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### The European Protection Order

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# **The European protection order: No time to waste or a waste of time?**

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## **1. Introduction**

Resorting to the police does not automatically guarantee that a victim is safeguarded against future assaults by the hands of the same offender. On the contrary, some victims put their safety on the line precisely by going to the police. Certain offenders will, for instance, try to intimidate their victims into dropping their charges or their testimony in order to evade prosecution. Others will simply want to retaliate. And where filing a report can potentially be a precarious act for all victims, there are victims that show an additional need for protection against recidivism: these are the victims of crimes that are characterized by their repetitive nature, such as stalking or domestic violence. The chances of them being victimized for a second, third or even fourth time by the same offender are much higher than the chances for the average victim.

In order to protect victims from repeat offences by the same offender, criminal protection orders have been created: in addition to or instead of a regular penalty, the court orders the offender to refrain from stalking or assaulting the victim, usually on pain of detention. If the offender violates this order, he or she will be confined to prison. Next to post-trial orders, the judicial authorities can also hand down pre-trial protection measures, or a victim can turn to a civil court to ask for a civil protection order. Supposedly, all the European Member States have protection measures available,<sup>1</sup> but at present they are only effective on the territory of the state which adopted them. This means that a victim who moves to another Member State would have to start new proceedings and procure evidence as if the previous decision had never been adopted. Having to go through new proceedings can seriously inconvenience the victim, especially since there is no guarantee that the second trial will have the same outcome as the first trial.

On 6 January 2010, under the Spanish presidency of the European Union, twelve Member States launched an initiative for a Directive of the European Parliament and the Council on

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<sup>1</sup> At least, this is what the Explanatory Memorandum relating to the Initiative for a Directive of the European Parliament and of the Council on the European Protection Order suggests; see Council Document 5677/10 of 22 January 2010. Whether this assumption is true and whether all European Member States actually have such protection measures available will be discussed in Section 10.

the European Protection Order.<sup>2</sup> In the light of the freedom of movement of both victims and perpetrators, the initiators contend that protection should not be limited to the territory of the state in which the protection order originated. Maintaining this restrictive attitude would either limit the victims' freedom of movement or it would force them to relinquish the protection which the state provided and put them at increased risk. The proposal aims to increase the protection for victims who cross borders by making sure that protection orders apply across the European Union. It does so by introducing the European Protection Order (hereafter: EPO). Once implemented, the EPO would provide a legal basis for EU Member States to mutually recognize a victim protection order that was granted in another Member State. As such, this proposal supplements the current whole of mutual recognition instruments (framework decisions and directives).

Although the ordinary legislative procedure is still in full progress,<sup>3</sup> and statements on the EPO can therefore only be tentative at the moment, the outline of the envisaged EPO slowly but steadily becomes clearer. This article aims to assess whether the EPO would actually increase the safety of crime victims or whether it is merely symbolic legislation: legislation which may look good on paper, but has fundamental flaws in practice. In order to do so, we will first discuss the content of the EPO and mention the objections that have been raised against the proposal by several Member States' representatives (Sections 2 and 3). In Sections 4 through 10, some of the objections against the EPO will be explored more in-depth. The EPO, for instance, converges to a certain extent with other EU regulations. We will assess whether the EPO still has added value next to the already existent armamentarium. The article concludes with an answer to the question of whether there is no time to waste in adopting and implementing the EPO or whether the EPO is merely a waste of time (Section 11).

## **2. The European Protection Order**

If a Member State has adopted a protection measure in the context of a criminal, civil or administrative procedure (the issuing state) and the person continues to be in danger in the Member State to which he or she wants to move or stay (the executing state), an EPO can be requested for. The EPO can be acquired on the basis of a simple, three-step approach:

- 1) On the request of the protected person, the issuing state makes a request for an EPO;
- 2) The executing state recognizes the EPO;
- 3) The executing state adopts any necessary measure available under its national law in order to execute the EPO and to continue the protection of the person concerned.

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<sup>2</sup> OJ 18.03.2010, C 69/5. These Member States were: Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden.

<sup>3</sup> For this act, the ordinary legislative procedure applies (Art. 289 *in conjunction with* Art. 294 of the Treaty on the functioning of the European Union). In fact, the procedure has just passed the European Parliament's first (or single) reading stage (adopted by 610 votes to 13 with 56 abstentions). This has resulted in a resolution from the European Parliament of 14 December 2010. This article departs from the text adopted by this resolution. For an overview of the current status of the proposal, see: <http://www.europarl.europa.eu/oeil/file.jsp?id=5840492> (last assessed on April 8, 2011).

This entire procedure would have to be processed with certain celerity.<sup>4</sup> The idea is to create a ‘dynamic and effective mechanism far removed from a bureaucratic procedure which would stand in the way of an effective response being adopted as swiftly as possible in the executing State’.<sup>5</sup> For this reason, it is said that the proposal does not entail a classical mutual recognition procedure, thereby suggesting that such a procedure would take up too much time and would not be able to provide an ‘immediate response required for a victim once again in danger in the executing State’.

The executing State has to adopt a measure that would be available under its national law in a similar case and which corresponds, to the highest degree possible, to the protection measure ordered in the issuing State (Art. 9(1) and (2)). As the Explanatory Memorandum clarifies:

‘The thinking behind the instrument is not that the executing State has to provide a level of protection which it is unable to provide for its own residents under its national legislation, but rather to ensure that the protected person obtains in a European State the same level of protection as that State stipulates under its own regulations. As a result, the executing State is not required to apply measures which go beyond its own legal system but to choose, from among those established under its legal order, those best adapted to the measures adopted by the issuing State in each individual case, specifically the measures which it would have adopted under its legislation in a similar case.’<sup>6</sup>

In other words, the executing state does not have to take over the exact protection measure that the issuing state provided for – this would be impossible given the national differences in type and scope of protection measures and the different proceedings under which they may be adopted (civil, criminal or administrative) – but it has to provide the victim with a protection measure that is already available under its own national law. The EPO is based on mutual recognition, not harmonization, so its objective is not to ensure uniformity as regards protection measures.

### **3. Objections to the proposed EPO**

The proposed Directive on the European Protection Order has already given rise to much debate. On 23 December 2009, a questionnaire was distributed to the delegations of the European Union Member States on the envisaged instrument for a European Protection Order. Twenty delegations replied to the questionnaire.<sup>7</sup> Although a majority of the Member States is in favor of the EPO, the German, French, and Austrian delegates plainly stated that, in their opinion, a measure such as the EPO would not improve the protection of the victim. The UK, Czech, Slovakian, and Slovenian delegates – although not explicitly discarding the idea –

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<sup>4</sup> How the criteria of the processing time of the EPO have changed over the course of several drafts is discussed in Section 9.

<sup>5</sup> Explanatory Memorandum, p. 13.

<sup>6</sup> Explanatory Memorandum, p. 17.

<sup>7</sup> Note from the General Secretariat to the Working Party on Cooperation in Criminal Matters on the European Protection Order (Answers by delegations in reply to the questionnaire), Council Document No 5002/10 of 6 January 2010.

were not overenthusiastic either. Even some of the delegates that did embrace the general idea of an EPO raised substantial objections to the proposal at hand. The most important objections are listed below:

- a) An objection that kept recurring was whether there was an actual need in practice for the EPO. The representatives of the Czech Republic, Germany, and the UK all indicated that cases in which a person continues to pose a threat to the life, physical and psychological integrity, freedom, sexual indemnity or property of another person after that person has moved from one EU Member State to another, are bound to be exceptional. Even rarer are cases in which persons continue to be in danger *and* are unable to get a protection order in the Member State to which they move.
- b) Another issue that touches upon the question of necessity is the fact that the problem is possibly already partly covered by other Framework Decisions (e.g. France, UK). In the light of its convergence with these other instruments, what is the added value of the EPO?
- c) Some representatives objected to or questioned the inclusion of administrative and civil protection orders (Slovakia, Sweden). Can an instrument of mutual recognition in criminal matters prescribe the recognition of civil and administrative decisions?
- d) Some representatives questioned the effects the EPO will have on the capacity of their criminal justice system (NL, UK). They feared, for example, that the EPO would bring along additional costs and put additional strain on an already overburdened prison system (UK).
- e) For a number of practical reasons, some delegates argued that the victim may be in a better position to apply for a new protection order in the Member State to which he or she move, rather than have the original order recognized by the new Member State (Germany, UK). The German representative, for example, claimed that within a couple of hours a protection order can be issued based on German law. Issuing and executing an EPO would probably take longer.
- f) Some representatives feared that the differences between the protection mechanisms chosen in each Member State would cause problems or at least seriously limit the added value of the EPO (Latvia, NL, Austria).

These objections will be singled out and discussed more in-depth to see if and how they might impact the anticipated working of the EPO. In addition, some extra arguments will be examined as well.

#### **4. The EPO and the eligible victim**

The first point of criticism was that the EPO would lack necessity, because of the limited need for such an instrument. It is true that the Explanatory Memorandum does mention the prevalence of outstanding protection measures in the EU – apparently over 100.000 women

residing in the EU are covered by such measures<sup>8</sup>. However, these data do not reflect the number of victims that have not only been granted a protection measure in a certain Member State, but that also continue to be in danger after crossing the border of this Member State *and* that have a need for the original protection order to be taken over by the Member State to which they move, for example because they encounter difficulties in applying for a regular protection order in their new country of temporal or permanent residence. Rather, these data only reflect the number of female victims in the EU who are covered by national protection measures. Exact numbers are lacking, but it stands to reason that – even including male victims<sup>9</sup> – the number of victims who fit all three criteria will be exponentially lower than the previously mentioned 100.000.

It is open to debate whether the availability of exact numbers is really relevant. In the United States, the absence of exact numbers did not stop Congress to pass a provision requiring every state to grant ‘full faith and credit’ and enforce civil and criminal protection orders from all the other states.<sup>10</sup> What mattered to Congress was that there had been known cases of victims experiencing difficulties in obtaining a new order upon arrival in a different state.<sup>11</sup> And the attention of Congress did not falter once the Full Faith and Credit provision was codified. The federal government also created a national protection order registry which law enforcement agents could access to obtain information on out-of-state orders and it funded the National Center on Full Faith and Credit to provide technical assistance to states implementing the provision. On top of that, with the passing of the Violence against Women Act of 2000, some of the remaining problems in the implementation of the original Full Faith and Credit provision were addressed. In other words, US Congress devoted substantial time, money and

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<sup>8</sup> Explanatory Memorandum, p. 4.

<sup>9</sup> The data mentioned in the Explanatory Memorandum to the EPO seem to neglect that protective measures are potentially adopted in response to violence against men as well. Especially in the area of trafficking in human beings, recent statistics show an increasing number of men being at risk of being trafficked for the purposes of forced labour and sexual exploitation. See for instance: the 10<sup>th</sup> Trafficking in Persons Report of June 2010 (U.S. Department of State), available at: <http://www.state.gov/documents/organization/142979.pdf> (last assessed on April 5, 2011); *Trafficking of men – a trend less considered. The case of Belarus and Ukraine* (IOM Migration Research Series, No. 36, 2008), available at: [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/serial\\_publications/MRS-36.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/MRS-36.pdf) (last assessed on April 5, 2011). Data on the number of male victims in the Netherlands are to be found in the annual 2009 report of the Coördinatiecentrum Mensenhandel Nederland (CoMensha), available at: <http://www.mensenhandel.nl/cms/docs/jaarrapportage2009.pdf> (last assessed on April 5, 2011).

<sup>10</sup> The Full Faith and Credit provision was codified as part of the Violence Against Women Act of 1994 (VAWA). It is codified at 18 U.S.C. §2265 (2000). A remarkable difference between the Full Faith and Credit provision and the EPO is that under the Full Faith and Credit provision, if the order is valid under the terms of the issuing state, the executing state has to enforce it even if the original order contains terms or includes parties that would be beyond the scope of an order in the executing state.

<sup>11</sup> Some of the obstacles that victims encountered were, for instance, that the court lacked jurisdiction to issue an order, that petitioning for a new order would require the offender to be served with a notice of hearing (which could reveal the new hiding place of the victim), that it could bring along additional filing fees, and that there could be differences in the eligibility requirements and the terms of the orders, see E.J. Sack, *Domestic violence across state lines: The Full Faith and Credit Clause, Congressional power, and interstate enforcement of protection orders* (research paper 04), 2004, to be found at <http://ssrn.com/abstract=838884> (last assessed on 27.01.2011).

energy to tackling the problem of interstate enforcement of protection orders, even though, up to this day, it has remained in the dark as to the exact quantitative need for such orders.

Advocates of a similar practice in the European Union would probably say that each single victim being unprotected due to the crossing of one of the EU's internal borders is one victim too many and that each victim must be protected with all possible methods (like in the US). This is a very sympathetic position. However, even if we admit that the lack of an estimation of the size of the problem is certainly not the strongest argument to prematurely discard the idea of a European Protection Order, and even if we blindly assume that there will be a group of victims who have a need for an EPO, there are still other factors that affect the usefulness and applicability of the EPO.

## 5. The EPO and its convergence with other EU regulations

Another objection was that the subject matter of the EPO was already (partially) covered by two other framework decisions with a cross-border nature, notably the Framework Decision on the mutual recognition of decisions on supervision measures as an alternative to provisional detention (hereafter: FD on supervision measures) and the Framework Decision on the mutual recognition of decisions on the supervision of probation measures and alternative sanctions (hereafter: FD on probation measures).<sup>12</sup> As the UK representative put it:

‘It may be that the FD [Framework Decision] on probation may be able to capture some of these cases if the restrictions on contact etc formed part of a sentence under that FD. We would want to see a strong evidence base for the need of the EPO in addition to that.’<sup>13</sup>

According to the French it is ‘paradoxical’ to recognize a measure in the country of residence of the victim, since the offender is not located in that country. After all, the effectiveness of the protection order does not depend on the recognition of the order in the country where the victim lives, but applies to the offender, regardless of the place of residence of the victim. In case the offender follows the victim and relocates to the new Member State as well, the obligations deriving from the protection order could already be transferred to the new Member State on the basis of the FD on probation measures and the FD on supervision measures.<sup>14</sup> In other words, from the viewpoint of the French representative, there is no real need for the EPO either.<sup>15</sup> In the end, it all boils down to one important question: What is the

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<sup>12</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 11.11.2009, L 294/20 and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ 16.12.2008, L 337/102.

<sup>13</sup> Answers by delegations in reply to the questionnaire, *loc. cit.*, p. 58.

<sup>14</sup> Answers by delegations in reply to the questionnaire, *loc. cit.*, p. 27.

<sup>15</sup> Other representatives, although not as pessimistic, at least indicated that the envisaged EPO should be carefully tailored to the aforementioned two framework decisions in order to keep the system coherent (Portugal, NL, Sweden). The Czech representative even suggested waiting for their evaluation first to see if the framework decisions are actually used in practice.

added value of the EPO next to the already existent framework decisions and where can we find overlap?<sup>16</sup>

### *5.1. The Framework Decision on supervision measures*

The Framework Decision on supervision measures addresses the situation in which a person becomes the suspect of a crime outside his home Member State (or: Member State of residence). In order to decrease the frequency with which foreign suspects are commonly kept in pre-trial detention – compared to national suspects under similar circumstances foreigners are provisionally detained more often – this instrument enables Member States to mutually recognize non-custodial pre-trial supervision measures, issued anywhere in the European Union (Art. 1 FD on supervision measures). Such would encourage Member States to choose a non-custodial supervision measure, while at the same time the suspect may stay in his ‘natural environment’ pending trial.

The most obvious difference between the scope of the EPO and that of the FD on supervision measures is that the latter only sees to pre-trial orders as an alternative to provisional detention, whereas the EPO also sees to post-trial orders. A second difference relates to the criminal nature of orders under the FD on supervision measures, while the EPO also addresses civil and administrative orders. As far as post-trial orders as well as orders imposed in the course of civil or administrative proceedings are concerned, the EPO clearly does not poach on the territory of the FD on supervision measures. However, there is some overlap when it comes to pre-trial orders handed down in the course of criminal proceedings.

This overlap is caused by the fact that the EPO and the FD on supervision measures partly cover the same types of supervision measures. The types of supervision measures that the FD on supervision measures sees to be enumerated in Art. 8(1) and include: (b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; and (f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed. These two measures more or less correspond with the measures that are enumerated in the EPO (Art. 5). However, in addition, the EPO provides for the possibility to impose on an offender the ‘prohibition or regulation on approaching the protected person closer than a prescribed distance’ (Art. 5(c) EPO). When in the pre-trial stage a judicial authority orders a suspect to maintain a certain distance from the victim, the EPO could be issued to transpose this order to the executing Member State, whereas the FD on supervision measures would be of no avail.

As to the two types of pre-trial supervision measures covered in both EU instruments and handed down in the context of criminal law, there are four possible scenarios in the pre-trial context:

- 1) The victim moves, but the offender stays (only the EPO applies)

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<sup>16</sup> The legislative resolution already takes into account that there may be some overlap between the EPO and the two Framework Decisions. In that case, the two Framework Decisions take precedence over the EPO (see Art. 20(2), 13(3) and 14(1)(d)).

- 2) The victim stays, but the offender moves (only the FD on supervision measures applies)
- 3) Both victim and offender move to the same Member State (both the FD on supervision measures as the EPO apply and they possibly overlap)
- 4) Both victim and offender move, but to different Member States (both the FD on supervision measures as the EPO apply, but there is no overlap)

This categorization shows that the EPO's added value for criminal pre-trial orders is quite limited. In case of the third scenario, the EPO can only be of added value when the judicial authority has imposed a prohibition or regulation on approaching the protected person closer than a prescribed distance. No added value of the EPO exists in those situations where the offender moves to another Member State while the victim stays (second scenario). This, however, cannot be a surprise, since the EPO has not been designed for such situations; it primarily sees to victims crossing the internal borders of the EU. Only under the first and the fourth scenario, an added value to the FD on supervision measures exist. Under these scenarios, victim and offender reside in different Member States. But what are the odds of an offender posing a threat from another country?

Nevertheless, as to the overlapping situation (scenario 3), one could argue that the two instruments pursue different goals, and that the EPO is therefore not superfluous. After all, one cannot ignore that the EPO solely aims at the protection of victims, whereas the FD on supervision measures primarily encompasses other goals. Though it is true that the FD on supervision takes into account the protection of the general public as well, at the same time it mainly seeks to discourage the use of custodial pre-trial supervision measures and to stimulate an equal treatment of national and foreign suspects where it comes to provisional detention.

In our view, however, these very differences are not decisive since the result is equal: victims are protected across national borders. Nothing else remains but to conclude that the added value of the EPO is quite limited.

## 5.2. *The Framework Decision on probation measures*

The Framework Decision on the mutual recognition of decisions on the supervision of probation measures and alternative sanctions (hereafter: FD on probation measures) made it possible, for a person sentenced to a probation measure or given an alternative sanction in a Member State other than his own, to be sent back to the Member State where he or she normally resides. Upon recognition of the judgment, the supervision of the sentence will be taken on by the country of residence. The idea is that the social rehabilitation of the sentenced person can be more easily achieved in his or her home country.

Basically, what has been said before on the FD on supervision measures, also applies to the FD on probation measures, albeit that the latter applies to criminal post-trial measures, whereas the former sees to criminal pre-trial measures. Besides, the FD on probation measures is also characterized by dual purposes, encompassing the protection of victims and the general public as well as the reintegration of sentenced persons by enabling that person to

upkeep family, linguistic, cultural and other ties. In that sense, the framework decisions are each other's mirror image and, as a result, the same line of reasoning applies when it comes to a comparison between the FD on probation measures and the EPO. As appears, when both the victim and the offender would move to the same Member State and the protection measure entails an obligation not to enter certain localities, places or defined areas in the issuing or executing state and/or an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed, there is overlap between the EPO and the FD on probation measures in case of criminal post-trial measures.<sup>17</sup> In all other situations, which are very limited in scope, the EPO has independent added value.

### 5.3. Council Regulation (EC) No 44/2001

A final piece of EU legislation with which the EPO may have some overlap is the Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is a legally binding and directly applicable instrument which covers all the main civil and commercial matters. It prescribes that civil judicial decisions and judgments given in a Member State have to be recognized automatically without the need for any special procedure, except in cases of dispute.

Although the Council Regulation mainly seems to have been written with different types of civil judicial decisions in mind, it also refers to tort, *delict* or *quasi-delict* (Art. 5(3)). It is in the context of procedures in matters relating to tort, that civil protection orders are often handed down. Would this indicate that the Council Regulation applies to civil protection orders? A complicating factor in this respect is that civil protection orders are often of a provisional nature. It is not evident that the Council Regulation also sees to provisional measures, but given the fact that these measures are not explicitly excluded and given the fact that the Regulation sees to 'any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution' (Art. 32), chances are that civil protection orders are covered as well.

This would mean that a civil protection order given in a Member State has to be recognized in the other Member States without any special procedure being required (Art. 33(1)). If the protected person wants to enforce the order in the new Member State, he or she can easily apply for a declaration of enforceability (Art 38) and the judgment has to be declared enforceable immediately on completion of certain formalities (Art. 41). Though we have no indications that the Council Regulation is used in practice for the mutual recognition of civil protection orders, purely based on the text of the instrument there seems to be significant overlap with the EPO.<sup>18</sup>

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<sup>17</sup> As with the FD on supervision measures, the FD on probation measures is not applicable when a judicial authority imposes a prohibition or regulation on approaching the protected person closer than a prescribed distance.

<sup>18</sup> In fact, the EPO itself recognizes that there may be overlap with the Council Regulation (EC) No 44/2001 and also with another Council Regulation and two Hague Conventions for that matter. When a judgment falls under the scope of any of those instruments, they take precedence (Art. 20 and recital 34).

#### 5.4. *Conclusion on the convergence of the EPO with other EU regulations*

When it comes to criminal protection orders, it appears that, when the offender returns to the same Member State that the victim moved to, there is only a very marginal role left for the EPO. In that case, the FD on supervision measures in combination with the FD on probation more or less covers all possible criminal protection measures both pre- and post-trial. The only two situations in which the EPO can be of added value is 1) the one in which the offender returns to the same state that the victim moved to and the judicial authority imposes a prohibition or regulation on approaching the protected person closer than a prescribed distance and 2) the situation in which the offender does not move to the same State as the victim, but still poses a threat to the victim from abroad (e.g. by travelling back and forth). As for civil protection measures, Council Regulation (EC) No 44/2001 seems to have covered most, if not all of them. It stands to reason that the number of cases that the EPO would apply to – a number that is probably very small to begin with – is now further reduced by the fact that in certain cases existing protection measures can already be recognized on the basis of other EU regulations. But yet, this is not quite the whole story.

### **6. The EPO and the principle of double criminality**

Another factor that can further diminish the impact of the EPO is the principle of double criminality. This is the principle that mutual recognition will only occur if both the issuing and the executing country recognize the behavior underlying the protection measure as a crime. Although the Explanatory Memorandum was silent on the topic of double criminality, the European Parliament legislative resolution is very explicit: in Art. 10(1)(c) it says that the competent authorities of the executing state may refuse to recognize an EPO if ‘the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State’. This is different from the FD on supervision measures or the FD on probation measures. Under those Framework Decisions, the principle of double criminality is abolished, at least for certain categories of offences. This means that these offences are eligible for mutual recognition without verification of the double criminality of the act (given that all other criteria are fulfilled). In the United States, the Full Faith and Credit clause is even more drastic. If the order is valid under the terms of the issuing state, the executing state has to enforce it even if the original order contains terms or includes parties that would be beyond the scope of an order in the executing state. Nevertheless, within the context of the EPO, the lack of double criminality is an established ground for refusal.

The consequence is that certain behavior will fall under the radar of the EPO. Stalking, for example, has only been criminalized in twelve Member States.<sup>19</sup> This means that the mutual recognition of protection measures that were imposed in cases of stalking remains subject to the condition that stalking is an offence under the law of the executing Member State. In

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<sup>19</sup> These twelve Member States are: Italy, the Czech Republic, Hungary, Luxembourg, Austria, Belgium, Denmark, Germany, Ireland, Malta, the Netherlands and the United Kingdom, see S. van der Aa, ‘International (cyber)stalking: Impediments to investigation and prosecution’, in: R. Letschert & J. van Dijk (eds.), *The new faces of victimhood: Globalization, transnational crimes and victim rights*, Dordrecht: Springer 2011, pp. 191-213, on pp. 199-200.

fifteen Member States this is not the case. Victims who move to any of those fifteen Member States will encounter difficulties in having their protection order recognized. Especially for stalking this is ironic, given that stalking is precisely one of those offences for which the EPO was created. Perhaps the group of stalking victims – once the EPO is implemented – even proves to be the largest category to which the EPO can be of service. If that group is partially denied protection under the EPO, there may not be many victims left to make use of the instrument. Again, the EPO's radius of action is reduced.

## 7. The parameters of the term 'protection measure'

There are other developments that could potentially decrease the impact of the EPO. Judging from the legislative history of the EPO, there seems to have been some bickering about the exact definition and scope of the term 'protection measure'. In particular the fact that in the Member States different kinds of authorities (civil, criminal or administrative) can be competent to issue and enforce protection measures was mind-bending. In an attempt to cast the net of the EPO as wide as possible, the initiative proposal<sup>20</sup> defined in Art. 1(2) the term protection measure as:

‘a decision adopted by a competent authority of a Member State imposing on a person causing danger one or more of the obligations or prohibitions referred to in article [...], provided *that the infringement of such obligations or prohibitions constitutes a criminal offence* under the law of the Member State concerned or may otherwise be punishable by a deprivation of liberty in that state’ (italics added).

By defining protection measures as such, the initiators made sure that not only protection measures that arose within criminal proceedings would be eligible for conversion into an EPO, but also civil and administrative ones, provided that a breach of such orders involved criminal liability or entailed a deprivation of liberty in some other way. The idea was to extend the benefits of the EPO to the largest possible number of victims.<sup>21</sup> This inclusion of civil and administrative measures, however, was questioned by some representatives.<sup>22</sup>

The ensuing explanatory statement of the Draft European Parliament legislative resolution was conspicuously silent on the topic, but the subtle changes to the definition of protection measure meant that the definition became even more inclusive. According to Art. 1(2) of the draft resolution,<sup>23</sup> a 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 [...], are imposed on a person or persons causing danger, to the benefit of a protected person *with a view to protecting the latter against a criminal act* which may endanger his

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<sup>20</sup> Supra note 2.

<sup>21</sup> Explanatory Memorandum, p. 14.

<sup>22</sup> See, for instance, the Czech and Swedish response to the questionnaire (Answers by delegations in reply to the questionnaire, *loc. cit.*)

<sup>23</sup> Supra note 3.

life, physical or psychological integrity and dignity, personal liberty or sexual integrity’  
(italics added).

Now all administrative and civil protection measures were included – not just the ones that had criminal consequences in case of a breach<sup>24</sup> – on the condition that they had been imposed to protect a person against a criminal act. The rapporteurs only mentioned that ‘[t]he fact that the judicial systems of Member States are different and that the proceedings may be criminal, civil or administrative needs to be overcome’ without providing further guidance on how to reconcile these differences with one another.<sup>25</sup>

The final European Parliament legislative resolution took over this exact definition in Art. 2(2) but – possibly with a view to its uniform interpretation – it specified that protection measures taken by an authority other than a criminal court were included as well. In recital 9 it says that the Directive applies to:

‘protection measures independently from the nature – criminal, civil or administrative – of the judicial or equivalent authority that adopts the decision concerned, be it in the context of criminal proceedings or in the context of any other proceedings with regard to an act which has been or could have been the object of proceedings by a court having jurisdiction in particular in criminal matters.’

For this reason, it would be more accurate if the EPO would not only refer to Art. 82(1)(a) and (d) TFEU as the legal basis for mutual recognition of protection measures, but also to Art. 81 TFEU – this article provides a legal basis for the mutual recognition of civil judgments and of decisions in extrajudicial cases – and possibly to the general provisions of Art. 67(3) and (4) TFEU. If the text of the EPO remains as it is – i.e. only referring to Art. 82(1)(a) and (d) TFEU – then it is possible that only protection orders handed down in criminal courts are covered, not administrative and civil ones. The question is whether the EPO, being at the moment an instrument of mutual recognition in *criminal* matters, can in fact prescribe the recognition of civil and administrative decisions. Whether civil and administrative judgments related to criminal acts fulfill the requirement of being a ‘decision in criminal matters’ or whether Art. 82(1)(a) TFEU only sees to judgments handed down by criminal courts is open to debate. It all depends on how narrow or how broad the term ‘criminal matters’ is interpreted. Depending on the outcome of this discussion, the scope of the EPO might be reduced once more.

## **8. The costs of executing the EPO**

A factor which has nothing to do with the limited scope of the EPO, but which may possibly reduce its practical use nevertheless is the distribution of the costs attached to the execution of the order. Although the initiators gave little weight to the budgetary implications of the

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<sup>24</sup> In the Netherlands, for example, the act of violating a civil protection order does not in itself result in criminal liability.

<sup>25</sup> Draft report of 20 May 2010 on the initiative for a directive of the European Parliament and of the Council on the European Protection Order, 2010/0802 (COD), p. 52.

EPO,<sup>26</sup> applying the directive can bring along several costs, such as the costs of notifying the person causing danger, the protected person and the competent authority of the issuing state of any measure taken on the basis of the EPO and to keep them informed in a language they understand; the costs for opening up legal remedies for the protected person against the refusal to recognize an EPO; the costs for executing the EPO (e.g. the use of technical devices to enforce the protection order or the imposing of (criminal) sanctions in case of a breach); the costs for communicating relevant data related to the application of national procedures on the EPO to the European Commission; and so on. According to the European Parliament legislative resolution, it is the executing state which has to bear these costs, unless certain costs have arisen exclusively within the territory of the issuing state (Art. 18).

The way in which the costs are distributed is not unique for the EPO. On the contrary, it appears from the different framework decisions and directives on the application of the mutual recognition principle that the executing Member State has to pay for the majority of expenses arising as a result of executing the foreign judicial decision. Nevertheless, it is conceivable that governments – keeping in mind their responsibility for taxpayers' money and keeping in mind the workload of the national police force and the public prosecution service – are less inclined to take over the burden of another state when the expenses associated with that burden will not be compensated. In fact, the Dutch and UK representative already raised their concerns as regards the money and capacity issue.<sup>27</sup> Mutual recognition of judicial decisions such as the EPO will probably be facilitated if the expenses for the most money-consuming activities related to the execution of a European protection order would be reimbursable with the issuing state. It would provide a very practical incentive to encourage Member States to cooperate in this area and to enhance the protection of victims of crime.<sup>28</sup>

One could reason that such a division of costs is likely to discourage Member States to issue European protection orders likewise: States might shy away from such a course of action if they would have to bear the financial burden. This would leave the victim without transnational protection. However, according to us, this viewpoint cannot persist; would a Member State refuse to issue a European protection order on the basis of a domestic protection measure solely on financial grounds, the blame will primarily be laid at the door of this Member State for its failure to take action. For it is the issuing state that holds primary responsibility. Refusing to issue an EPO on the basis of financial reasons, while first administering the protection measure in the national order and thereby explicitly recognizing that protection is needed, is more reprehensible than refusing to execute an order that was not issued in the own jurisdiction.

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<sup>26</sup> According to the Explanatory Memorandum (p. 21), the proposal will not impose any major additional expenditure on the Member States' budgets.

<sup>27</sup> Answers by delegations in reply to the questionnaire, *loc. cit.*, p. 39 and p. 61.

<sup>28</sup> Compare J. Ouwerkerk, *Quid pro quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (diss Tilburg.), Cambridge/Antwerp/Portland: Intersentia 2011, pp. 282-283. It is therefore that the USA and Switzerland have incorporated systems in which either the issuing state is responsible for any costs that arise in the executing jurisdiction (USA) or in which some of the most money-consuming activities are reimbursable (Switzerland).

In conclusion, it is strongly recommended to provide an alternative division of costs in the final version of the EPO. In default of this, the EPO's functioning in practice will possibly be curtailed even further.

## **9. The processing time for procuring an EPO**

Because of the need to protect a person from apparent dangers, the initiators wanted to create a mutual recognition procedure that was fast; a classical mutual recognition procedure would take up too much time.<sup>29</sup> The initiators therefore not only created a fairly simple and flexible system, but also instigated that the EPO should be recognized 'without delay' (Art. 12).

In the ensuing draft report this sense of urgency was even more articulate. The proposed amendment to Art. 12 read that 'the European protection order shall be executed within 20 days'. In many cases, this 20-day deadline for the execution of a protection order would have certainly meant a clear improvement for victims in comparison to having to go through regular procedures in the new Member State again. Despite the fact that many Member States allow for provisional protection measures, which can be procured in accelerated procedures, obtaining certain other protection measures (e.g. a protection measure imposed at the final disposition of a case by a criminal court) generally takes up much more time. Regardless of the question of how feasible this 20-day deadline would have been, the EPO would at least have provided the victims with an immediate response.

This 20-day deadline, however, was not adopted by the European Parliament. In its legislative resolution it decided that the EPO 'shall be recognized with the same priority which would be applicable in a similar national case, taking into consideration the specific circumstances of the case, including the urgency of the matter, the date foreseen for the arrival of the protected person on the territory of the executing state and, where possible, the degree of risk for the protected person' (Art. 15). As a result, it is unclear whether the current time limits are really advantageous for the victims. If the EPO is granted the same priority as would be applicable in a similar national case, then what is the advantage of applying for an EPO instead of a national protection order? It cannot be denied that, on this point, the legislative resolution is a watered down version of the initial proposal and certainly of the draft report.

## **10. The EPO and the requirement of a similar level of protection**

Another area in which the latest version of the proposed Framework Decision mitigated the ambitions of previous drafts is the manner in which the EPO needs to be converted into the legal system of the executing Member State. The initiative proposal stated that the executing state has to provide the victim with a level of protection that is '*similar* to that provided by the State whose authority adopted the initial measure and *equivalent* to that provided to other victims in the executing State' (italics added).<sup>30</sup> This accords with the thinking behind the principle of mutual recognition, which has been defined as 'the acceptance [...] of judicial

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<sup>29</sup> Explanatory Memorandum, p. 13.

<sup>30</sup> Explanatory Memorandum, p. 12.

decisions delivered in another Member State as if these judicial decisions were delivered in the domestic legal order, even though they could never have been so delivered.<sup>31</sup>

However, the European Parliament legislative resolution took a more nuanced stand, obviously because the initial viewpoint neglects the numerous differences in the type and scope of national protection measures. While the different protection schemes in the European Member States have never been the subject of careful study, there have been some research projects that have at least touched upon the issue.<sup>32</sup> Although there are some irregularities in the data, every one of these studies bears witness to the fact that the legislative differences do have a bearing on the level of protection that is provided.

Now instead of presuming that all Member States are able to provide victims with a corresponding level of protection – something that the initiators did by requiring that executing states provide victims with a *similar* level of protection – the European Parliament legislative resolution seems to have realized that this is impossible. Instead, the executing State has to adopt a measure that would be available under its national law in a similar case and which corresponds, to the highest degree possible, to the protection measure ordered in the issuing state (Art. 9 (1)(2)).

Was the European Parliament right in removing the requirement of a similar level of protection? That requirement would have entailed a certain level of harmonization, since at the moment not all Member States are able to provide victims with a similar level of protection. For the victims it would have meant a huge improvement, as it would have obliged certain Member States to bring their native protection systems up to par with the rest of the European Union. All victims, not only the ones that cross borders, would have profited from this. Now they just have to contend themselves with the existent protection measures that are sometimes inadequate.

This question relates to whether in this current state of play a mutual recognition instrument really fits the needs of victims of crime, who want to move freely and safely throughout the entire European Union. Given the absence of real insight into the levels of protection at the national level, to oblige the Member States to mutually recognize each other's protection measures and to provide for the same level of protection is likely to appear premature. From this point of view, the mitigation – from a similar level of protection to protection to the

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<sup>31</sup> Ouwerkerk, loc. cit, p. 77.

<sup>32</sup> See: Modena Group on Stalking, *Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union*, University of Modena and Reggio Emilia 2007; S. van der Aa, R. van Merriënboer, A. Pemberton, J. Lázaro, C. Rasquete, C. Amaral, F. Marques & M. Pita, *Project Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member states of the European Union*, Lisbon: APAV 2009; *Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, children and sexual orientation violence*, Luxembourg: European Commission, Directorate-General for Justice 2010; M.E.I. Brienens & E.H. Hoegen, *Victims of crime in 22 European criminal justice systems* (diss. Tilburg), Nijmegen: Wolf Legal Publishers 2000. Furthermore, within the context of the preparatory works for the Draft EPO, the Member States were asked to fill out the previously mentioned questionnaire which also contained questions on their native protection order regimes.

highest degree possible – probably made it more feasible to have the directive adopted. But the promises made to victims by launching the EPO may easily result in bitter disappointment in practice, just because the level of protection differs from state to state. For these reasons, we strongly support profound research into the differences and similarities in this context. Such research will reveal whether a harmonization instrument or a mutual recognition instrument is preferable in order to improve the protection of victims of crime. Would harmonization appear most favorable, it would entail the extra advantage of serving all victims of crime, not only the ones that cross borders.

## 11. Conclusion

In itself, it is wonderful that twelve Member States, the European Parliament and the Council of Europe have taken an active interest in protecting victims of repetitive crime. Despite their potential effectiveness,<sup>33</sup> protection measures have undeservedly been overlooked for too long and the European legislator is right in finally taking the matter to hand. The question is, whether the EPO is the right instrument to achieve this otherwise laudable goal.

This article demonstrates that – once adopted – the EPO would probably only be useful to a very limited number of victims and to a quite limited number of situations. It stands to reason that victims who have been granted a protection order in one Member State, who then continue to be in danger once they move to another Member State, and who are unable to easily obtain a protective measure in their new place of residence are rare. This limited range of action of the EPO is then even further reduced by the fact certain situations are already covered by the Framework Decision on supervision measures, the Framework Decision on probation decisions, and by Council Regulation No. 44/2001. Besides, in contrast to other framework decisions and directives which apply the principle of mutual recognition to judicial decisions in criminal matters, the EPO brings back in the principle of double criminality. It goes without saying that this means a further diminishing of situations in which the EPO could provide Union-wide protection to victims of crime. A final factor which could potentially further reduce the scope of the EPO is its current legal basis in Art. 82(1)(a)(d) TFEU. It remains to be seen whether an instrument of mutual recognition in criminal matters can also prescribe the recognition of civil and administrative judgments or whether the legal basis needs to be extended to Art. 81 TFEU as well.

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<sup>33</sup> According to the court and police files of a random sample of 240 Finnish stalking cases in which a protection order had been issued, 35% of the stalkers violated the protection order. Within that group there was a significant decline of the proportion of restraints employing violent stalking actions and threats. Although the issuing of a protection order did not affect actions like making telephone calls, sending text messages and letters, the proportion of those who physically assaulted the victim decreased from 80% to 17% following the issuance of the protection order. See H. Häkkänen, C. Hagelstam & P. Santtila, 'Stalking actions, prior offender-victim relationships and issuing of restraining orders in a Finnish sample of stalkers', *Legal and Criminological Psychology* (8) 2003, pp. 189-206. In another study that included 285 domestic violence and stalking victims who had petitioned for a protection order, 72% reported no continuing problems one month after the issuance of the temporary or permanent protection order and in a follow-up interview after six months, 65% claimed the same, S.L. Keilitz, C. Davis, H.S. Efkenan, C. Flango & P.L. Hannaford, *Civil protection orders: Victims' views on effectiveness*, Washington, DC: U.S. Department of Justice 1998.

Furthermore, to those persons and in those situations that the EPO does have added value, the current proposal has missed some chances to provide a considerable amelioration for victims of crime who want to move and reside freely on the entire territory of the European Union. In general, the current draft of the EPO is a watered-down version of the original. It bears all the signs of a political compromise. The one real asset of this directive, namely the speed with which the EPO had to be recognized (initially ‘without delay’, later on within 20 days), was discarded by the European Parliament in its legislative resolution. Now the EPO has to be recognized with ‘the same priority which would be applicable in a similar national case’. If the EPO is recognized with the same priority as a national protection measure, then why bother going through all the trouble of requesting an EPO while you could have applied for a regular protection order in the exact same amount of time? Especially since the current draft makes no more mention of the ‘similar level of protection’ that the initiators had included in their proposal either. In the end, victims will get the same protection measures they would have gotten had they gone through the traditional procedure in the new Member State, probably within the same amount of time.

Moreover, on a practical level, the attribution of costs of executing and enforcing an EPO to the executing State may turn out more problematic than the initiators had anticipated. As argued, it would serve the mutual recognition of European protection orders to enable the executing Member State to be reimbursed for the most money-consuming activities by the issuing Member State.

If we add the minimal added value of an EPO over a national protection order up to the limited applicability of the proposed directive, then we can rightfully question the necessity of having an EPO present. The few advantages do not compensate for the time, energy and increased degree of regulation that the adoption of the proposal would bring along, let alone the heightened expectations on the part of the victims. It merely distracts from the real problem here. The EPO only sees to a relatively small issue, while the bigger problem – the fact that there are extreme discrepancies in the levels of protection offered in the various Member States – remains unsolved. It may be questioned whether a harmonizing instrument would not better fit the situation in this stage. A common minimum level with regard to protective measures would not only serve victims of crime in the sense that they know which level of protection can be guaranteed throughout the entire Union at the very least. It would also require previous research as to the current differences and similarities in this context. Such could possibly contribute to gaining an insight into the actual need for an EU instrument, either for the purpose of harmonization, or aiming at the mutual recognition of national protection measures. On top of that, the EPO may even work counter-productive: Member States might take the adoption of the EPO as an excuse to rest on their laurels. With self-satisfaction they could point to the EPO as evidence of their commitment to victims’ issues, while making no real changes to their national systems in practice. In its current form and in this current state of play, the EPO seems a waste of time.