

DOMESTIC VIOLENCE IN EUROPEAN LEGAL DOCUMENTS

Libor Klimek¹

Abstract: This contribution deals with European legal documents in the context of domestic violence. It focuses on the most crucial contemporary documents containing requirements addressed to European States. It analyses documents of the European Union and the Council of Europe. It is divided into three sections. The first section introduces the European Union Directive 2012/29/EU on victims of crime (Directive 2012/29/EU establishing the minimum standards on the rights, support and protection of victims of crime), the second section analyses the Directive 2011/99/EU on the European protection order, and the third section briefly focuses on the Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul convention). Many problems occurred. The legal framework exists, but the needs of each victim should be assessed individually. As regards the Directive on victims of crime, no government is willing to monitor it. As regards the European protection order, only a few such protection orders have been applied.

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Introduction

Domestic violence, in particular violence against women, is a violation of fundamental rights. As it is argued by the European Union Agency for Fundamental Rights, it is a violation of human dignity and, in its worst form, it violates the right to life. It is also an extreme expression of inequality on the grounds of sex.² In all European States domestic violence is understood as an undesirable phenomenon. On the one hand, some States have adopted applicable legislation while on the other hand, some States are reluctant.

In European context many documents have been introduced – political, strategic, as well as legal – in order to fight against domestic violence. This contribution deals with European legal documents in the context of domestic violence. It focuses the most crucial contemporary documents containing requirements addressed to European States.

Directive 2012/29/EU on Victims of Crime (Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime)

Many legal documents protecting victims of crime, including victims of domestic violence, have been adopted in the European Union. The most important contemporary legal document regulating their rights is the Directive 2012/29/EU on victims of crime³ (however, Denmark does not take part in the adoption of the Directive and is not bound by it or subject to its application). It was adopted under the Treaty on the Functioning of the European Union, which provides for the establishment of minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation in criminal matters having a cross-border dimension, in particular with regard to the rights of victims of crime⁴.

The main objective of the Directive is to ensure that victims of crime receive appropriate information, support and protection and may participate in criminal proceedings wherever the damage occurred in the European Union. All Member States of the European Union shall ensure that victims of crime are recognised and treated in a respectful, sensitive and professional manner according to their individual needs and without any discrimination.

As is argued by Kaczorowska-Ireland (2016) the needs of each victim should be assessed individually; for victims of crime not only is it vital that the offended is punished, but they can obtain also compensation for their suffering. The Directive lays down minimum standards for all victims of all crimes regardless of the victim's nationality or residence status. As soon as a crime is committed, or criminal proceedings take place in the European Union, the victim must be granted the rights

¹ Faculty of Law, Pan-European University, Bratislava, Slovak Republic, libor.klimek@paneurouni.com, libor.klimek@yahoo.com

² European Union Agency for Fundamental Rights (2015): 'Violence against women: an EU-wide survey: Main results', Luxembourg: Publications Office of the European Union, p. 7.

³ Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Official Journal of the European Union, L 315/57 of 14th November 2012.

⁴ Article 82(2) of the Treaty on the Functioning of the European Union.

established by the victims' Directive. Moreover, family members of deceased victims are considered victims themselves. As is stated in the core text of the Directive, the term victim is defined as⁵:

- a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence and
- family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

Under the Directive the victims of crime have, in particular, the following rights:

- the right to be heard,
- the right to protection during criminal investigations,
- the right to avoid contact between the victim and the offender,
- the right to legal aid,
- the right to access support services,
- the right to receive information about the case and
- the right to interpretation and translation.

The Directive contains also weaknesses. For example, as argued by Whine (2016), no government is willing to monitor it, although the minimum relevant statistical data should be achievable by all, in time.

Since the Directive (as all European Union directives) does not entail direct effect in the Member States of the European Union, its implementation is needed. The form(s) and method(s) can be chosen in all States under the decision of national legislators.

As far as the Slovak Republic is concerned, the National Council of the Slovak Republic (i.e. Slovak parliament) adopted the Act No. 274/2017 Coll. on Victims on Crime⁶ (and it came into force on 1st January 2018). The Act regulates the rights, protection and support of victims of crime, the relations between the State and the victims, providing assistance to the victims and financial compensation to victims of violent crimes.⁷ The Act is a result of a long legislative process, including compromises. Its final wording is the result of negotiations for almost four years (the author of this contribution was a member of the working group preparing the draft version of the Act as the result of the national implementation of the Directive 2012/29/EU on victims of crime).

As far as basic principles of protection and supports of victims are concerned, the Act expects that any person claiming to be a victim shall be treated as a victim until proven otherwise or if there is no apparent abuse of the victim's status under the Act, regardless of whether the offender has been identified, prosecuted or convicted. In addition, the rights granted to the victim by the Act shall be applied without discrimination based on sex, religion or belief, race, ethnic or ethnic group, state of health, age, sexual orientation, marital status, face colour, language, political or other opinion, national or social origin, property or other status.

Directive 2011/99/EU on the European Protection Order

Many national protection orders protecting victims of crime, including victims of domestic violence, have been adopted in the Member States of the European Union. However, they have never been applicable at the European Union level. The European Union decided to introduce the European protection order by the Directive 2011/99/EU on the European protection order⁸. The objective of the Directive 2011/99/EU on the European protection order is to ensure the trans-border protection to victims of crimes in other Member States when they move within the European Union.

The core text of the Directive 2011/99/EU on the European protection order stipulates that it sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order; the European protection order enables a competent authority in

⁵ Article 1(a) of the Directive 2012/29/EU on victims of crime.

⁶ Zákon č. 274/2017 Z. z. o obetiach trestných činov a o zmene a doplnení niektorých zákonov.

⁷ Article 1 of the Act No. 274/2017 Coll. on Victims on Crime.

⁸ Directive 2011/99/EU of the European Parliament and of the Council of 13th December 2011 on the European protection order. Official Journal of the European Union, L 338/2 of 21st December 2011.

another Member State to continue the protection of the person in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State⁹.

The Directive 2011/99/EU on the European protection order takes account of the different legal traditions of the Member States as well as the fact that effective protection can be provided by means of protection orders issued by an authority other than a criminal court. The Directive does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order.

A principal question which begs consideration is the definition of the term European protection order (in criminal matters). In the national legal systems of the Member States of the European Union the concept of the protection order is defined and interpreted differently.¹⁰ The Directive 2011/99/EU on the European protection order clearly seeks to restrict its scope of application to criminal matters (Bradley, 2014).

The Directive 2011/99/EU on the European protection order defines an European protection order as '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'¹¹. The precedent is the protection order in the English-speaking world which takes the form of a court order protecting one person from another, is valid for the entire national territory and contains a number of obligations or prohibitions which the person to whom it is directed towards must observe, for example, prohibition on possessing weapons, approaching or contacting one or more persons, etc.

All protection measures at the national context in the European Union Member States are based on the national (domestic) legal documents, i.e. national acts, for example, Criminal Codes or Criminal Procedure Codes. European protection orders are issued by national competent authorities on the basis of domestic criminal law protection measures.

As pointed out by the European Parliament, only a few European protection orders have been applied. The very limited use of this instrument is striking given the number of victims who are benefiting from protection measures in criminal matters at the level of the Member States of the European Union – many of whom probably travel/move/commute across the European Union on a regular and/or occasional basis.¹²

Application of the European protection order is not perfect. It has indicated some practical problems, for example.¹³

- as European protection orders always imply the movement of a victim from one Member State to another, all victims at some point will be confronted with an unknown legal system or language, placing them in a particularly vulnerable situation; most Member States have not established any special measures or provisions regarding persons with specific needs,
- the national implementing laws of the Member States have used different formulas to stress the immediacy and urgency of the procedure, and in some cases even establish specific time limits; the co-ordination and communication among the competent and central authorities is also important to the protection of the victims and to the effectiveness of the European protection order,

⁹ Article 1 of the Directive 2011/99/EU on the European protection order.

¹⁰As argues Van der Aa (2012), various synonyms of the term 'protection order' exist. For example, in national laws of the Member States of the European Union can be observed equivalents or closely related terms such as protective order, restraining order, stay-away order, or even no-contact order.

¹¹ Article 2(1) of the Directive 2011/99/EU on the European protection order.

¹² European Parliament (2018): 'Report on the implementation of Directive 2011/99/EU on the European Protection Order' (2016/2329(INI)), A8-0065/2018, p. 4.

¹³ European Parliament (2018): 'Report on the implementation of Directive 2011/99/EU on the European Protection Order' (2016/2329(INI)), A8-0065/2018, p. 5.

- experts underlined that the issue of training of professionals likely to come in contact with victims in need of protective measures appears to be key; very few Member States have organised specific training on the topic of the European protection order.

Since the Directive (as all European Union directives) does not entail direct effect in the Member States of the European Union, its implementation is needed. The form(s) and method(s) can be chosen in all States under the decision of national legislator(s).

As far as the Slovak Republic is concerned, the National Council of the Slovak Republic (i.e. Slovak parliament) adopted the Act No. 398/2015 Coll. on the European Protection Order in Criminal Matters¹⁴ (it came into force on 1st January 2016). The Act regulates the procedure of competent authorities of the Slovak Republic in case of, first, issuing the European protection order for recognition in another Member State of the European Union, and second, recognition of the European protection order issued by a court or other judicial authority of other Member State of the European Union in criminal proceedings; it also regulates the adoption of a subsequent measure in the territory of the Slovak Republic.¹⁵

On the one hand, the European protection order in criminal matters can be issued in the Slovak Republic, if:

- if a protection order has been issued in the criminal proceedings imposing one or more restrictive measures,
- the protected person is staying or residing in the territory of another Member State of the European Union or intends to reside or stay in the territory of another Member State and
- at the request of the protected person.

On the other hand, the European protection order in criminal matters can be recognised in the Slovak Republic, if:

- a protection order has been issued in criminal proceedings in another Member State of the European Union imposing one or more restrictive measures and
- the protected person is residing or staying or intending to stay or in the territory of the Slovak Republic.

Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

The Convention on preventing and combating violence against women and domestic violence¹⁶ was adopted in 2011 by the Council of Europe. It is open for signature and approval by the member States of the Council of Europe, non-member States which have participated in its elaboration and the European Union. As argued by McQuigg (2017), it was not until the 1990s, more than 40 years after its formation, than the Council of Europe took steps in relation to domestic violence. This emphasises the fact that it is only relatively recently that domestic violence was recognised as being an issue of social and legal concern.

The Convention creates a comprehensive legal framework to protect women and girls against all forms of violence, including domestic violence. The Convention covers a broad range of measures from data collection and awareness-raising to legal measures on criminalising different forms of violence against women. It includes measures for the protection of victims and the provision of support services and addresses the gender-based violence dimension in matters of asylum and migration as well as cross-border elements. It establishes a specific monitoring mechanism in order to ensure effective implementation of its provisions. Contracting parties are obliged to condemn all forms of

¹⁴ Zákon č. 398/2015 Z. z. o európskom ochrannom príkaze v trestných veciach a o zmene a doplnení niektorých zákonov.

¹⁵ Article 1 of the Act No. 398/2015 Coll. on the European Protection Order in Criminal Matters.

¹⁶ Convention on preventing and combating violence against women and domestic violence. Council of Europe, European Treaty Series No. 210 [1997], Istanbul, 11th May 2011.

discrimination by ensuring that the principle of equality between men and women is applied in their legal orders, and it is made clear that positive action may be taken.¹⁷

In the Council of Europe, as well as in the European Union, violence against women is a violation of their human rights and an extreme form of discrimination, entrenched in gender inequalities and contributing to maintaining and reinforcing them. Equality between men and women is a fundamental value and the objective of the European Union, as recognised in the Treaty on European Union¹⁸, in the Treaty on the Functioning of the European Union¹⁹ and the Charter of Fundamental Rights of the European Union²⁰. The Charter also recognises the right to human dignity, the right to life, and the right to the integrity of the person, and prohibits inhuman or degrading treatment, as well as all forms of slavery and forced labour. As a consequence, the European Union decided to accept the Convention²¹.

Since the Convention is not a self-executing type of convention, its ratification is needed in the contracting parties (contracting States).

As far as the Slovak Republic is concerned, it signed the Convention in 2011. However, it has not ratified it and its ratification will not happen in the near future. In February 2018, the Prime Minister of the Slovak Republic declared that he had not consented to the Government of the Slovak Republic submitting this Convention for ratification, because there were legitimate and obvious contradictions between its content and the constitutional definition of marriage as the relationship of man and woman in the light of the Slovak legislation, in particular in the Slovak Constitution. For example, the government has the opinion that the definition of marriage is a major problem. Under Slovak Constitution, the Slovak Republic accepts marriage only between man and woman. Another problem in the Convention is that it supports so-called gender ideology, within which a person decides what gender s(he) is. The Convention perceives gender independently of biological reality, i.e. regardless of whether somebody was born as a man or as woman in the traditional approach.

Conclusion

In the European legal context there have been adopted legal documents supporting victims of domestic violence. Among others, such documents of crucial importance are, first, the Directive 2012/29/EU on victims of crime (Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime), second, the Directive 2011/99/EU on the European protection order, and third, the Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul convention). Each mentioned legal document has special subject matters as well as scope of application.

The main objective of the Directive 2012/29/EU on victims of crime is to ensure that victims of crime receive appropriate information, support and protection and may participate in criminal proceedings wherever the damage occurred in the European Union. All Members States of the European Union shall ensure that victims of crime are recognised and treated in a respectful, sensitive and professional manner according to their individual needs and without any discrimination.

The objective of the Directive 2011/99/EU on the European protection order is to ensure the trans-border protection to victims of crimes in other Member States when they move within the European Union. It sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, 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 in the territory of that other Member

¹⁷European Commission (2016): 'Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence Brussels', COM(2016) 111 final.

¹⁸Articles 2 and 3 of the Treaty on European Union.

¹⁹Article 8 of the Treaty on the Functioning of the European Union.

²⁰Article 23 of the Charter of Fundamental Rights of the European Union.

²¹Council Decision (EU) 2017/866 of 11th May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement. Official Journal of the European Union, L 131/13 of 20th May 2017.

State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State.

The Convention on preventing and combating violence against women and domestic violence (Istanbul convention) creates a comprehensive legal framework to protect women and girls against all forms of violence, including domestic violence. The Convention covers a broad range of measures from data collection and awareness-raising to legal measures on criminalising different forms of violence against women. It includes measures for the protection of victims and the provision of support services and addresses the gender-based violence dimension in matters of asylum and migration as well as cross-border elements. It establishes a specific monitoring mechanism in order to ensure effective implementation of its provisions.

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References

- Atanasov, A. et al. (2015). *The European Protection Order: Its Application to the Victims of Gender Violence*. Madrid: Tecnos.
- Bradley, K. C. (2014). *Legislating in the European Union*. In: Peers, S. (Ed.). (2014). *European Union Law*. Oxford: Oxford University Press.
- Kaczorowska-Ireland, A. (2016). *European Union Law. Fourth Edition*. London – New York: Routledge.
- McQuigg, R. (2017). *The Istanbul Convention, Domestic Violence and Human Rights*. Oxon. Routledge.
- Van der Aa, S. (2012, June). *Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?* *European Journal on Criminal Policy and Research*, 18(2), 183-204.
- Whine, M. (2016). *National Monitoring of Hate Crime in Europe: The Case for a European Level Policy*. In: Schweppe, J., Walters, M. A. (Ed.). (2016). *The Globalization of Hate: Internationalizing Hate Crime?* Oxford: Oxford University Press.