEGAL INSTRUMENT FOR TRANSPOSING THE DIRECTIVE 2011/99/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 DECEMBER 2011 ON THE EUROPEAN PROTECTION ORDER, HAVING AS MAIN PURPOSE THE APPLICATION OF CERTAIN PROTECTION MEASURES ADOPTED IN FAVOR FOR THE VICTIMS OR POTENTIAL VICTIMS OF OFFENCES.

WHEN THE NATIONAL OF AN EU MEMBER STATE, BENEFICIARY OF A PROTECTION MEASURE IN THE CRIMINAL AREA INTENDS TO TRAVEL ON THE TERRITORY OF ANOTHER EU MEMBER STATE, OTHER THAN THE ISSUANT OF THE PROTECTION MEASURE, THE CITIZEN SHALL SUBMIT A REQUEST FOR A EUROPEAN PROTECTION ORDER, TO THE COMPETENT AUTHORITY OF HIS STATE OF RESIDENCE. AFTER VERIFICATIONS, IF THE LEGAL CONDITIONS ARE FULFILLED, THE COMPETENT AUTHORITY OF THE ISSUANT STATE SHALL SEND FOR EXECUTION THE ORDER TO THE COMPETENT AUTHORITY FROM THE STATE OF EXECUTION (THE STATE ON WHOSE TERRITORY THE PROTECTED PERSON ESTABLISHES THE TEMPORARY DOMICILE OR RESIDENCE).

LAW NO 151/2016 SPECIFICALLY STATES THE PROCEDURES FOR SOLVING THE REQUESTS FOR THE EUROPEAN PROTECTION ORDER, GIVEN THE DOUBLE NATURE OF THE ROMANIAN STATE, NAMELY ISSUANT STATE AND STATE OF EXECUTION.

KEY WORDS: EUROPEAN PROTECTION ORDER, PROTECTION MEASURE, PROTECTED PERSON, ISSUANT STATE, EXECUTION STATE

INTRODUCTION

The text of the European Directive defines the “European protection order”² as being a decision taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes

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² Art 2 Pct.. 1 of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order

any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person.

It is necessary to be mentioned that the European protection order shall be issued only if previously are taken measures for protection aiming the protected person and is incumbent on the person causing danger.

We ascertain that both the Directive, as well as the disposition for its implementation refers to “protection measures”³, as well as to “protected person”.

Regarding the “protection measures”, Art 5 of the Directive states the necessity prior to their disposition, without which the European order of protection cannot be issued. These measures consist of:

- a) a prohibition from entering 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, fax or any other means;
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

According to Art 6 of the communitarian document, the condition required for such European protection order to be issued or, if necessary, recognized and applied is that a “protected person” by a protection measure in an EU Member State, to establish the domicile or residence for a period of time or aims to establish the domicile or residence for a period of time on the territory of another EU Member State.

But who may have the quality as “protected person”? The answer to this question is offered both by the Directive, as well as by the text of the law transposing it, by reiterating the provisions of the first one.

Specifically, the Directive defines the concept of “protected person”⁴ representing a natural person who is the object of the protection resulting from a protection measure adopted by the issuing State by a decision in criminal matters, by which are imposed for the person causing danger one or more of the interdictions or restrictions stated by the current norm in order to prevent the commission of a criminal offence against the protected person, jeopardizing the life, physical or psychological integrity, dignity, personal freedom or sexual integrity.

Reiterating the above mentions inserted in the framework directive, the Romanian legislator by Art 2 of the Law No 151/2016, establishes a set of conditions which must be cumulatively fulfilled by the protected person, for the issuance of a European protection order:

- a) The protected person inhabits or shall inhabit, established or shall establish the domicile or residence in another EU Member State, to which is requested to recognize and apply the European protection order;
- b) The protected person has the quality as victim in a pending criminal trial or in which the court ordered a definitive decision for conviction or to delay the application of the penalty or that person is a member of the victim’s family.

³ “Protection measure” means a decision in criminal matters adopted in the issuing State in accordance with its national law and procedures by which one or more of the prohibitions or restrictions referred to in Article 5 are imposed on a person causing danger in order to protect a protected person against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity; see also Art 1 Pct... 2 of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order

⁴ See in this regard, Art 2 Pct.. 3 of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order

Art 1 Let d) of the Law No 151/2016 defines the “person causing danger” as being the natural person who has the quality as defendant, convicted or the person on whom was ordered the delay of the application of the penalty during the criminal trial, and against whom was ordered at least of the following measures:

i) One of the obligations stated by Art 215 Para 2 Let b) or d) of the Law No 135/2010 of the Criminal Procedure Code, with its subsequent modifications and amendments⁵, and imposed with the adoption of the measure of judiciary control or temporary release on bail⁶;

ii) The obligation stated by Art 221 Para 2 Let b) of the Law No 135/2010, with subsequent modifications and amendments, imposed during house arrest⁷;

iii) One of the obligations stated by Art 85 Para 2 Let e) or f) of the Law No 286/2009 on the Criminal Code, with its subsequent modifications and amendments⁸, imposed for the defendant with the delay of applying the penalty⁹;

⁵ The present Criminal Procedure Code, published in the Official Gazette No 486/15 July 2010, has entered into force on 1st of February 2013 and has been modified and amended until the present by: *Law No 63/2012* for the completion and amendment of the Romanian Penal Code and of the Law No 286/2009 on the Criminal Code, published in the Official Gazette No 258/19 April 2012; *Law No 255/2013* for the application of the Law No 135/2010 on the Criminal Procedure Code and for the modification and amendment of other normative acts stating criminal procedural provisions, published in the Official Gazette No 515/14 August 2013; *G.E.O No 3/2014* for the adoption of the measures necessary for the application of the Law No 135/2010 on the Criminal Procedure Code and for the implementation of other normative acts; *G.E.O No 82/2014* for the modification and amendment of the Law No 135/2010 on the Criminal Procedure Code)

⁶ Art 215 Para 2, “The judicial body orders that, during the judicial control, one or more of the following obligations should be followed: a) not to trespass the territorial limit agreed upon, except under the conditions settled by the judicial body; b) not to go to places previously agreed upon; c) permanently wear an electronical monitoring device; d) not to return to the family’s domicile, to not come close to the victim or his family’s members, to other participants in committing the offence, to witnesses or experts or close to other persons especially mentioned by the judicial body and not to directly or indirectly communicate with them, by any means.

⁷ Art 221 Content of a house arrest measure: 2. During house arrest, a defendant has the following obligations: a) to appear before criminal investigation bodies, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court whenever they are called; b) not to communicate with the victim or with members of their family, with other participants in the commission of the offense, with witnesses or experts, as well as with other persons established by the judicial bodies.

⁸ Law No 286/2009 on the new Criminal Code, published in the Official Gazette No 510/24 July 2009, in force since 1st February 2014, was amended by: the Decision of the Romanian Constitutional Court No 603/2015 regarding the exception for unconstitutionality of Art 301 Para 1 and Art 308 Para 1 of the Criminal Code, published in the Official Gazette No 845/2015; Decision of the RCC No 11/2015 on the exception of unconstitutionality of Art 112¹ Para 2 Let a) of the Criminal Code, published in the Off. G. No 102/2015; Decision of the RCC No 732/2014 regarding the unconstitutionality of Art 336 Para 1 and 3 of the Criminal Code, published in the Off. G. No 69/2015; Law No 159/2014 repealing Art 276 of the Law No 286/2009 on the Criminal Code, published in the Off. G. No 887/2014; Decision of the RCC No 265/2014 on the exception of unconstitutionality of Art 5 of the Criminal Code, published in the Off. G. 372/2014; Law No 187/2012 for the application of Law No 286/2009 on the Criminal Code, published in the Off. G. No 757/2012; Law No 63/2012 for the modification and amendment of the Romanian Criminal Code and of the Law No 286/2009 on the Criminal Code, published in the Off. G. No 258/2012; Law No 27/2012 for the modification and amendment of the Romanian Criminal Code and of the Law No 286/2009 on the Criminal Code, published in the Off. G. No 180/2012

⁹ Art 85 Supervision measures and obligations: 2. The court may order for the person for whom was ordered the delay of the application of the penalty to comply with one or more of the following obligations: e) not to come into contact with the victim or members of the victim’s family, with other participants in the commission of the offence, or with other persons especially mentioned by the court, or to not come close to these persons; f) not to frequent certain places established or certain sportive, cultural manifestations or other type of public gatherings, established by the court.

iv) One of the obligations mentioned by Art 101 Para 2 Let d) or e) of the Law No 286/2009, with its subsequent modifications and amendments, imposed for the convicted person by the conditional release¹⁰;

v) One of the obligations mentioned by Art 121 Para 1 Let c) or e) of the Law No 286/2009, with subsequent modifications, imposed for the defendant by the application of educatory measure non-depriving of freedom¹¹;

vi) The prohibition of one of the rights mentioned by Art 66 Para 1 Let l)-o) of the Law No 286/2009, with subsequent modifications, established by the court with the application of the accessory penalty or complementary penalty prohibiting certain rights¹².

Which is the purpose for which, as effect of the request, the court approves the request and also, for which period of time such protection shall be ordered? The issuance of the European protection order is necessary for the removal of a danger to which the protected person is exposed or shall be exposed. From the perspective of the protected person such danger is imminent. The European protection order shall be issued for the period during which the protected person resides or shall reside, established or shall establish the domicile or residence in another EU Member State, without exceeding the period for which was ordered the measure basing its issuance.

The cross-border feature of the analyzed issue raises questions regarding the establishment of the court competent to rule upon the issuance of a European protection order.

Thus, in the meaning of the Directive, are defined the following concepts: “issuing state”, “executing state” and “state of supervision”. Art 1 of the Law No 151/2016 reiterates the provisions of the communitarian act, defining the concepts as following: a) *issuing state* – means the Member State in which a protection measure has been adopted that constitutes the basis for issuing a European protection order; b) *executing state* – means the Member State to which a European protection order has been forwarded with a view to its recognition; c) *state of supervision* - means the Member State to which a judgment or a decision by which the court has ordered for the natural person who has committed an offence one of the sanctions or measures stated by Art 170¹, namely Art 170¹⁷ of the Law No 302/2004 on the international cooperation in criminal matters, republished with modifications¹³.

¹⁰ Section 6 Conditional release, Art 101 Supervision measures and obligations: 1. If the rest of the punishment unserved at the date of release is of 2 years or higher, the convicted must comply to the following supervision measures: ...; 2. For the case mentioned by Para 1, the court may order the convict to comply with one or more of the following obligations: e) not to come into contact with the victim of members of the victim’s family, with other participants in the commission of the offence, or with other persons especially mentioned by the court, or to not come close to these persons.

¹¹ Art 121 Obligations for minors, 1. For the duration of the service of educatory measures non-depriving of freedom, the court may order for the minor one or more of the following obligations: ...b) not to trespass, without the approval of the probation service, the territorial limit established by the court; ...d) not to come into contact or communicate with the victim or with members of the victim’s family, with other participants in the offence or with other persons especially established by the court.

¹² Art 66 The Content of the complementary penalty prohibiting certain rights, 1. The complementary penalty resides in the prohibition for a duration from 1 up to 5 years of one or some of the following rights: ...l) the right to be in certain localities established by the court; m) the right to be in certain places or at certain sportive, cultural manifestations or other public gatherings, established by the court; n) the right to communicate with the victim or members of the victim’s family, with other participants in the offence or other persons, established by the court; o) the right to come close to the residence, workplace, school or other places in which the victims performs social activities, under the conditions established by the court.

¹³ The consolidated form of the Law No 302/2004 modified and republished on 23 May 2016 is accomplished by including the modifications and amendments inserted by the Law No 300/15 November 2013; Law No 318/11 December 2015; G.E.O No 18/18 May 2016.

Art 3 of the law transposing the communitarian directive identified the Romanian judicial body, as authority competent for the solution of the request for the European protection order.

Specifically, the Romanian legislator has identified four cases:

- a) When Romania is the issuant state;
- b) When Romania is the executing state;
- c) When in the case for which was ordered the protection measure basing the European protection order, was issued a definitive court decision;
- d) When in the case for which was ordered the protection measures basing the European protection order, was ordered the delay of the application of the penalty.

Concretely, when *Romania is the issuant state*, the authority competent to issue the European protection order is the judicial body ruling in the case for which was ordered the protection measure basing the request for the European protection order.

In the case in which Romania is the executing state, the authority competent to recognize the European protection order, to order the measures for its execution and to order their replacement or cessation is the tribunal on whose territory the protected person inhabits or shall inhabit, established or shall establish the domicile or residence. The Romanian legislator has identified a third situation, according to which, if in the case for which was ordered the protection measure basing the request for a European protection order a definitive decision for conviction was ruled, the competence regarding the issuance of the European protection order belongs to the judge appointed with its execution, according to Art 554 of the Law No 135/2010 on the Criminal Procedure Code, with subsequent modifications. We also identify a fourth situation, namely, if for the case in which was ordered the protection measure basing the request for the European protection order, was ordered the delay of the application of the penalty, the competence shall belong to the court of first instance which ordered the delay of the penalty.

MAIN TEXT

1. THE PROCEDURE ON THE EUROPEAN PROTECTION ORDER IF ROMANIA IS THE ISSUANT STATE

Concepts defined by the communitarian act and reiterated by the domestic act for implementation are “*issuant state*” – “*executing state*”, the terms being required by the cross-border feature of the approached matter.

According to the norm for implementation, two situations are identifiable, namely: a) Romania is the issuant state; b) Romania is the executing state.

a) When Romania is the issuant state, the request for the European protection order shall be submitted by the protected person, personal or by representative, to the judicial competent body¹⁴.

As soon as the request was registered, the court, the judge in the preliminary chamber, the judge for rights and freedoms appointed with the issuance shall order by a motivated conclusion, and the prosecutor shall issue an ordinance¹⁵.

Regarding the possibility to challenge the measure ordered by the judicial body, the law states two situations: i) the conclusion or ordinance by which the request for a European protection order is approved is not challengeable; ii) the conclusion or ordinance rejecting the request for a European protection order can be challenged within 3 days from communication.

¹⁴ See in this regard Art 3 of the Law No 151/2016

¹⁵ See in this regard, Art 6 of the Law No 151/2016

Solving the appeal shall be made in an advising chamber, by summoning the protected person, the person causing a danger and the prosecutor, within 3 days. If the persons being summoned are not present, this fact shall not delay the trial of the cause.

The appeal shall be solved by the superior court or, where appropriate, by the judge for rights and freedoms or by the preliminary chamber of the superior court or by the hierarchical superior prosecutor. The reasoned ordinance or conclusion shall be communicated to the person causing a danger and to the protected person. The reasoned ordinance or conclusion regarding the issuance of a European protection order, a copy of the European protection order and any other subsequent documents shall be attached to the case file. The European protection order shall be issued in 4 original documents, from which one is attached to the case file, one shall be sent to the competent authority of the executing state, one shall be sent to the protected person, and one to the person causing a danger.

Which are the cases for which, if necessary, may be requested the prolongation, modification of the content or revocation of the European protection order? Art 10 of the Law No 151/2016 clarifies this situation, thus it states that “Every time the judicial body rules upon the protection measure which based the issuance of a European protection order, it shall also rule regarding the European protection order”. Thus, the court may rule, where appropriate, the revocation of the protection measure basing the European protection order, and, therefore, the latter one is being revoked.

Also, if the protection measure basing the European protection order is being replaced by another protection measure with a different content, the competent authority may issue a new European protection order. The European protection order may be prolonged if the protection measure is prolonged.

2. THE PROCEDURE REGARDING THE EUROPEAN PROTECTION ORDER IF ROMANIA IS THE EXECUTING STATE

When the court receives a European protection order, first it shall verify its own competence:

a) Shall verify if the European protection order is translated in Romanian, on the contrary requesting the competent authority of the issuant state to provide a translation and establishing a term which cannot exceed 5 days;

b) Shall verify if the European protection order is complete, on the contrary having the possibility to reject the request or to request the competent authority of the issuant state to provide the necessary data within a term which cannot exceed 10 days, on the contrary the court having the possibility to deny the recognition of the European protection order;

c) Shall verify if the European protection order was issued based on one or more protection measures, according to Art 1 Let b) of the Law No 151/2016 and if one of the reasons for rejection above mentioned is incident.

If it ascertains that all the above mentioned conditions are fulfilled, the court shall recognize the European protection measure, regardless if the competent court of the issuant state is, according to their domestic law, a judicial body or its equivalent.

The trial shall be urgent, in an advisory chamber, by a panel of a single judge, by summoning the protected person, the person causing a danger and the prosecutor, their absence having no effect upon the case solution.

The court shall rule a decision, ordering for the person causing a danger one or more of the following interdictions: a) the prohibition of the right to be in certain places established by the court; b) the prohibition of the right to communicate or to be in the vicinity of the protected person;

c) the prohibition of the right to be in the vicinity of the domicile, workplace, school or other places in which the protected person performs social activities, under the conditions established by the court. The content of the decision also refers to the consequences ordered in case of non-compliance with the ordered measures¹⁶.

The decision recognizing the European protection order shall be notified to:

- i) The protected person;
- ii) The person causing a danger;
- iii) General Inspectorate of the Metropolitan Police in Bucharest or, where appropriate to the county inspectorates of police in whose circumscription resides or shall reside the protected person, as well as, if necessary, in whose circumscription resides or will reside the person causing a danger, or in whose circumscription are located the places prohibited by the court;
- iv) The issuer authority.

Which are the reasons for rejecting the recognition of a European protection order? Art 14 of the implementation norm specifically states the cases for rejection of this request: a) when the European protection order is not complete or has not been completed within the term granted by the court; b) the European protection order has not been issued based on a protection measure; c) the protection measure refers to an action which does not represent an offence according to the Romanian legislation; d) the protection is based on the performance of a penalty or of a measure of amnesty in Romania; e) the person causing a danger beneficiaries of immunity in Romania; f) was invoked the prescription of the criminal liability for the offence generating the protection measure related to the European protection order; g) the recognition of the European protection order is contradictory to the principle of *ne bis in idem*; h) the person causing a danger is not criminally liable¹⁷; i) the protection measure regarding to the European protection order is related to an offence committed within the Romanian territory, according to the principle of territoriality¹⁸. Regarding the duration of the measure ordered for the execution of the European protection order, Art 15 states that the interdiction(s) above mentioned shall be ordered by the competent court for the duration stated by the European protection order, without exceeding the maximum stated by the Romanian law for similar measures. If a similar measure cannot be identified, the maximum period shall be of 180 days.

The court may rule the termination of the measure ordered for the execution of the European protection order in the following situations (Art 18 of the Law No 151/2016): a) there are obvious proofs that the protected person does not reside within the Romanian territory or has left permanently the Romanian territory; b) the maximum period for which the European protection order was recognized has expired; c) subsequently to the recognition and execution of the European protection order, a supervision measure, a probation measure or an alternative sanction was recognized by Romania regarding the person causing a danger, related to whom was issued the European protection order¹⁹; d) if it received a notification regarding the revoking or withdrawal of the European protection order from the issuer state; e) if it is known the fact that the protected person has permanently left the Romanian territory²⁰.

¹⁶ See in this regard, Art 13 Para 5 of the Law No 151/2016

¹⁷ See Art 113 of the Law No 286/2009, with subsequent modifications

¹⁸ See Art 8 of the Law No 286/2009, with subsequent modifications

¹⁹ In the meaning of Art 170¹ Para 2 Let a) and Art 170²⁰ of the Law No 302/2004, republished with subsequent modifications

²⁰ The General Inspectorate of the Metropolitan Police in Bucharest or the county inspectorate of police in whose circumscription resides or will reside the protected person has the obligation to notify the competent court for the cessation of the measure.

CONCLUSION

The protection measures inserted in the European protection order have the purpose to protect a person against a criminal offence or offences performed by direct or indirect constraint, which endanger or may endanger the life, physical, psychical or sexual integrity.

We also consider that the issuance, recognition and execution of a European protection order specifically establishing protection measures for the victim aims the prevention of new offences, as well as the reduction of the consequences of the offences already committed and ascertained on the territory of the EU Member States.

REFERENCES

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5. Law No 302/2004 on international judicial cooperation in criminal matters, republished, with subsequent modifications (the consolidated form of the Law No 302/2004 modified and republished on 23 May 2016 includes the modifications brought by the Law No 300/15 November 2013; Law No 318/11 December 2015; G.E.O No 18/18 May 2016).