COUNCIL OF THE EUROPEAN UNION

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REPORT

from :	Presidency
to :	COREPER / Council
no. Initiative:	PE-CONS 2/10 + ADD 1 + ADD 2
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Subject :	Initiative for a Directive of the European Parliament and of the Council on the European Protection Order

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 order [1].

2. The JHA Council on 25/26 February 2010 examined the initiative and discussed some general issues. All Member States welcomed the objectives pursued by the initiative, and generally showed a positive and constructive attitude to work on the text and to reach quickly tangible results, while recognising that some technical difficulties still had to be overcome.

[1] PE-CONS 2/10 + ADD 1 + ADD 2; OJ C 69, 18.3.2010, p. 5.

3. Various delegations entered a general scrutiny reservation on the text. Some Member States also have a Parliamentary scrutiny reservation.

4. After thorough examination by the Working Party on Cooperation in criminal matters, the text has been the object of discussions by COREPER on 15 April 2010. The Presidency has taken note of the various comments by the delegations,. The document has been further discussed during a meeting of the Working Party on Cooperation in Criminal matters on 16 April 2010, identifying in the questions of the scope and legal basis of the proposed Directive the key issue which will need to be solved in order to proceed in the negotiations.

5. Indeed, under the Directive as currently drafted, European protection orders may be issued by any judicial or equivalent authority — independent of the legal nature of such authority (criminal, civil or administrative) — on condition that the underlying domestic protection measure has been adopted by a competent authority in the context of criminal proceedings or in the context of any other proceedings with regard to an act or behaviour of a person which may endanger the life, physical or psychological integrity, personal liberty or sexual integrity of another person.

6. This implies for instance that, provided that the above condition has been fulfilled, a judicial or equivalent authority having a criminal nature may be called upon to execute a European protection order that has been issued by a judicial or equivalent authority having a civil nature, and vice versa. In order to address this particular situation, a three steps approach has been inserted in the Directive, under which, after recognition of the European protection order, the executing State takes a decision under its national law in order to continue the protection of the person concerned [see Article 8(1)].

7. The Council Legal Service has been asked to verify whether Article 82(1) provides a sufficient legal basis for the Directive as currently drafted. The Council Legal Service issued its opinion on 17 February 2010 [1]. The opinion confirms that Article 82(1)(a) and (d) TFEU may be relied upon as legal basis for the draft Directive as currently drafted.

8. The Commission however contests that Article 82(1) provides a sufficient legal basis. According to the Commission, which presented its opinion orally during the meeting of the Friends of the Presidency on 22/23 March 2010 [2], the Council Legal Service has given a too wide interpretation of "criminal matters", as referred to in Article 82(1)(d) TFEU. The Commission is of the opinion that the Directive should only apply in situations in which a "criminal offence" has actually been committed, since only prosecution but not prevention of crime would belong to the notion of "criminal matters". This would imply that in the issuing State protection measures should only be those taken in the context of criminal proceedings following the commission of a criminal offence.

9. Taking into account the opinion expressed by the Council Legal Service, the Presidency is of the opinion that those measures may well be included in the scope of the proposed Directive acting on the legal basis provided for by Article 82 TFEU. The proposed text contains provisions which clarify the link between the protection measures and a criminal act, ensuring that the area of application of the instrument does not go beyond the field of application of Article 82(1)(a) and (d) TFEU. In order to further underline this link, the Presidency has suggested at the last meeting of COREPER an amended wording for Articles 1, 2, 5 and 9. The amended text of the relevant part of these Articles is set out in the Annex; the proposed changes are highlighted by underlining.

10. Bearing this in mind, the Presidency submits the matter to the Council for its consideration, asking for guidance on the subject of the scope of the proposed instrument in order to reach a common approach.

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1 See doc 6516/10.

2 The Commission expressed its position in a non-paper: see doc. 8313/10.

11. If the proposed text were not to gather the necessary support, the Presidency will ask delegations to agree on an alternative approach limited to protection measures taken in the context of criminal proceedings.

12. Either solution should allow to reach political agreement on a compromise text by the June Council meeting

ANNEX

Draft

Directive of the European Parliament and of the Council on the European Protection Order

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

[…]

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective

This Directive sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been issued with a view to protecting a person against a criminal act (…) of another person which may endanger his life, physical or psychological integrity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection of the person concerned in the territory of this Member State, following the commission of an act (…) which has been or could have been the object of proceedings by a court having jurisdiction in particular in criminal matters.

Article 2

Definitions

For the purposes of this Directive the following definitions shall apply:

1) "European protection order" means a decision, taken by a judicial or equivalent authority of a Member State in relation with a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure under its own national law with a view to continue the safeguard of the protected person.

2) "Protection measure" means a decision adopted in the issuing State in accordance with its national law and procedures by which one or more of the obligations or prohibitions, referred to in Article 4, are imposed on a person causing danger to the benefit of a protected person with a view to protecting the latter against a criminal act which may endanger his life, physical or psychological integrity, personal liberty or sexual integrity.

[…]

Article 5

Issue of a European protection order

1. A European protection order may be issued when the protected person 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. When deciding upon the advisability to issue a European protection order, the competent authority in the issuing State shall take into account, inter alia, the length of the period or periods time for which the protected person envisages to stay in the executing State and the seriousness of the need for protection.

2. A judicial or equivalent authority of the issuing State may issue a European protection order only at the request of the protected person and after verifying that the protection measure meets all the requirements set out in Article 4.

3. The protected person may submit a request for issuing a European protection order either to the competent authority of the issuing State or to the competent authority of the executing State. If such a request is submitted in the executing State, its competent authority shall transfer this request as soon as possible to the competent authority of the issuing State.

3 bis. Before issuing an European protection order, the person causing danger shall be given the right to be heard and the right to challenge the protection measure, if he has not had these rights in the procedure leading to the adoption of the protection measure.

[…]

Article 9

Grounds for non-recognition of a European protection order

1. Reasons shall be given for any refusal to recognise a European protection order.

2. The competent authority of the executing State may refuse to recognise a European protection order in the following circumstances:

   (a) the European protection order is not complete or has not been completed within the time-limit set by the competent authority of the executing State;

   (b) the requirements set out in Article 4 have not been met.

   (c) the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State.

3. Where giving effect to a European protection order in the executing State implies that measures are to be taken in the context of criminal proceedings, the competent authority of the executing State may also refuse to recognise a European protection order in the following circumstances:

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