

THE ISSUANCE OF THE EUROPEAN PROTECTION ORDER

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ABSTRACT

This scientific article researches the procedure for issuing a European protection order by a Polish court or public prosecutor, resulting in the enforcement of protective, penal, or probation measures by a competent judicial or equivalent authority in a Member State of the European Union. These measures require refraining from staying in certain environments or places and avoiding contact with or proximity to certain people. This article does not cover provisions concerning the execution of such an order by the competent authority of a Member State. The main research objective is to demonstrate the importance of this measure in continuing the protection of the aggrieved in another Member State. The research findings are original and primarily national in scope but also relevant to other countries due to their relation to an EU instrument. This article analyses the essence of the European protection order, its issuance requirements, including the ruling on the aggrieved's protection measure, necessity of issuing the order, aggrieved's motion, issuance proceedings, authorised issuing authorities, ruling form, forum for issuance, issuance mode, right to appeal, order transmission, and information obligations. The paper is significant for its in-depth dogmatic analysis and substantial theoretical content and is practical in guiding interpretation of the requirements for the application of this measure and the issuance procedure.

Keywords: European protection order, Directive, prosecutor, court, protective measure, penal measure, preventive measure, European Union

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INTRODUCTION

The European protection order was introduced into Polish criminal procedure law by the Act of 28 November 2014 on the protection of and assistance to the aggrieved and a witness.¹ This act implemented, *inter alia*, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.² As per Article 288 of the Treaty on the Functioning of the European Union,³ 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods,' necessitating its transposition into the Polish legal system.

The Directive was implemented through the addition of Chapter 66j 'Application to a Member State of the European Union for the execution of the European protection order' (Articles 611w–611wc) and Chapter 66k 'Application of a Member State of the European Union for the execution of the European protection order' (Articles 611wd–611wj) to the Code of Criminal Procedure. This delineates two procedures: firstly, the application by a Polish court or prosecutor for the execution of an adjudicated protection measure of the aggrieved (Chapter 66j CCP), and secondly, the execution of such a measure issued by another Member State of the European Union (Chapter 66j).

Literature correctly points out that the initial assumption of the transposition is flawed, adopting the stance that the application for execution always initiates the procedure of the European protection order. In contrast, according to the Directive, it is the recognition of the European protection order that initiates the procedure, and the execution constitutes the final stage of the procedure.⁴ However, this issue is not crucial for the instrument's functioning.

ESSENCE OF THE EUROPEAN PROTECTION ORDER

The European protection order, as defined in Article 2(1) of Directive 2011/99/EU, is '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 any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person.'

A protection measure is a decision in criminal matters adopted in the issuing State in accordance with its national law and procedures. It imposes one or more of the following prohibitions or restrictions on a person causing danger to protect a protected person against a criminal act that may endanger their life, physical or psychological integrity, dignity, personal liberty, or sexual integrity:

¹ Journal of Laws of 2015, item 21.

² OJ L 338, 21.12.2011, p. 2, hereinafter referred to as 'Directive 2011/99/EU'.

³ OJ C 83, 30.3.2010, p. 1.

⁴ Bieńkowska, E., 'Ochrona ofiar przestępstw w sytuacjach transgranicznych – regulacje polskie na tle wymogów prawa unijnego', *Prokuratura i Prawo*, 2016, No. 5, p. 11.

- (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 (Article 2 (2) in conjunction with Article 5 of Directive 2011/99/EU).

The essence of the European protection order is to ensure the protection of the aggrieved, regardless of the European Union Member State they are in. Issuing a European protection order results in the protection of the aggrieved across the entire European Union, not just within the territory of the Member State where the protective measure was originally issued.⁵

The objective of the European protection order, in accordance with Article 1 of Directive 2011/99/EU, is to protect a person against a criminal act by another person which may endanger their life, physical or psychological integrity, dignity, personal liberty, or sexual integrity in a Member State different from the one where a judicial or equivalent authority applied such protection measures. It aims to ensure cross-border protection of the aggrieved,⁶ allowing for the continuation of protection in a Member State other than their country of residence and the State issuing the protection measure.⁷ This instrument ensures the aggrieved are protected regardless of their location within the European Union, extending beyond the territory of the Member State that issued the protective measure.⁸ It sets rules for allowing another Member State to continue a preventive, penal, or probation measure issued by a Polish court or prosecutor, which requires refraining from entering certain environments or places, or from contacting or approaching certain people (Article 611w § 1 CCP). It also aims to prevent a situation where the justified exercise of EU citizens' right to move and reside freely within the Member States, as per Article 21 of the Treaty on the Functioning of the European Union, could result in the loss of protection provided within a criminal proceeding.

GROUND FOR THE ISSUANCE OF THE EUROPEAN PROTECTION ORDER

A European protection order may be issued when the following requirements are met: (1) a protective measure for the aggrieved is ruled; (2) the aggrieved resides in another EU Member State; (3) issuing a European protection order is necessary to protect the aggrieved's rights; (4) the aggrieved submits a relevant request. The first

⁵ Bieńkowska, E., 'Europejski nakaz ochrony – istota i znaczenie', *Zeszyty Prawnicze*, 2012, No. 4, p. 160.

⁶ Barcik, J., 'Europejski nakaz ochrony z perspektywy adwokata', *Palestra*, 2016, No. 5, p. 6.

⁷ Bieńkowska, E., 'Regulacje ustawy o ochronie i pomocy dla pokrzywdzonego i świadka na tle wymogów dyrektywy 2012/29/UE ustanawiającej normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw', in: Mazowiecka, L. (ed.), *Nowe środki ochrony i pomocy dla ofiar*, Warszawa, 2016, p. 32.

⁸ Bieńkowska, E., 'Europejski nakaz ochrony...', op. cit., p. 160.

three requirements are substantive, and the last one is formal. The latter is particularly important as it initiates the proceeding for issuing the European protection order.

What is executed in another EU Member State is the protection order itself, not the judgment containing the protective measure that requires refraining from staying in certain environments or places, or from contacting or approaching certain people.⁹

1. RULING ON A MEASURE OF PROTECTION OF THE AGGRIEVED

The primary condition for issuing a European protection order is a ruling imposing at least one protective measure on the accused to protect the aggrieved. Under Article 5 of Directive 2011/99/EU, a European protection order 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 the following prohibitions or restrictions: (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. These measures 'aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person's life or physical, psychological, and sexual integrity, for example by preventing any form of harassment, as well as that person's dignity or personal liberty, for example by preventing abductions, stalking, and other forms of indirect coercion, and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts. These personal rights of the protected person correspond to fundamental values recognised and upheld in all Member States' (recital 9 of the preamble to Directive 2011/99/EU).

These measures are specified in Article 611w § 1 of the Code of Criminal Procedure (CCP) using two parameters: (1) by indicating a preventive measure, i.e., a protective, penal, or probation measure; the first two measures are directly named in the provision, and the third one is defined as an obligation to place a perpetrator on probation; (2) the content of these measures in the form of prohibitions or obligations. After 'a probation measure' is mentioned in the provision, it is followed by the phrase: 'consisting in refraining from entering specified environments or places or contacting certain persons or approaching certain persons.' In this context, there is a doubt whether this phrase specifies only the content of the probation measure or also refers to the remaining measures, i.e., the preventive and penal ones. The conjunction of the measures in Article 611w § 1 CCP using the sentential operator 'or' (indicating an ordinary alternative)¹⁰ the *ratio legis* of the provision allow the conclusion that each measure must contain at least one of the obligations. The use of a comma before the phrase also supports this interpretation.

⁹ Sakowicz, A., in: Sakowicz, A., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 1953.

¹⁰ Wolter, W., Lipczyńska, M., *Elementy logiki. Wykład dla prawników*, Warszawa-Wrocław, 1973, p. 82.

Determining which measures may be subject to the European protection order requires an analysis of the content of a specific measure to determine whether it contains an obligation to refrain from entering certain environments or places or contacting or approaching certain persons. Based on this criterion, measures that may be subject to the European protection order include:

- (1) Preventive measures:
 - (a) police supervision, provided the procedural authority has included in the decision on its application a ban on contacting the aggrieved or other persons, a ban on approaching certain persons within a specified distance, or a ban on staying in certain places (Article 275 § 2 CCP);
 - (b) a preventive measure applied to a person accused of a crime committed against a member of medical staff or a person asked to assist medical staff, *inter alia*, consisting of the prohibition of approaching the aggrieved within the specified distance or contacting them (Article 276a § 1 CCP).
- (2) Penal measures:
 - Prohibition of entering certain environments or places, contacting certain persons or approaching certain persons (Article 41a §§ 1–3 CC).
- (3) Probation measures ruled in conjunction with:
 - (a) conditional suspension of the execution of the penalty of deprivation of liberty, consisting of:
 - refraining from entering certain environments or places (Article 72 § 1 (7) CC),
 - refraining from contacting the aggrieved or other persons in a specified way or approaching the aggrieved persons closer than the distance specified by the court (Article 72 § 1 (7a) in conjunction with § 1a CC),
 - a method of contact between the convicted person and the aggrieved determined by the court in connection with the order to leave the premises occupied jointly with the aggrieved (Article 72 § 1 (7b) in conjunction with § 1b CC).
 - (b) conditional discontinuation of the proceeding:
 - refraining from contacting the aggrieved or other persons in a certain way or approaching the aggrieved or other persons closer than the distance determined by the court (Article 67 § 3 in fine CC in conjunction with Article 72 § 1 (7a) and § 1a CC),
 - a method of contact between the convicted person and the aggrieved determined by the court in connection with the order to leave the premises occupied jointly with the aggrieved (Article 67 § 3 in fine CC in conjunction with Article 72 § 1 (7b) in conjunction with § 1b CC);
 - (c) conditional early release: the same obligations as those imposed in the event of conditional suspension of the execution of the penalty of deprivation of liberty (Article 159 § 1 CC in conjunction with Article 72 § 1 (7), (7a) in conjunction with § 1a, (7b) in conjunction with § 1b CC).

The possibility of ruling to refrain from entering certain environments or places and refrain from contacting the aggrieved or other persons in a certain way or approaching the aggrieved or other persons closer than the distance determined

by the court is also contained in the penalty of limitation of liberty (Article 34 § 3 in fine in conjunction with Article 72 § 1 (7), (7a) in conjunction with § 1a CC). However, they cannot be covered by the European protection order when they are not obligations connected with placing a perpetrator on probation.

The prohibition of entering certain environments or places, contacting certain persons, or approaching certain persons may be ruled as a protection measure in relation to a perpetrator who committed a criminal act in a state of insanity (Article 99 § 1 in conjunction with Article 39 (2b) CC). However, this measure cannot be considered under Article 611w § 1 CCP, which specifies measures for the European protection order. The omission of these measures has been criticised in the doctrine for being discriminatory and violating the constitutional principle of equality before the law. It is argued that by this omission the legislator deprived 'aggrieved persons protected in the country by protection measures in the form of the penalty of limitation of liberty or means ensuring the right to protection in cross-border situations, even though these protection measures correspond to those in Article 5 of Directive 2011/99/EU and involve the application of preventive measures or belong to the category of penal measures or probation obligations.'¹¹ This criticism of the Code of Criminal Procedure's approach is valid, as these measures fall within the scope of Article 5 Directive 2011/99/EU, which covers such obligations regardless of their legal nature. However, the claim that they are connected with the application of preventive measures or fall within the category of penal measures or probation obligations is incorrect. While their content is identical, they possess a distinctly different legal character. The aggrieved should be subject to the European protection order, regardless of the nature of the obligations imposed on the accused, since their interest constitutes the rationale of the European protection order.

Article 611w § 1 CCP does not require that the decision on applying any of these measures be final. However, this does not imply that a European protection order can be issued in every situation where the ruling is not final. Undoubtedly, the decision must be enforceable. Since the decision is enforceable upon its issuance and, in the event of an appeal, it does not stay the execution of the challenged decision, the court that issued it or the court competent to hear the appeal may stay the execution of the ruling (Article 462 § 1 CCP). Therefore, the European protection order may also be issued when the decision on the application of a preventive measure is not final. The same applies to probation measures used in connection with conditional release from serving the rest of the penalty of deprivation of liberty in an execution proceeding, which are imposed by means of a decision (Article 159 § 1 PEC), with the exception of a situation where the prosecutor has objected to granting conditional release, as then the decision on conditional release is enforceable only when it becomes final (Article 162 § 2 in conjunction with Article 154 § 1 PEC). This also applies to probationary measures modified after being ruled in connection with conditional discontinuation of the proceeding or conditional suspension of the execution of the penalty of deprivation of liberty (Article 67 § 3 and Article 74 § 1 CC).

¹¹ Bieńkowska, E., 'Ochrona ofiar...', *op. cit.*, p. 13.

Penal measures and probation measures discussed, with the exception of the above-mentioned situations, are ruled by means of a sentence and are subject to execution when they become final. Thus, the European protection order concerning these measures may be issued only after such a sentence becomes final.¹²

2. STAYING OF THE AGGRIEVED IN ANOTHER MEMBER STATE

The Act uses a broad term to specify this condition, namely it requires that the aggrieved stay in another EU country or declare an intention to stay there (Article 611w § 1 in fine CCP). Literature correctly notes that 'staying' has a broader meaning than the expressions 'has a permanent or temporary place of residence' (cf. Article 611ff § 1 CCP) or 'has a legal permanent place of residence' (Article 607zd § 1 CCP) used in other provisions. This means that even a short-term leave of the aggrieved to another Member State is sufficient and does not have to be combined with a change of place of residence.¹³ Before deciding on the issuance of a European protection order, a court or a prosecutor shall consider, *inter alia*, the length of the period or periods that the aggrieved person intends to spend in the executing State (Article 6 par. 1 of Directive 2011/99/EU).

A declaration of the intention to move may be submitted in writing or orally for the record (Article 116 CCP). It must extend beyond a mere statement of intent to stay in another Member State in the near or distant future.¹⁴ If the aggrieved is already in that country, a relevant declaration is not necessary, as their presence there sufficiently indicates this fact.¹⁵

3. NECESSITY OF ISSUING THE EUROPEAN PROTECTION ORDER FOR THE PURPOSE OF PROTECTING THE RIGHTS OF THE AGGRIEVED

The European protection order may be issued only when necessary to protect the rights of the aggrieved. It aims to ensure the personal safety of the aggrieved and prevent infringement of their rights, such as bodily integrity, health, life, personal liberty, and sexual integrity¹⁶ The order cannot be issued to protect another person. This protection is limited to the aggrieved because Directive 2011/99/EU covers only such persons.

¹² Grajewski, J., Steinborn, S., in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, LEX/el. 2015, thesis 3 to Article 611w.

¹³ Augustyniak, B., in: Grzegorzczak, T. (ed.), *Kodeks postępowania karnego. Komentarz Art. 425–673*, Vol. II, Warszawa, 2018, p. 1365; Dąbkiewicz, K., *Kodeks postępowania karnego. Komentarz do zmian 2015*, Warszawa, 2015, p. 591; Nita-Świątłowska, B., in: Skorupka, J., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 2089.

¹⁴ Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks...*, op. cit., p. 1955.

¹⁵ Kraszewska, K., 'Postępowanie w przedmiocie wydania europejskiego nakazu ochrony w polskim procesie karnym', *Kwartalnik Prawo – Społeczeństwo – Ekonomia*, 2018, No. 4, p. 16.

¹⁶ Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany...*, op. cit., thesis 10 to Article 611w.

It cannot protect a person closest to the aggrieved. The non-coverage of this person by the European protection order is questioned in the literature because recital 12 of the preamble to Directive 2011/99/EU implies an obligation to provide such protection.¹⁷ According to that provision, if a protection measure is adopted for the protection of a relative of the main protected person, a European protection order may also be issued in respect. However, the interpretation that it is admissible to issue a European protection order to enforce a measure or obligation that serves to protect a person closest to the aggrieved, on the grounds that the threat to that closest person indirectly also poses a threat to the aggrieved, is too far-reaching.¹⁸

This explicitly implies that the measures must be ruled in a criminal proceeding, and those applied in civil or administrative proceedings are excluded.¹⁹ Moreover, Article 2(2) of Directive 2011/99/EU stipulates that a 'protection measure' means 'a decision in criminal matters', i.e., a measure that is penal in nature.²⁰

For the issuance of the European protection order, the type of crime committed is generally irrelevant. However, the application of some protection measures is related to specific types of offences; for example, a penal measure in the form of a ban on entering certain environments or places, contacting certain persons, and approaching certain persons may be adjudicated in the event of a conviction for a crime against sexual integrity or decency to the detriment of a minor or another offence against liberty, and in the case of a conviction for a violent intentional crime (Article 41a § 1 CC).

The age of the aggrieved is also irrelevant; it can also concern a minor.²¹ Recital 15 of the preamble to Directive 2011/99/EU emphasises that: 'In the procedures for the issuing and recognition of a European protection order, competent authorities should give appropriate consideration to the needs of victims, including particularly vulnerable persons, such as minors.'

An application by a Polish court or a Polish prosecutor for the execution of a European protection order does not stay the execution of a preventive measure, a penal measure, or an obligation connected with putting a perpetrator on probation (Article 611wa CCP). It is rightly emphasised in the doctrine as connected with guaranteeing the fullest possible protection for victims, covering the territory of both the issuing State and the executing State.²² It ensures the continuation of

¹⁷ Kraszewska, K., 'Postępowanie...', op. cit., p. 16.

¹⁸ Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany...*, op. cit., thesis 6 to Article 611w.

¹⁹ Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks...*, op. cit., p. 1954. Protection measures applicable in a civil proceeding are laid down in Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, 29.6.2013, p. 4).

²⁰ Janicz, M., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 1614.

²¹ Statkiewicz, A., 'Ochrona małoletnich w postępowaniu karnym w Unii Europejskiej', in: Bator, A., Jabłoński, M., Maciejewski, M., Wójtowicz, K. (eds), *Współczesne koncepcje ochrony wolności i praw podstawowych*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław, 2013, p. 159.

²² Augustyniak, B., in: Grzegorzczak, T., *Kodeks...*, op. cit., p. 1367; Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks...*, op. cit., p. 1957; Nita-Świątłowska, B., in: Skorupka, J., *Kodeks...*, op. cit., p. 2092.

the protection of the aggrieved regardless of temporary changes in their place of residence and the decisions taken by the authority of the executing State or delay in the execution of the order by that authority.²³

The European protection order may be issued regardless of the aggrieved's citizenship; they may be a Polish citizen, a foreigner, a person holding dual citizenship, or a stateless person, and do not have to be a citizen of an EU Member State.²⁴

4. THE AGGRIEVED PARTY'S REQUEST

The European protection order is issued at the request of the aggrieved (Article 611w § 1 CCP). This means that the order must result from a motion.²⁵ It is not possible to issue it *ex officio*, which is a rational solution, as the aggrieved knows best whether they need such protection abroad. Under Article 300 § 2 CCP, before the first interview of the aggrieved or after determining the aggrieved without an interview, they are informed that they may file a motion to enforce an injunction barring the perpetrator from approaching or contacting them in another Member State of the European Union based on the European protection order (Articles 611w–611wc CCP). Although the provision refers to informing the aggrieved about available protection and assistance measures laid down in the Act of 28 November 2014 on the protection of the aggrieved and a witness, this act does not contain a regulation of the European protection order; it only introduces the instrument to the Code of Criminal Procedure. This information is laid out in subsection 10 indent 4 of the Appendix 'Information about the rights and obligations of the aggrieved in a criminal proceeding' to the Regulation of the Minister of Justice of 14 September 2020, which determines the form of information about the rights and obligations of the aggrieved in a criminal proceeding.²⁶ This information is given to the aggrieved in writing, and receipt of which the aggrieved shall confirm by signature. In the event of withdrawal from an interview of the aggrieved, the information shall be delivered (Article 300 § 2 in fine CCP).

If the aggrieved is a minor or a fully or partially legally incapacitated person, their statutory representative or permanent guardian may file the request (Article 51 § 2 CCP). In the event the aggrieved is incapable, particularly due to age or health, the request may be filed by a person who has custody of them (Article 51 § 2 CCP).

There is no deadline for filing the request. It is possible throughout the period of the protective measures application. Neither the of the accused's nor the convicted person's consent is required.²⁷

²³ Sakowicz, A., in: Sakowicz, A., *Kodeks...*, op. cit., p. 1957.

²⁴ Janicz, M., in: Dudka, K. (ed.), *Kodeks...*, op. cit., p. 1614.

²⁵ Barcik, J., 'Sędzia polski wobec europejskiego nakazu ochrony', *Iustitia*, 2015, No. 2, p. 92 et seq.; idem, 'Europejski nakaz ochrony...', op. cit., p. 7.

²⁶ Journal of Laws of 2020, item 1619.

²⁷ Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany...*, op. cit., theses 8 and 9 to Article 611w.

The aggrieved may submit a request for the issuing of 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 (Article 6(3) of Directive 2011/99/EU).

THE EUROPEAN PROTECTION ORDER ISSUANCE PROCEDURE

The *modus operandi* of the European protection order, as indicated in the literature, is based on a three-stage procedure. First, a European protection order is issued at the request of the protected person, then the order is transmitted to the State where the protected person intends to stay, and shall be recognised by this State. As a result, the executing State is obliged to adopt any necessary protection measures available under its national law to ensure the execution of the European protection order.²⁸

1. AUTHORITIES COMPETENT TO ISSUE AN ORDER

The competence of the authority issuing the European protection order depends on the stage of the criminal proceeding. Although the European protection order may be issued at any stage of criminal proceedings, i.e., in the course of a preparatory proceeding, a judicial proceeding, and an enforcement proceeding,²⁹ the authority competent to issue it is the one that applied or conducts this proceeding. The court has the broadest powers in this field as it may apply all the protection measures provided for in Article 611w § 1 CCP, except for preventive measures applied mainly by a prosecutor in a preparatory proceeding. In the judicial proceeding, the court before which a case is heard is competent (Articles 24 and 25, Articles 31 and 32 CCP), and in the enforcement proceeding, the first instance court that issued the judgement is competent (Article 3 § 1 PEC).

A prosecutor is authorised to issue the European protection order only if a preventive measure is enforced in the course of a preparatory proceeding. A clear indication in Article 611w § 1 *in principio* CCP confirms that it is admissible to issue it at this last stage if 'a Polish court or a prosecutor implements the measure'. Therefore, it is unreasonable to claim that all these protection measures may be imposed at any stage of a criminal proceeding, i.e., in the course of a preparatory, judicial, or enforcement proceeding.³⁰

²⁸ Barcik, J., 'Europejski nakaz ochrony...', op. cit., p. 6.

²⁹ Kraszewska, K., 'Postępowanie...', op. cit., p. 15.

³⁰ Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks...*, op. cit., pp. 1953–1954.

2. THE ORDER FORM

The European protection order is issued in the form of a court's or a prosecutor's decision. In the case of a court, this form results directly from Article 93 § 1 CC, which stipulates that the court issues a decision unless the law requires the issuance of a judgement; in the case of a prosecutor, it indirectly results from Article 611wc CCP, which states that the decision of a court or a prosecutor on the issuance of the European protection order shall not be subject to a complaint.

If the request of the aggrieved is approved, a court or a prosecutor shall issue a decision to apply for the execution of a particular measure or obligation, as directly results from Article 611w § 1 CCP. This formulation is questioned in the literature based on the argument that the decision should concern the transfer of the European protection order understood as an application for its recognition.³¹ However, this is not justified, as the term 'a decision to apply for the execution of a particular measure or obligation' best reflects its nature, considering the State issuing the European protection order is primarily competent to issue it and the executing State has primarily the competence to execute it.³²

The decision should meet the requirements outlined in Article 94 CC; specifically, the justification should indicate that the conditions for issuing the European protection order have been fulfilled.

The decision of the court or the prosecutor is not equivalent to the European protection order; it is a decision to issue it. The European protection order itself is a separate document, prepared using the template provided in the Regulation of the Minister of Justice of 13 January 2015, which determines the form of the European protection order.³³ The distinction between these procedural acts is evident from Article 611w § 2 CCP, which stipulates that a certified copy of the original decision to issue the European protection order should be attached to this order. This provision also includes general instructions on what the European protection order should contain, namely information that enables proper execution, concerning the judgement, the aggrieved, the accused, and the preventive or penal measure or obligation to place the perpetrator on probation, consisting of refraining from entering certain environments or places, contacting certain persons, or approaching certain persons.

The form of the European protection order aligns with Annex 1 to Directive 2011/99/EU. A comparison with the template in the Annex to the Regulation of the Minister of Justice reveals no substantive differences between the documents; the existing differences are editorial in nature. However, it is difficult to agree with the objection that the Minister of Justice lacks the competence to regulate this issue,³⁴ because, firstly, Article 611w § 7 CCP expressly authorises this body to do so;

³¹ Bieńkowska, E., 'Uprawnienia pokrzywdzonego w ujęciu nowych projektów nowelizacji prawa karnego', *Prokuratura i Prawo*, 2014, No. 11–12, pp. 84–85; Kraszewska, K., 'Postępowanie...', op. cit., p. 17.

³² Kraszewska, K., 'Postępowanie...', op. cit., p. 17.

³³ *Journal of Laws of 2015*, item 123.

³⁴ Bieńkowska, E., 'Uprawnienia...', op. cit., p. 83.

and, secondly, the Directive allows national authorities of Member States to choose the form and methods (*argumento ex* Article 288 of the Treaty on the Functioning of the European Union).

Due to the inability to apply the EU Directive directly, entities applying the law are compelled to interpret the national provision as closely as possible in the spirit of the EU provision.³⁵

The order, in accordance with Article 611w § 4 CCP, should be translated into the official language of the executing State or another language indicated by that State.

3. FORUM FOR ISSUING THE ORDER

The court shall take a decision to issue a European protection order during a session. This session is held in camera (Article 95b § 1 CCP).

Article 6(4) of Directive 2011/99/EU stipulates that, 'before issuing a European protection order, the person causing danger shall be given the right to be heard.'

The Code of Criminal Procedure does not provide for the participation of the aggrieved in the session, as, according to Article 92 § 1 CCP, the party demonstrating legal interest in the decision has the right to participate in the hearing as stipulated by the statute unless mandatory. The aggrieved is not notified of the hearing but may participate, if present (Article 96 § 2 CCP). This constitutes a significant limitation of their rights. Thus, this leads to a *de lege ferenda* proposal to introduce to Chapter 66j CCP an obligation to notify the aggrieved of the session date to enable their attendance.

4. MODE OF ISSUANCE

The issuance of the European protection order is discretionary, as indicated by the phrase 'the court or the prosecutor may (...) request the execution of the measure' in Article 611w § 1 *in medio* CCP. Important considerations for its issuance include the length of time the protected person stays in another Member State and the seriousness of the need for protection (Article 6(1) of Directive 2011/99/EU). The decision in this respect is left to the discretion of the court or prosecutor, who may refuse to issue the order even if all conditions are met, provided they consider the request would be pointless, for example, due to a short period remaining for the execution of a penal measure or a probation obligation.³⁶

³⁵ Buczek, L., 'Europejski nakaz ochrony w polskim postępowaniu karnym', in: *Osobliwości integracji krajów w światowy ekonomiczny i polityko-prawowy przestrzeń*, materiały II Międzynarodowej naukowo-praktycznej konferencji 04 grudnia 2015 r., Mariupol, 2015, p. 26.

³⁶ Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany...*, op. cit., thesis 15 to Article 661w.

5. ENTITLEMENT TO APPEAL

The decision on the European protection order issued by the court or the prosecutor is not be subject to appeal. This exclusion is stated *expressis verbis* in Article 611wc CCP. The provision's indication that there is no right to complain against the decision concerning the order means that it is inadmissible to challenge either the decision to issue or refuse a European protection order, or the decision to revoke it. Therefore, the legislator did not implement Article 6(4) of Directive 2011/99/EU, which provides for the right to challenge a given protection measure if the person has not been granted these rights in the procedure leading to the adoption of the protection measure, and Article 6(7) which stipulates that if the request to issue a European protection order is rejected, the competent authority of the issuing State shall inform the protected person of any applicable legal remedies that are available, under its national law, against such a decision. It is noted in the literature that there is a lack of equality between the parties to the proceeding due to the fact that the aggrieved, in the event of the refusal to issue a European protection order, may apply for its issuance again, while the person causing danger, in the event of a decision to issue a European protection order, has no right to any appeal measures.³⁷

6. THE EUROPEAN ORDER TRANSMISSION PROCEDURE

The court or the prosecutor transmits the European protection order for execution directly to the competent court or another competent authority of a Member State of the European Union. The competence of this authority is determined by the domestic law of the concerned State.

The copy of the judgement and the order, as per Article 611w § 5 CCP, may be transmitted using automatic data transmission devices in a manner that establishes the authenticity of the documents. Upon request from the competent court or authority of the executing State, the court or the prosecutor transmits a copy of the judgement and the original order. Article 8(1) of Directive 2011/99/EU also allows for such a transmission, stipulating that the competent authority of the issuing State transmits the European protection order to the competent authority of the executing State by any means which leaves a written record so as to allow the competent authority of the executing State to establish its authenticity. All official communication shall also be made directly between those competent authorities.

The order should be translated into the official language of the executing State or another language indicated by this State (Article 611w § 4 CCP).

Within the structure of the public prosecution office, the authorities that may apply for the execution of the European protection order include: Director of the Department for Organised Crime and Corruption of the National Public Prosecution Office, Head of the Department of Internal Affairs of the National Public Prosecution Office, head of the territorially competent branch department,

³⁷ Kraszewska, K., 'Postępowanie...', *op. cit.*, p. 18.

and the regional or district prosecutor (§ 297 of the Regulation of the Minister of Justice of 7 April 2016: Rules and regulations for the internal functioning of common organisational units of the public prosecution office³⁸).

In the event of difficulties in determining the competent court or another authority of the executing State, the court or the prosecutor may also apply to relevant organisational units of the European Judicial Network or Eurojust (Article 611w § 6 CCP). Under § 348 (3) of the Regulation of the Minister of Justice of 18 June 2019: Rules and regulations for the operation of common courts,³⁹ the court may apply to a national representative in Eurojust for information or assistance in matters within the competence of Eurojust that are under the jurisdiction of the Republic of Poland or in which the Republic of Poland is directly involved, particularly for assistance in determining the authority in a Member State of the European Union that is competent to execute mutual legal assistance requests, European protection orders, and other judgements subject to mutual recognition.

The prosecutor who has requested the execution of the European protection order shall, if necessary, consult with a judicial authority of another Member State of the European Union and, particularly at the request of that authority, provide further necessary information allowing the execution of the decision or order. This can be done via the contact points of the European Judicial Network, Eurojust, or the National Prosecution Office (Article 298(1) and (2) of the Rules and Regulations for the Public Prosecution Office).

Where necessary, the order is to be transmitted to more than one executing State (Article 611w § 2 CCP). This may be justified when the aggrieved is staying, or his statement indicates that he intends to stay, in the territory of several Member States of the European Union in the close time period.⁴⁰

7. INFORMATION OBLIGATIONS

In the event a measure or an obligation is to be modified or revoked, the court or the prosecutor is obliged to immediately notify the competent court or another authority of the executing State; this notification may also be transmitted using automatic data transmission devices in a manner that allows the establishment of the authenticity of the transferred documents (Article 611wb CCP). The obligation arises from the principle that only the competent authority of the issuing State is entitled to make decisions on modifying or revoking a protection measure.⁴¹ This obligation arises in the event of:

- (1) revocation or modification of a preventive measure by means of revoking the obligations covered by the European protection order;
- (2) recognition of a penal measure as executable in accordance with Article 84 §§ 1 and 2a CC;

³⁸ Journal of Laws of 2023, item 1115, hereinafter referred to as 'R&R PP'.

³⁹ Journal of Laws of 2022, item 2514, as amended.

⁴⁰ Nita-Świątłowska, B., in: Skorupka, J., *Kodeks...*, op. cit., p. 2090.

⁴¹ Augustyniak, B., in: Grzegorzczak, T. (ed.), *Kodeks...*, op. cit., p. 1368.

- (3) revocation of the obligation covered by the European protection order (Article 67 § 4 in conjunction with Article 72 § 4, Article 74 § 3 CC, Article 159 § 1 PEC), as well as successful completion of the probation period (Article 76 CC) or the commencement of the proceeding conditionally discontinued (Article 68 CC), a ruling to execute a conditionally suspended penalty of deprivation of liberty (Article 75 CC) or the cancellation of the conditional early release (Article 82 CC);
- (4) reversal of the sentence imposing a penal measure or a probation measure covered by the European protection order as a result of a cassation, reopening of a proceeding or an extraordinary complaint;
- (5) remission, based on a pardon or amnesty granted, of a penal measure or a penalty within which a probation measure was ruled, or the measure alone;
- (6) limitation of the execution of a penal measure or a penalty with which a probation measure is connected (Article 103 CC).

It is correctly noted in legal scholarship that the obligation to provide information also extends to cases where, following the submission of a constitutional complaint, the Constitutional Tribunal issues an interim decision to suspend or stay the enforcement of a judgment (as per Article 7 (1) of the Act of 30 November 2016 on the Organisation and Procedure Before the Constitutional Tribunal).⁴² Similarly, this obligation should apply to the suspension of the penalty or order enforcement to interrupt the enforcement of a penalty issued by the court or the Prosecutor General in the course of pardon proceedings (Article 568 CCP).

CONCLUSIONS

1. The provisions of Chapter 66j CCP 'Application to a Member State of the European Union for the execution of the European protection order' stem from the transposition of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. These provisions are particularly significant in the context of protecting interests of the aggrieved, as the European protection order enables continuation of protection for the aggrieved in an EU Member State other than the one which granted the protection measure.
2. The European protection order pertains to the execution, in another EU Member State, of preventive, penal, and probation measures, which include obligations to refrain from entering certain environments or places, contacting specific persons, or approaching certain persons within a prescribed distance. Determining which measures may be subject to the European protection order necessitates an analysis of the content of a specific measure to ascertain whether it contains at least one of such obligations. The order cannot apply to obligations imposed within the penalty of limitation of liberty or as a protective measure. This exclusion is problematic, as the aggrieved should be subject to the European protection order

⁴² Journal of Laws of 2019, item 2393.

irrespective of the nature of the obligations imposed on the accused, since the *ratio legis* of the analysed provisions is the protection of the aggrieved.

3. The issuance of the European protection order does not require the aggrieved to reside permanently or temporarily in another EU Member State; it is sufficient if they intend to move there, even for a short period, that allows for their protection.
4. The European protection order aims to ensure personal security of the aggrieved and prevent the violation of rights such as bodily integrity, health, life, personal liberty, and sexual integrity. It should not be issued to protect another person.
5. The issuance of the European protection order must be based on an application; the aggrieved may submit a request in writing or orally for the record. Issuing the order *ex officio* is not permissible.
6. The court or the prosecutor is authorised to issue the order; however, the prosecutor may do so only as a preventive measure in a preparatory proceeding. The issuance should take the form of a decision with a justification indicating the fulfilment of conditions for issuing a protection order. The decision is to issue the order, and the European protection order itself is a separate document drafted using a template provided in the Regulation of the Minister of Justice. The decision on the European protection order is not subject to appeal.
7. The court or the prosecutor shall transmit the European protection order for execution directly to a competent judicial authority of another Member State of the European Union. The competence of this authority is determined by the domestic law of the Member State concerned. As per Article 611w § 5 CCP, the copy of the order and the judgement can also be transmitted using automatic data transmission devices in a manner that guarantees the authenticity of the documents.

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