

*Simone Lonati*<sup>\*§</sup>

# Is the European Protection Order Sufficiently Robust to Prevent any Discrimination among Victims Moving Across the European Union? An Assessment of the First Seven Years

## *Abstract*

The purpose of this paper is, on the one hand, to highlight the reasons that have thus far prevented a systematic and widespread recourse to the commendable (in intent at least) European Protection Order, introduced by Directive 2011/99/EU (so-called EPO DIRECTIVE); and, on the other, to assess whether said mechanism is actually capable of preventing discriminations in the protection of victims within the Area of Freedom, Security and Justice. Starting from a general analysis of the above instrument, this article briefly examines how the foregoing Directive has been implemented in the domestic legal systems of the only Member States that, as at 2017, have issued at least one protection order: Italy, Spain and the United Kingdom. In particular, the analysis focuses on the main issues surrounding this instrument that have caused it to be used on a merely sporadic basis, and it shows how the European Protection Order pays the price of the almost complete lack of harmonization in the field of judicial cooperation in criminal matters: the profound discrepancies between the individual domestic legal systems as to the type of offences criminalized, and the absence of protection measures common to all Member States, are the primary factors standing in the way of achieving sufficient and uniform levels of victim protection throughout the entire EU territory<sup>1</sup>.

\* Department of Law, Bocconi University, Milan, Italy; [simone.lonati@unibocconi.it](mailto:simone.lonati@unibocconi.it).

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## 1. Introduction: victim protection

In the past century, statutory and codified provisions had cornered victims into a secondary and marginal role<sup>2</sup>, as, traditionally, the criminal justice field had always been founded on a two-party relationship with the defendant on one side and the authorities on the other, thereby leaving out, by its very nature, any other private parties. Today, on the contrary, the position of victims has been significantly strengthened<sup>3</sup>: victim protection needs have, indeed, gained critical importance, also as a result of particularly hateful forms of violence becoming increasingly widespread: consider all the cases of gender violence, domestic violence, sexual harassment, stalking and other forms of more or less manifest aggression capable of endangering the “life, physical or psychological integrity, dignity, personal liberty or sexual integrity” of the (potential) victims<sup>4</sup>.

The protection of victims of crime has proven particularly meaningful to the European Union ever since the establishment of an area of freedom, security and justice<sup>5</sup> under the Treaties of Amsterdam and Maastricht<sup>6</sup>. In general, the Member States have

- 2 By way of example, the Italian Code of Criminal Procedure, even after the 1989 reform, acknowledges the “offended party” but it does so “perhaps still in ambiguous and limited terms”, essentially for the purpose of bringing a civil action in criminal proceedings”. See, among many others, ALLEGREZZA S., *La riscoperta della vittima nella giustizia penale europea* (in) *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, (a cura di) ALLEGREZZA S. – BELLUTA H. – GIALUZ M. – LUPARIA L., Torino, 2012, p. 3; SIMONATO M., *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, Padova, 2014, p. 31.
- 3 And, possibly, for the purpose of letting go that attitude denounced not so long ago by WALK-LATE S., *Victimology*, Unwin Hyman, 1989, p. XII: “the more innocent a victim can show themselves to be, the greater their legitimate claim for victim status”.
- 4 See Directive 2011/99/EU, Article 2(1)(2).
- 5 With regard to the – not always obvious – connections between victim protection and the area of freedom, security and justice, see ASP P., *The substantive Criminal Law Competence of the EU*, Stockholm, 2012, pp. 24 ff. and MITSILEGAS V., *EU Criminal Law*, Oxford and Portland, 2009, pp. 90 ff.
- 6 See the Communication from the Commission to the European Parliament and the European Economic and Social Committee of 14 July, 1999: the “European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all”. The issue of protection of victims of crime has also been addressed in (a) the Action Plan of the Council and the Commission of Vienna dated 3 December 1998; (b) the Tampere European Council of 16 October 1999; (c) the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; (d) the Directive 2004/80/EC of 29 April 2004, which inaugurated the principle – expressed in Recital 6 – pursuant to which the “crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed”; (e) the Directive 2011/99/EU of 13 December 2011 (so-called EPO Directive); (f) the Directive 2012/29/EU of 25 October 2012 (so-called Victims’ Rights Directive); (g) the Regulation 606/2013 of 12 June 2013 (so-called EPM

provided – at the domestic level – for a number of civil, criminal and administrative law instruments aimed at the protection of victims, and especially of those regarded as particularly vulnerable. By way of example, the UK legal system provides, in addition to ‘conditional bail’<sup>7</sup> – typical criminal law instrument – also for a number of civil law measures, namely the Non-Molestation Order<sup>8</sup>, governed by Section 42(1) and (2) of the Family law Act of 1996, and the Occupation Order<sup>9</sup>, described in the same Act, as well as for administrative law measures, such as the Domestic Violence Protection Notice<sup>10</sup>, which can be adopted by the police pursuant to Sections 24–33 of the Crime and Security Act of 2010. The limit of these forms of protection, however, is precisely their scope of application, which is confined within national borders, thereby risking to lose

Regulation). In addition, vulnerable victims have also been specifically taken into consideration in the Council Framework Decision 2002/475/JHA, in the Directive 2011/36/EU and in the Directive 2011/92/EU (replacing the Council Framework Decision 2004/68/JHA). The concept of “vulnerable victim” was superseded by the concept of “victims with special needs” in the Opinion of the European Economic and Social Committee of 21 June 2012. See GIALUZ M., *Lo statuto europeo delle vittime vulnerabili*, (in) *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, (a cura di) ALLEGREZZA S. – BELLUTA H. – GIALUZ M. – LUPARIA L., Torino, 2012, pp. 6 ff.; see also LUDOVICI L., *L’ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 353. In addition, see WIECZOREK I., *The new proposal on victims’ rights: law enforcement or safeguard for the rights of the individual?*, (in) *New Journal of European Criminal Law*, 2011, II, n. 3.

- 7 Governed under different aspects by Section 37 of the Police and Criminal Evidence Act of 1984, bail allows a suspect or defendant, who has already been deprived of his or her liberty, not to be kept in police detention upon certain conditions specifically prescribed in the order (also) in the interest of protecting the victim. Bail may be ordered in the pre-trial stage by the police or in the course of the trial by the judge (who may prescribe additional terms). Furthermore, Section 5 of the Protection from Harassment Act of 1997 introduced the possibility, once a final verdict is reached and the defendant has been found guilty of ‘harassment’ and of ‘putting people in fear of violence’, of issuing restraining orders (restraining orders on conviction), by way of a post-trial protection measure. Subsequently, with the entry into force of the Domestic Violence, Crime and Victims Act of 2004, the power to issue restraining orders was extended not only to crimes other than harassment and fear of violence (see Section 5), but also to cases of acquittal (restraining orders on acquittal, see Section 5(A)), provided that during the trial the judge found there to be a danger of harassment by the defendant. See, extensively, SPRACK J., *A practical approach to criminal procedure*, Oxford University Press, 2012, pp. 97 ff., nonché CHATTERTON C., *Bail. Law and Practice*, Butterworths, 1986, p. 146. With regards to the Protection from Harassment Act of 1997, see ADDISON N. – LARSON-CRUTTENDEN T., *Blackstone’s guide to the protection from harassment act*, Blackstone Press, 1997; with reference to the Domestic Violence, Crime and Victims Act of 2004, see WARD R. – BIRD R., *Domestic violence, Crime and Victims 2004*, Jordans, 2004, pp. 68 ff.
- 8 A type of injunction – whose breach constitutes a criminal offence – that sets forth measures aiming to prevent any form of harassment by a partner or a family member against the other partner and/or children. Although the order is made for a specific period of time, it may be extended for an unlimited period.
- 9 A type of injunction – whose breach constitutes a criminal offence – by which the judge suspends, for a maximum period of 12 months, the right to stay in the household of the spouse or civil partner, or other household member.
- 10 An emergency notice aiming to prevent domestic violence by ordering the alleged perpetrator to leave the household.

effectiveness once the victim steps out into another EU Member State. Any such risk clearly hinders the fundamental freedoms underlying the EU unification process.

In the aim to ensure that “the legitimate exercise by citizens of the Union of their right to move and reside freely within the territory of Member States... does not result in a loss of their protection”<sup>11</sup>, the EU set out to secure the victims’ effective protection with the issuance of Directive 2011/99/EE (so-called EPO DIRECTIVE), supported by Directive 2012/29/EU (so-called VICTIMS’ RIGHTS DIRECTIVE) and by Regulation 606/2013 (so-called EPM REGULATION)<sup>12</sup>. Nonetheless, the foregoing objective inevitably faces the massive challenges that the unification process encounters in the field of judicial cooperation in criminal matters<sup>13</sup>: it is well known how reluctant Member States are when it comes to relinquishing part of their sovereign authority in the field of criminal justice<sup>14</sup>. A concrete example of the harmonization difficulties<sup>15</sup> encountered in the now former “III pillar” is precisely the European Protection Order (hereinafter, also “EPO”)<sup>16</sup>: by the end of 2017, out of 1,180 victims entitled to benefit from

- 11 See Directive 2011/99/EU, Recital 6: “In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved”.
- 12 See Directive 2011/99/EU on the European protection order; Regulation 606/2013 on mutual recognition of protection measures in civil matters; Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.
- 13 See Articles 81 ff. of Chapter 4, Title 5 TFEU.
- 14 See, among many others, ILLUMINATI G., *L’armonizzazione della prova penale nell’Unione europea*, (in) AA. VV., *Prova penale e Unione europea*, (a cura di) ILLUMINATI G., Bologna, 2009, p. 9. See also ERVO L., *La Orden Europea de protección: eficacia europea o un simple sialogo de besugos?*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de género y cooperación judicial penal en Europa*, (diretto da) MARTINEZ GARCIA E., Valencia, 2016, p. 208: “Otra cuestión fundamental sobre la que también deberíamos preguntarnos en este contexto tiene que ver con la soberanía estatal: no es un concepto anticuado? Muchos instrumentos transfronterizos chocan con ese principio fundamental, según el cual las autoridades estatales no tienen jurisdicción para operar en países extranjeros. Sus competencias solo llegan hasta la frontera, donde los delinquentes, los acosadores y otros tipos de malhechores continúan su trayecto”.
- 15 On this matter, see WEYMBERGH A., *L’harmonisation des législations: condition de l’espace pénal européen et révélateur des ses tensions*, Bruxelles, 2004. See also TADIĆ F.M., *How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law*, (in) *Harmonisation and harmonising measures in criminal law*, (a cura di) KLIP A. – VAN DER WILT H., Amsterdam, 2002.
- 16 For a further in-depth analysis of the instrument under examination, of the protection measures provided for by the individual Member States and of victim protection in the Member States and in the European union, see: ADDISON N. – LARSON-CRUTTENDEN T., *Blackstone’s guide to the protection from harassment act*, Blackstone Press, 1997; ALLEGREZZA S., *La riscoperta della vittima nella giustizia penale europea* (in) *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, (a cura di) ALLEGREZZA S. – BELLUTA H. – GIALUZ M. – LUPARIA L., Torino, 2012; AMALFITANO C., *Unione europea e principio del reciproco riconoscimento delle decisioni penali*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; ASP P., *The sub-*

an EPO<sup>17</sup>, only 7 – according to the studies published by the European Parliament –

*stantive Criminal Law Competence of the EU*, Stockholm, 2012; BAZELL C. – GIBSON B., *Domestic violence and occupation of the family home*, Sheffield on London, 1999; BECERRIL T.J. – ROMEO LÓPEZ C., *The european protection order*, (in) *Eu crim.*, 2011, II, pp. 76 ff.; BOCK S., *Das europäische Opferrechtspaket: zwischen substantiellem Fortschritt und blindem Aktionismus*, (in) *ZIS*, 2013; BONTEMPELLI M., *Novità nelle procedure di revoca e sostituzione*, (in) *Misure cautelari ad personam in un triennio di riforme*, Torino, 2015; CAGOSSI M., *L'ordine di protezione europeo fa il suo ingresso nell'ordinamento italiano*, (in) *Dir. pen. cont.*, 23 febbraio 2015; CAGOSSI M., *L'ordine di protezione europeo fa il suo ingresso nell'ordinamento italiano*, (in) *Dir. pen. cont.*, 23 marzo 2015; CAIANIELLO M., *Dal terzo pilastro ai nuovi strumenti: diritti fondamentali, "road map" e l'impatto delle nuove direttive*, (in) *Dir. pen. cont.*, 4 febbraio 2015; CAMALDO L., *Novità sovranazionali*, (in) *Proc. pen. e giust.*, 2012, II; CAMPBELL C., *Neues EU-Gewaltschutzverfahrensgesetz zum 11.1.2015*, (in) *NJW-Spezial*, 2014; CASIRAGHI R., *Il procedimento di emissione dell'ordine europeo*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; CHATTERTON C., *Bail. Law and Practice*, Butterworths, 1986; DAMATO A., *Un intervento diretto a garantire la libertà da ogni coercizione*, (in) *Guida al diritto*, 2015, XIII; DE AMICIS G., *Il mandato d'arresto europeo: prassi e problemi applicativi*, (in) [www.europeanrights.eu](http://www.europeanrights.eu); DI NICOLA P., *L'applicazione delle misure di prevenzione agli indiziati del delitto di atti persecutori*, (in) *Il Penalista*, Milano, 2017; DUTTA A., *Grenzüberschreitender Gewaltschutz in der Europäischen Union*, (in) *FamRZ*, 2015; ERVO L., *La Orden Europea de protección: eficacia europea o un simple sialogo de besugos?*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de género y cooperación judicial penal en Europa*, (diretto da) MARTINEZ GARCIA E., Valencia, 2016; European Parliament, *Report on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI))*, Committee on Civil Liberties, Justice and Home Affairs Committee on Women's Rights and Gender Equality, 14.3.2018 (A8-0065/2018); European Parliament, *Resolution of 19 April 2018 on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI))*, 19.4.2018, P8\_TA-PROV(2018)0189; FREIXES T. – ROMÀN L., *Protection of the Gender-based violence victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order*, Publicacions Universitat Rovira i Virgili, Publicacion Universitat Autònoma de Barcelona, 2014; GALLEGO SÁNCHEZ G., *La violencia contra la mujer en la Unión Europea. La Directiva 2011/99/UE: La Orden Europea de Protección*, (in) *Revista de Jurisprudencia*, 2012, IV; GIALUZ M., *Lo statuto europeo delle vittime vulnerabili*, (in) *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, (a cura di) ALLEGREZZA S. – BELLUTA H. – GIALUZ M. – LUPARIA L., Torino, 2012; ILLUMINATI G., *L'armonizzazione della prova penale nell'Unione europea*, (in) AA. VV., *Prova penale e Unione europea*, (a cura di) ILLUMINATI G., Bologna, 2009; JIMÉNEZ BECERRIL T. – ROMERO LOPEZ C., *The European Protection Order*, (in) *Eurocrim.*, 2011, II; KEMPER R., *Internationaler Gewaltschutz im Wandel*, (in) *FuR*, 2015; KEMPER R., *Internationaler Gewaltschutz im Wandel*, (in) *FuR*, 2015; LADRÓN DE GUEVARA J.B., (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; LADRÓN DE GUEVARA J.B., *European protection order: analogies and differences with the spanish protection order*, (in) *Dir. pen. cont.*, 6 marzo 2013; LADRÓN DE GUEVARA J.B., *Il nuovo ordine europeo di protezione in Spagna*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; LONATI S., *Le vicende modificative dell'ordine di protezione europeo*, (in) AA. VV., *L'ordine europeo di protezione. La tutela*

were the orders actually issued<sup>18</sup>. The reasons for such a limited use of the EPO are

delle vittime di reato come motore della cooperazione giudiziaria, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; LUDOVICI L., *L'ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015; MARTINEZ PARDO V.J., *La Orden Europea de Protección: la cooperación jurisdiccional. Las anotaciones en los registros públicos*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de género y cooperación judicial penal en Europa*, (diretto da) MARTINEZ GARCIA E., Valencia, 2016; MEZZOLLA V., *La tutela delle vittime di reato e l'attuazione della Direttiva 2011/99/UE*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; MITSILEGAS V., *EU Criminal Law*, Oxford and Portland, 2009; MOIOLI C., *Nuove misure "europee" di protezione delle vittime di reato in materia penale e civile*, (in) www.eurojus.it, 27 febbraio 2015; MOLINA MANSILLA M.C., *La protección de la víctima en el espacio europeo: la orden europea de protección*, (in) *La Ley penal*, 2012, XCII, pp. 1 e ss.; MORGADE CORTES M., *La orden europea de protección como instrumento tuitivo de las víctimas de violencia de género*, (in) *Cuaderno Electrónico de Estudios Jurídicos*, III, 2014; PARLATO L., *La disciplina tedesca (e quella austriaca) sull'ordine di protezione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; PEERS S., *EU Justice and Home Affairs Law*, Oxford University Press, 2011; PÉREZ MARÍN M. A., *La lucha contra la criminalidad en la Unión Europea. El camino hacia una Jurisdicción Penal común*, Madrid, 2013; PEYRÓ LLOPIS A., *La protección de las víctimas en la Unión Europea: La orden europea de protección*, (in) *Revista Española de Derecho Europeo*, XLVI, 2013; RECCHIONE S., *Il riconoscimento dell'ordine di protezione europeo*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; RIESS P., *Die Rechtsstellung des Verletzten im Strafverfahren, Gutachten C für den 55. Deutschen Juristentag*, (in) AA. VV., *Verhandlungen des 55. DJT*, München, 1984; RODRÍGUEZ L., *La Orden Europea de Protección*, (in) *Diario La Ley*, n. 7854, 2012; RUGGERI F., *Ordine di protezione europeo e Legislazione italiana di attuazione: un'analisi e qualche perplessità*, (in) *Processo penale e giustizia*, V, 2015; SCHNEIDER H., *Verfahren nach dem neuen EU-Gewaltschutzverfahrgesetz*, (in) *FamRB*, 2015; SIMONATO M., *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, Padova, 2014; SOYER R., *Opferrechte in Österreich*, (in) *StraFo*, 2014; SPRACK J., *A practical approach to criminal procedure*, Oxford University Press, 2012; TADIĆ F.M., *How armoniousus can harmonisation be? A theoretical approach towards harmonisation of (criminal) law*, (in) *Harmonisation and harmonising measures in criminal law*, (a cura di) KLIP A. – VAN DER WILT H., Amsterdam, 2002; TROGLIA M., *L'ordine di protezione europeo dalla direttiva alla recente legislazione italiana di recepimento: alcune riflessioni*, (in) *Cass. Pen.*, 2015; VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the european member states*, (in) *Wolf Legal Publisher*, 2015; VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX; VAN DER AA S. – SOSA L. – NIEMI J. – FERREIRA A. – BALDRY A., *Challenges to the european protection order: mutual recognition in the light of different national protection systems*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016; VAN DER AA S., *Protection Orders in the European Member States: Where do we stand and where do we go from here?*, (in) *Eur. J. Crim. Policy Res.*, 2012; WARD R. – BIRD R., *Domestic violence, Crime and Victims 2004*, Jordans, 2004; WEYMBERGH A., *L'harmonisation des législations: condition de l'espace pénal européen et révélateur des ses tensions*, Bruxelles,

multiple: from the issues relating to the “issuing” and “execution” stages, to the ones arising out of the very “requirements” underlying the instrument, conceived as a “mutual recognition” mechanism, which, however, is not supported by a sufficient degree of harmonization among the domestic legislations<sup>19</sup>.

## 2. Main characteristics of the European Protection Order

The rationale behind the introduction of the European Protection Order, by means of the aforementioned Directive 2011/99/EU (hereinafter, the “EPO DIRECTIVE”)<sup>20</sup>, is described in detail in the European Implementation Assessment of September 2017<sup>21</sup>:

2004; WIECZOREK I., *The new proposal on victims' rights: law enforcement or safeguard for the rights of the individual?*, (in) *New Journal of European Criminal Law*, 2011, II, n. 3.

- 17 The study commissioned by the European Parliament on the European Protection Order Directive 2011/99/EU, entitled “European Implementation Assessment”, jointly requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) and by the Committee on Women’s Rights and Gender Equality (FEMM), and published in September 2017, states that: “In 2010, the Council of the EU estimated that over 100 000 (118 000) women residing in the EU were covered by protective measures related to gender-based violence (...) The two European Parliament co-rapporteurs on the draft EPO directive (Teresa Jiménez-Becerril and Carmen Romero López) argued at the time that, by estimating that at least 1% of these victims would move, an average of 1180 individuals would need continuous protection across the EU” (pp. 8 and 9).
- 18 See the European Implementation Assessment, p. 17: “Two research projects were funded in 2012-2014 under the European Commission's DAPHNE Programme to explore the issue of protection orders at the level of Member States (...) The research team that prepared the study could identify only seven EPOs issued since the entry into force of the directive: four of the seven EPOs were issued in Spain, two in the UK and one in Italy”.
- 19 The EPO DIRECTIVE (Recital 8) is explicit on this matter: “This Directive 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. This 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”.
- 20 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (“EPO DIRECTIVE”).
- 21 See also FREIXES T. – ROMÀN L., *Protection of the Gender-based violence victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order*, Publicacions Universitat Rovira i Virgili, Publicacion Universitat Autònoma de Barcelona, 2014, p. 8: “The same goal of protecting the victims of violence in a comprehensive way can be found in Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011, which in addition establishes a mechanism for judicial cooperation which aims to ensure this protection when a victim of violence exercises his/her right to free movement within the EU: the European Protection Order. The European Protection Order (EPO) aims to ensure that the victims of violence, including the victims of gender violence, who have obtained a protection order in one of the EU Member States, continue to receive this protection when they move to another Member State. This principle, which seems so obvious and so simple, presents a large number of difficulties. The European Union has therefore created a number of instruments, such as the EPO, to guarantee that Court decisions made in one of the Member States are also enforced in other Member States, as established by Article 82 of the Treaty on the Functioning of the European Union, when provid-

“If an individual benefiting from protective measures issued in one Member State decides to travel or reside in another Member State, how can it be ensured that those measures are valid and enforced outside the Member State of origin? Individuals under threat in one Member State may have various reasons or obligations to spend some time in another Member State: to visit family, to travel for holidays, or to work (especially in cross-border areas). A victim might also decide to establish her/himself in another Member State to start afresh. Therefore, there is a strong cross-border dimension in victim protection that needs to be taken into account”.

Indeed, in the past, any national protection measures issued for the benefit of a “victim” would have only been “effective on the territory of the state which adopted them”<sup>22</sup>, hence “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”<sup>23</sup>, thereby having to face all the issues that new proceedings would entail<sup>24</sup>, starting with the *ne bis in idem* principle – also applied in EU law. Consequently, victims would have been forced to choose whether to sacrifice their “freedom of movement”<sup>25</sup> or the protection ensured by the State of residence<sup>26</sup>.

ing that judicial cooperation implies the mutual recognition of judgments and judicial decisions”.

- 22 See VAN DER AA S., *Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?*, (in) *European Journal on Criminal Policy and Research*, 2012, p. 184: “Supposedly, all European Member States have (criminal) protection orders available, but at present they are only effective on the territory of the state which adopted them, thereby seriously impeding victims who wish to cross borders. Once implemented, the EPO would provide a legal basis for EU Member States to recognize a victim protection order that was granted in another Member State”.
- 23 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 268. In the same terms, VAN DER AA S. – SOSA L. – NIEMI J. – FERREIRA A. – BALDRY A., *Challenges to the european protection order: mutual recognition in the light of different national protection systems*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 4: “until recently, protection orders were only valid on the territory of the Member State that issued the order. Victims who travelled or moved to another Member State were forced to initiate new proceedings or to acquire a substitute protection order in the new country of residence, which could seriously inconvenience the victim. As a result, the victim’s freedom of movement could be hindered”.
- 24 See CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. IX.
- 25 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 268.
- 26 See LUDOVICI L., *L'ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 354: “at the root of this statutory intervention is, therefore, the need to avoid that the right to move freely within the European Union ironically ends up putting on the citizen the heavy burden of having to relinquish the protection mechanisms initiated for his or her benefit in the State of origin”.

Thus, for the purpose of satisfying cross-border protection needs across a European Union that may truly be free of internal boundaries (and not just physically)<sup>27</sup>, the EPO DIRECTIVE established “a mechanism to ensure mutual recognition among Member States of decisions concerning protection measures for victims of crime”<sup>28</sup>, in such a way that “the protection stemming from certain protection measures adopted according to the law of one Member State (‘the issuing State’) can be extended to another Member State in which the protected person decides to reside or stay (‘the executing State’)”<sup>29</sup>.

The analysis of the EPO DIRECTIVE enables to outline some of the main characteristics of the EPO, among which:

- the necessary involvement of (at least) two Member States of the European Union, one as the State of issuance and the other as the State of (recognition and) execution<sup>30</sup>;
- the subsidiary nature of the instrument<sup>31</sup>: the EPO is a “second degree” measure<sup>32</sup>, which means it is issued in addition to a pre-existing order – usually a court order – *already* imposing, in the issuing State, a number of “protection measures” aiming to ensure the safety of a victim or potential victim from illegal conducts. The purpose of this instrument is, therefore, to make sure that the protection of the victim is extended to all other EU Member States, by means of a specific recognition procedure;

27 See TROGLIA M., *L'ordine di protezione europeo dalla direttiva alla recente legislazione italiana di recepimento: alcune riflessioni*, (in) *Cass. Pen.*, 2015.

28 Recital 5 of the EPO DIRECTIVE.

29 Recital 7 of the EPO DIRECTIVE. The European Implementation Assessment of 2017 acknowledged that, with regards to victims who intend to travel across the EU or to move (even on a temporary basis) to another Member State, the purpose of the protection order was precisely that to: “continue to protect persons finding themselves in such circumstances, ensuring that in the Member State to which they move they will receive a level of protection identical or equivalent to the protection they enjoyed in the Member State which adopted the protection measure” (p. 11).

30 You may see LONATI S., *Le vicende modificative dell'ordine di protezione europeo*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 107.

31 See, specifically, Article 5 of the EPO DIRECTIVE. See, in the literature, CUETO MORENO C., *La Orden europea de protección. Su transposición en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Unión europea*, (in) *ReDCE*, XXI, 2014, p. 228: “*La relación de la OEP con la medida de protección es de subsidiariedad y dependencia de aquella respecto de ésta: la existencia de una medida de protección en los términos antes indicados constituye presupuesto jurídico indispensable para que por el Estado de emisión se acuerde una OEP (...)*”. The “*carácter instrumental de la OEP*” is also highlighted in MOLINA MANSILLA M. C., *La protección de la víctima en el espacio europeo: La Orden Europea de Protección*, (in) *La Ley Penal*, XCH, 2012, p. 13.

32 See LADRÒN DE GUEVARA J.B., *Il nuovo ordine europeo di protezione in Spagna*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 236.

- a scope of application that includes all victims (even only potential victims), rather than just the most “fragile” and vulnerable individuals, such as minors and women<sup>33</sup>;
- a guarantee of protection of the (potential) victim against not just a more or less extensive range of crimes but against any “criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity”<sup>34</sup>;
- the – generally – procedural origins of the instrument<sup>35</sup>, even in the absence of a judicial decision that ascertains the existence of a criminal offence<sup>36</sup>.

### 3. An overview of the implementation of the EPO Directive in Italy, Spain and the United Kingdom

For the purpose of this article, the analysis herein only covers the domestic legal systems that, to this day, have issued at least one protection order: namely, Italy, Spain and the United Kingdom.

#### 3.1. Italy: Legislative Decree No. 9/2015

In Italy, the European Protection Order was introduced by Legislative Decree No. 9 of 11 February 2015. Very briefly, the “active” procedure for issuing an EPO is triggered in the context of criminal proceedings that have already been initiated: if the judge presiding over the relevant case has already issued one of the precautionary mea-

33 See PÉREZ MARÍN M. Á., *La lucha contra la criminalidad en la Unión Europea. El camino hacia una Jurisdicción Penal común*, Madrid, 2013, p. 268. Negli stessi termini, MOIOLI C., *Nuove misure “europee” di protezione delle vittime di reato in materia penale e civile*, (in) [www.eurojus.it](http://www.eurojus.it) e MARTINEZ PARDO V.J., *La Orden Europea de Protección: la cooperación jurisdiccional. Las anotaciones en los registros públicos*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de genero y cooperación judicial penal en Europa*, (diretto da) MARTINEZ GARCIA E., Valencia, 2016, p. 160.

34 Article 2(1)(2) of the EPO DIRECTIVE. See also LADRÒN DE GUEVARA J.B., *Il nuovo ordine europeo di protezione in Spagna*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 233: “it seems crucial to highlight how the new European Protection Order sees to the protection of all victims, without any distinctions related to the type of criminal offence”.

35 LADRÒN DE GUEVARA J.B., *Il nuovo ordine europeo di protezione in Spagna*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 239.

36 In compliance with Article 1 of the EPO DIRECTIVE, “*la protección podrá tener su origen tanto en una infracción penal como en una presunta infracción penal, no siendo por lo tanto necesario que se haya declarado mediante una resolución firme la existencia de un delito*”, così MORGAGE CORTES M., *La Orden europea de protección como instrumento tutitivo de las víctimas de violencia de genero*, (in) *Cuaderno Electrónico de Estudios Jurídicos*, 2014, III, p. 103.

asures set forth in Articles 282-bis<sup>37</sup> and 282-ter<sup>38</sup> of the Italian Code of Criminal Procedure, he is *also* required to inform the victim of the possibility to request an EPO<sup>39</sup>. This means that in the Italian legal system, the procedure for issuing an EPO essentially *overlaps* with the underlying procedure for issuing a precautionary measure in criminal proceedings; thus, in Italy:

- the protection measures set forth in the EPO DIRECTIVE match the pre-trial precautionary measures described in Articles 282-bis and 282-ter of the Italian Code of Criminal Procedure, which inevitably entails the application of the related provisions regarding: probable cause, pursuant to Article 273 Italian Code of Criminal Procedure; grounds for issuance, pursuant to Article 274 Italian Code of Criminal Procedure; time limits, pursuant to Article 308 Italian Code of Criminal Procedure; and, especially, initiation of the procedure upon the request of the Public Prosecution (see Article 291 Italian Code of Criminal Procedure); this latter circumstance “splits the power to request a precautionary measure and the power to request an EPO between two different parties”<sup>40</sup>;

- 37 Article 282-bis(1), (2) and (3) Italian Code of Criminal Procedure (“Removal from family home”):
- “1. In issuing the order, the judge compels the defendant to immediately leave the family home, or to refrain from returning to it, and prohibits him or her to access the home without the approval of the judge before which the proceedings are pending. The approval granted may prescribe specific visitation plans.
  2. In case the safety of the victim or of close relatives thereof is at risk, the judge may also prohibit the defendant from approaching the places frequently visited by the victim, in particular the workplace, and the domicile of the parents or of close relatives, unless visits to such places are required for work. In this latter circumstance, the judge shall prescribe the relevant terms and may impose restrictions.
  3. Upon request by the Public Prosecutor, the judge may also order periodic payments, by cheque, to the household members who, as a result of the restraining order issued, are left without adequate resources”.
- 38 Article 282-ter Italian Code of Criminal Procedure (“Prohibition to approach the places visited by the victim”):
- “1. In issuing the order, the judge prohibits the defendant to approach places frequently visited by the victim or to come within a certain distance of such places or the victim.
  2. Should there be the need to provide further protection, the judge may prohibit the defendant to approach certain places frequently visited by close relatives or household members of the victim or by other persons having a personal relationship with the victim, or from coming within a certain distance of such places or persons.
  3. The judge may also prohibit the defendant from communicating, by any means, with the persons enumerated in paragraphs 1 and 2.
  4. When visits to the places described in paragraphs 1 and 2 are required for work- or residence-related purposes, the judge shall prescribe the relevant terms and may impose restrictions”.
- 39 See Article 282-quater (1-bis) Italian Code of Criminal Procedure.
- 40 LUDOVICI L., *L’ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 358. Cfr. anche CASIRAGHI R., *Il procedimento di emissione dell’ordine europeo*, (in) AA. VV., *L’ordine europeo di*

- whereas, the preventive measures set forth in Legislative Decree No. 159/2011<sup>41</sup>, which are issued – among others – against suspects accused of stalking, under Article 612-bis of the Italian Criminal Code, are not regarded as “protection measures” entitling to an EPO<sup>42</sup>;
- the judge competent for issuing the protection order is the same who previously ordered the precautionary measures; therefore, technically, only the “precautionary” judge<sup>43</sup>;
- the “protected person” described in the EPO DIRECTIVE matches the “offended party” of the crime for whose benefit the aforementioned precautionary measures are requested (see Article 282-quater(1-bis) Italian Code of Criminal Procedure)<sup>44</sup>;
- given that the “protection measures” coincide with the precautionary measures set forth in Article 282-bis and 282-ter of the Italian Code of Criminal Procedure, the former necessarily apply when a crime has already been committed and, therefore, when criminal proceedings have already been initiated<sup>45</sup>; furthermore, said measures may not be ordered once the proceedings have ended, unlike in other legal orders (such as the United Kingdom)<sup>46</sup>;
- as for the time limits, it would appear as though the EPO may only be issued concurrently with the underlying national protective measures (see Article 282-

*protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 76.

41 So-called “Anti-Mafia Code”.

42 Indeed, Law No. 161/2017 added letter i-ter) to Article 4(1) of Legislative Decree No. 159/2011 (so-called Anti-Mafia Code), with the purpose to extend the scope of application of the preventive measures set forth therein – in particular, the special surveillance measure under Article 6 of Legislative Decree No. 159/2011 – to suspects of stalking under 612-bis Italian Criminal Code.

43 This mechanism can short circuit the EPO’s enforcement, as the judge issuing the precautionary measures might not, at the time of request for a European Protection Order, necessarily be the judge before which the proceedings are currently pending: consequently, “the competence would lie with a body that, no longer holding the trial records, would lack the means to assess the essential requirement of an existing underlying national protection measure or to provide the authority of the executing State (...) with all the information deemed essential for deciding upon the recognition of a European Protection Order issued in Italy (...)”, LUDOVICI L., *L’ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 359. The solution would be to “place the competence regarding European Protection Orders in the hands of the trial before which the proceedings are pending, by following the same criteria applied to precautionary measures”.

44 Art. 282-quater (1-bis) Italian Code of Criminal Procedure: “... the victim shall be informed of the possibility to request a European Protection Order”.

45 On the contrary, other legal systems such as Finland, Denmark and Sweden set forth that “‘quasi-criminal’ protection orders can even be issued without suspension or prosecution for a crime”, VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the european member states*, (in) *Wolf Legal Publisher*, 2015, p. 231.

46 Consider the post-trial restraining orders issued under Section 5 of the Protection from Harassment Act of 1997.

quater(1-bis) Italian Code of Criminal Procedure)<sup>47</sup>, since no mention is made as to whether the request may also be filed subsequently. Such a limitation would cause a significant prejudice to all those victims who decide to move to another EU Member State only at a later stage – perhaps long after the application of the precautionary measures<sup>48</sup>.

If a request for an EPO is filed following the making of the above precautionary measures, the same judge will be competent to issue the order<sup>49</sup>; notice of the order must subsequently be given *without undue delay* to the Ministry of Justice, which shall be responsible for transmitting it to the authority of the Member State in which the “protected person” has declared to reside or stay, or to intend to reside or stay, for the purpose of recognition<sup>50</sup>.

As for the “passive” procedure for the recognition and execution of an EPO issued by another Member State, the request must be filed with the Ministry of Justice<sup>51</sup>, which will give notice of the request to the President of the Court of Appeal in the district in which the “protected person” has declared to reside or stay, or to intend to reside or stay<sup>52</sup>. The Court of Appeal will then decide, without any formalities, within ten days of receipt of the protection order, by means of a decision that may be challenged before the Supreme Court of Cassation<sup>53</sup>: if recognition is granted, the Court will order the enforcement of the precautionary measures set forth in Articles 282-bis and 282-ter of the Italian Code of Criminal Procedure, thereby imposing obligations that essentially coincide with those prescribed by the issuing State, in such a way as to ensure an *equivalent* degree of protection<sup>54</sup>.

### 3.2. Spain: Ley No. 23/2014

In Spain, the EPO DIRECTIVE was transposed by *Ley* No. 23 del 2014<sup>55</sup>.

47 Indeed, it would appear as though, technically, the request for a European Protection Order must be submitted concurrently with – or immediately after – the pre-trial precautionary measures made by the judge.

48 LUDOVICI L., *L'ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 358.

49 See Article 5(1) of Legislative Decree No. 9/2015.

50 See Article 6(1) of Legislative Decree No. 9/2015.

51 See Article 8(1) of Legislative Decree No. 9/2015.

52 See Article 7 of Legislative Decree No. 9/2015.

53 See Article 9(3) of Legislative Decree No. 9/2015.

54 See Article 9(1) of Legislative Decree No. 9/2015.

55 *Ley* 23/2014 *de reconocimiento mutuo de resoluciones penales en la Unión Europea, Título VI, Orden europea de protección*.

Protection orders are issued by the judge or Court presiding over the criminal proceedings in which “protection measures” are issued<sup>56</sup> – namely, criminal law measures<sup>57</sup> entailing:

“a) la prohibición de entrar o aproximarse a determinadas localidades, lugares o zonas definidas en las que la persona protegida reside o que frecuenta; b) la prohibición o reglamentación de cualquier tipo de contacto con la persona protegida, incluidos los contactos telefónicos, por correo electrónico o postal, por fax o por cualquier otro medi; c) o la prohibición o reglamentación del acercamiento a la persona protegida a una distancia menor de la indicada en la medida”<sup>58</sup>.

It is held that the duty to transmit the protection order to the competent authorities of the executing State lies *directly* with the judicial authority<sup>59</sup>.

As for the recognition procedure, the request is assessed by the competent judge or Court, without undue delay, after consultation with the “*Ministerio Fiscal*”, within three days of receipt of the request, accompanied by the necessary documentation. In the absence of grounds for non-recognition, the judicial authority shall adopt those protective measures provided for by the Spanish legal system that match, to the highest degree, the ones ordered in the issuing State<sup>60</sup>.

### 3.3. United Kingdom: the Criminal Justice Regulations No. 3300/2014

In the United Kingdom, the EPO DIRECTIVE was transposed by the Criminal Justice Regulations No. 3300 of 2014. Worthy of mention is the bizarre limitation of their scope of application to England and Wales only.

Very briefly, with regards to the “active” side of the procedure: the authority vested with the power to issue an EPO is the judicial authority (generally the Magistrates’

<sup>56</sup> Article 131 *Ley 23/2014*.

<sup>57</sup> “*En relación a la definición de OEP contenida en el art. 2 de la Directiva, el Proyecto añade expresamente que se trata de una resolución de naturaleza “penal”, como se desprende en todo caso de su contenido, si bien omite indicar que la autoridad competente del Estado de ejecución adoptará en su caso la medida o medidas oportunas a fin de mantener la protección de la persona protegida “con arreglo a su propio Derecho nacional”, CUETO MORENO C., La Orden europea de protección. Su transposición en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Unión europea, (in) ReDCE, XXI, 2014, p. 224.*

<sup>58</sup> Article 130 *Ley 23/2014*.

<sup>59</sup> See, among many others, CUETO MORENO C., *La Orden europea de protección. Su transposición en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Unión europea*, (in) *ReDCE*, XXI, 2014, p. 231; LADRÓN DE GUEVARA J.B., *Il nuovo ordine europeo di protezione in Spagna*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESAGASTALDO, Torino, 2016; MOLINA MANSILLA M.C., *La protección de la víctima en el espacio europeo: la orden europea de protección*, (in) *La Ley penal*, 2012, XCII, pp. 1 e ss.; MORGADÉ CORTÉS M., *La orden europea de protección como instrumento tutivo de las víctimas de violencia de género*, (in) *Cuaderno Electrónico de Estudios Jurídicos*, III, 2014; RODRÍGUEZ L., *La Orden Europea de Protección*, (in) *Diario La Ley*, n. 7854, 2012.

<sup>60</sup> Article 138 *Ley 23/2014*.

Court or, upon certain conditions, the Crown Court) that previously made a protection measure<sup>61</sup>. Nonetheless, it is the victim's duty to request the making of an order before leaving the United Kingdom.

Specifically, the "protection measures" meeting the requirements for the purpose of an EPO are defined as follows<sup>62</sup>:

*"a decision or order of a court in England and Wales when dealing with a criminal cause or matter, in which one or more of the following prohibitions or restrictions are placed on an individual: a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits; b) a prohibition or restriction of contact with the protected person by any means (including by telephone, post, facsimile transmission or electronic mail); c) a prohibition or restriction preventing the individual from approaching the protected person whether at all or to within a particular distance"*.

If the order is made, the same judge will transmit it to the competent authority of the executing State<sup>63</sup>.

As for the "passive" side of the procedure, the Criminal Justice Regulations 2014 stipulate that the request of the issuing State be notified to the Lord Chancellor<sup>64</sup> – identified as the "central authority" – who will then transmit the order to the Magistrates' Court, which must decide "without undue delay"<sup>65</sup>.

To this regard, note should be taken of a significant difference with the "active" side of the procedure: while there seem to be no limitations as to the measures of protection available to the UK judicial authority, on the contrary, when the United Kingdom acts as the executing State, the protection measures that may be enforced – under Regulation 13(2) of the Criminal Justice Regulations 2014<sup>66</sup> – are only the ones set forth in Section 5 of the Protection from Harassment Act 1997. Specifically, Section 5 governs the recourse to post-trial protection measures, namely, restraining orders on conviction, which the judge may apply upon conviction of the defendant for the purpose of protecting the victim against conducts that amount to harassment or cause fear

61 This is the "relevant court" under Regulation 3 and Regulation 4(2) of the Criminal Justice Regulations 2014.

62 See Regulation 3 of the Criminal Justice Regulations 2014.

63 See Regulation 9 of the Criminal Justice Regulations 2014.

64 Second-highest Office of State held in combination with that of Secretary of State for Justice, appointed by the Sovereign and essentially comparable to the Italian Ministry of Justice.

65 See Regulation 12 of the Criminal Justice Regulations 2014.

66 See Regulation 13(2) of the Criminal Justice Regulations 2014:

"The magistrates' court must give effect to the order by making a restraining order under section 5 of the Protection from Harassment Act 1997 (...)"

of violence<sup>67</sup>. Whereas, no mention is made to other instruments such as bail<sup>68</sup> – the pre-trial measure governed by the Bail Act 1976 and Section 37 of the Police and Criminal Evidence Act 1984 – or restraining orders on acquittal<sup>69</sup>, the post-trial protection measure that may be made by the Court even upon acquittal of the defendant, as defined in Section 5(A) of the Protection from Harassment Act 1997 inserted by Section 12(5) of the Domestic Violence, Crime and Victims Act 2004.

In conclusion, the provisions set forth in the Criminal Justice Regulations 2014 outline a clearly unequal treatment: while a UK victim may benefit from the protection

- 67 Section 5 Protection from Harassment Act 1997 “Restraining orders on conviction”:  
 “(1) A court sentencing or otherwise dealing with a person (“the defendant”) convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section. (2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which – (a) amounts to harassment, or (b) will cause a fear of violence, – prohibit the defendant from doing anything described in the order. (3) The order may have effect for a specified period or until further order. (3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3. (4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order. (4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4). (5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence. (6) A person guilty of an offence under this section is liable – (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both. (7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order”.
- 68 Technically, conditional bail was conceived as an instrument to balance the “person’s right not to be deprived of his or her liberty for a prolonged period of time during criminal proceedings” with “the State’s interest in ensuring the participation of said person in the proceedings and avoid the perpetration of any further criminal offences” (MEZZOLLA V., *La tutela delle vittime di reato e l’attuazione della Direttiva 2011/99/UE*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 175); however, the array of restrictions that may be imposed by means of bail, also with a view to “ensuring the victim’s psychological and physical integrity” have ultimately turned this mechanism into an “important instrument of protection”.
- 69 Section 5(A) Protection from Harassment Act 1997 “Restraining orders on acquittal”:  
 “(1) A court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order. (2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one. (3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section. (4) Where – (a) the Crown Court allows an appeal against conviction, or (b) a case is remitted to the Crown Court under subsection (3), the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court. (5) A person made subject to an order under this section has the same right of appeal against the order as if – (a) he had been convicted of the offence in question before the court which made the order, and (b) the order had been made under section 5”.

ensured by means of bail, restraining orders on conviction and restraining orders on acquittal, a cross-border victim intending to reside or stay in the United Kingdom would – according to national law – only benefit from restraining orders on conviction.

#### 4. *Similarities and differences in the implementation of the EPO Directive*

Some similarities and differences may be pinpointed in the methods of implementation adopted in the aforementioned legal systems. In particular:

- a) protection measures are determined and made by the judicial authority before which criminal proceedings are pending, consistently with the aim of the EPO DIRECTIVE, which has defined the EPO as an “instrument of mutual recognition in criminal matters”<sup>70</sup>; generally these measures will be “pre-trial protection measures”<sup>71</sup>;
- b) in line with the provisions of Article 5 of the EPO DIRECTIVE, protection measures entail – even rather significant – restrictions of the liberties and powers of the person “causing danger” to the victim, among which<sup>72</sup>:
  - i. the prohibition to enter certain localities, places or areas which the victim resides in or visits;
  - ii. the prohibition to contact the victim, by any means;
  - iii. the prohibition to physically approach the victim;
- c) in Italy, during the “active” stage of the procedure, the judge who issued the EPO, must subsequently transmit it to the Ministry of Justice, which shall then be responsible for notifying the competent authority of the executing State. On the contrary, in the United Kingdom, albeit the Lord Chancellor has been identified as the central authority, it is actually the Court that has issued the EPO that will directly transmit it to the competent authority of the executing State for the purpose of recognition. Lastly, in the Spanish legal system, it is not expressly stated which authority is responsible for notifying the competent authorities of the exe-

70 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 281. Eccezione rilevante è costituita dall’ordinamento tedesco, in cui l’ordine di protezione si innesta nell’ambito di una tutela di natura squisitamente civilistica. For further details, see PARLATO L., *La disciplina tedesca (e quella austriaca) sull’ordine di protezione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, pp. 193 ff..

71 See VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 267.

72 See: a) Article 282-bis and 282-ter Italian Code of Criminal Procedure, as referred to by Article 5 of Legislative Decree No. 9/2015; b) Article 130 of *Ley No. 23 del 2014*; c) Article 3 of the Criminal Justice Regulations No. 3300 of 2014.

cuting State<sup>73</sup>: it appears, however, that it should be the judicial authority that issued the EPO, since the latter is responsible for notifying the competent authorities of the executing State of any extension, review, modification, revocation or cancellation of the protection measures and, consequently, of the protection order<sup>74</sup>;

- d) with reference to the “passive” stage of the procedure, both Italy and the United Kingdom have designated a “central authority” (pursuant to Article 4 of the EPO DIRECTIVE)<sup>75</sup> that is responsible for receiving – and “sorting” – the requests for the recognition of protection orders: respectively, the Ministry of Justice and the Lord Chancellor. On the other hand, it would appear that in Spain it is the judicial authority that is directly competent for receiving any requests for the recognition of an EPO, namely, the Courts for preliminary investigation and the Courts for violence against women<sup>76</sup>;
- e) none of the legal systems examined herein set forth specific time limits within which an EPO must be issued;
- f) on the “passive” side of the procedure as executing State, Italy has set forth a period of ten days within which the Court of Appeal must either grant or refuse the EPO issued by another Member State; the other legal systems examined, on the other hand, have not provided for any clear deadlines: (i) in the United Kingdom, provisions stipulate that the Magistrates’ Court decide “without undue delay”; (ii) in Spain, that the “*Ministerio Fiscal*” be heard within 3 days<sup>77</sup> and that the decision on whether to grant or refuse recognition be made “*sin dilación*”;
- g) in line with the provisions of Article 6(4) of the EPO DIRECTIVE<sup>78</sup>, the legal systems considered in any case ensure – in the “active” stage of the procedure – that the person causing danger is heard; in particular, this right is ensured prior to the issuing of a protection order, since:
  - i. in Italy, when a precautionary measure is issued pursuant to Articles 282-bis and 282-ter of the Italian Code of Criminal Procedure, the alleged perpetra-

73 Although according to the European Implementation Assessment (p. 51), Spain too has nominated the Ministry of Justice as the central authority.

74 See Article 137 *Ley No. 23/2014*.

75 The establishment of a “central authority” was also supported by L FREIXES T. – ROMÀN L., *Protection of the Gender-based violence victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order*, Publicacions Universitat Rovira i Virgili, Publicacion Universitat Autònoma de Barcelona, 2014, p. 17: “we understand it would be highly advisable and necessary to establish a central national authority that coordinates and manages the issuing and execution of all orders and that oversees the state of modification, extension and suspension procedures regarding these orders. This authority could deal with identifying the courts that have the authority, both domestically and in other Member States, to issue and execute protection orders”. It should be noted that, among the Member States, just like Spain, neither Austria nor Germany have designated a central authority.

76 See Articles 131 and 138 *Ley No. 23/2014*.

77 Corresponding – more or less – to the Italian office of Public Prosecutor.

78 See Article 6(4) of the DIRECTIVE.

tor is subject to interrogation, albeit subsequently to the application of the measure, under Article 294 Italian Code of Criminal Procedure; thus no further hearing of the person causing danger is required for the purpose of issuing an EPO;

- ii. likewise, Spanish law provides that the “*persona causante del peligro*” be heard before a protection order is issued, unless said person was already heard before the protection measures were made<sup>79</sup>;
- iii. lastly, the United Kingdom also states the right for the person causing danger to be heard in the stages leading up to the adoption of a protection measure.

As for the “passive” stage of the procedure for the recognition and execution of an EPO, the EPO DIRECTIVE does not seem to impose on the Member States any further hearing of the person subject to the protection order.

## 5. Main issues

The legal framework outlined by the EPO DIRECTIVE presents a number of significant issues, which are the reasons behind such a “sporadic” use of the European Protection Order still to this day<sup>80</sup>. The issues may be divided into at least three macro-categories relating to: (a) the requirements; (b) the issuing stage; (c) the recognition and execution stages. Moreover, these issues are further exacerbated by a far from comprehensive and satisfactory degree of implementation of the EPO DIRECTIVE by the Member States.

### 5.1. Issues relating to the requirements

The main issues arising in connection with the requirements underlying the EPO essentially stem from it being a mechanism based on mutual recognition, rather than harmonisation<sup>81</sup>, in a field – that of criminal law – still marked by significant discrepancies among the domestic legal systems: it stands to reason that “mutual recognition in a field that is characterised by so many differences can be quite a challenge”<sup>82</sup>. The domestic criminal justice systems still largely differ with regards to, among others, the

79 If the person causing danger was not heard before the protection measures were made, he or she will in any case be called to appear, together with his or her attorney, before the “*Ministerio Fiscal*” and the other parties involved, within 78 hours of the request for the issuing of a protection order (See Article 134 *Ley No. 23/2014*).

80 The European Implementation Assessment, p. 18.

81 On this point, see criticism by VAN DER AA S., *Protection Orders in the European Member States: Where do we stand and where do we go from here?*, (in) *Eur. J. Crim. Policy Res.*, 2012, p. 185: “although the EPO is based on mutual recognition, not harmonization, in practice mutual recognition becomes very problematic when there is not a certain level of uniformity amongst protection measures”.

82 VAN DER AA S. – SOSA L. – NIEMI J. – FERREIRA A. – BALDRY A., *Challenges to the european protection order: mutual recognition in the light of different national protection systems*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 19.

type of offences criminalized, the requirements for criminal liability<sup>83</sup>, the eligibility conditions for criminal punishment<sup>84</sup>, and, inasmuch as of interest in this paper, the mechanisms of protection of potential victims. Under this latter aspect, the EPO DIRECTIVE does not ensure any *harmonization*, but rather simply describes the broad genus of “protection measures” that may be extended beyond national boundaries by means of an EPO. This inevitably results in a failure to ensure *standard* levels of protection to victims throughout the EU territory.

It should be noted that:

- firstly, the level of protection offered to the victims of the executing State is not required to be the *same* as or *similar* to the one ensured by the issuing State; it is sufficient that the measures *correspond*<sup>85</sup>. In other words, the executing State must: on the one hand, adopt the same protection measures that would have been adopted in a similar national case<sup>86</sup>; and, on the other, ensure that the domestic protection measures and those adopted by the issuing State *correspond* “to the highest de-
- 83 By way of example: The UK system – under Section 50 of the Children and Young Persons Act of 1933 – states that “it shall be conclusively presumed that no child under the age of ten can be guilty of any offence”, while the Italian legal system sets forth that “no person committing a crime under the age of fourteen may be held guilty” (Article 97 Italian Criminal Code). This means that, for the purpose of the EPO DIRECTIVE, a child under the age of fourteen in the United Kingdom may be subject to a protection order and, therefore, even a to European Protection Order, but the recognition of said order may be refused in Italy as the EPO DIRECTIVE itself – under Article 10(1)(h) – admits non-recognition if “under the law of the executing State, the person causing danger cannot, because of that person’s age, be held criminally responsible for the act or the conduct in relation to which the protection measure has been adopted”.
- 84 Consider, for instance, the issue of the statute of limitations, recently addressed in an articulated debate between the European Court of Justice on one side and the Italian Supreme Court of Cassation and the Constitutional Court on the other (the foregoing was referred to as the “Taricco Saga”): in common law systems – among which the UK system with which the ECtHR’s case law is closely aligned – the statute of limitations has a strictly procedural nature and role, inasmuch as it merely establishes “a time limit for prosecuting a crime, based on when the offence occurred” (See Black’s Law Dictionary, tenth edition, West Group) and, if lapsed, “the criminal prosecution cannot be brought in court”; whereas, in the Italian legal system (as in the Spanish one; see Tribunal Constitucional, sala segunda, sentencia n. 63 de 14 de marzo 2005) “the statute of limitations applies to substantive criminal law”, since “the instrument affects the perpetrator’s eligibility for punishment” (See Corte Cost., ord. 26 gennaio 2017, no. 24), which inevitably entails the application of the related general principle of the rule of law and other principles deriving therefrom, among which the principle pursuant to which only the facts and conducts specifically set forth by the law as criminal offences, and clearly and accurately defined thereby, may be punished under criminal law, as well as the principle of non-prejudicial-retroactivity of the law (See Article 25 Italian Constitution and Articles 1 and 2 Italian Criminal Code).
- 85 See LADRÓN DE GUEVARA J.B., *European protection order: analogies and differences with the spanish protection order*, (in) *Dir. pen. cont.*, 6 marzo 2013, p. 7: “Protective measures to be adopted by the competent authority of the executing State and that should have the biggest possible match to the extent agreed by the issuing State must therefore be at least equal”.
- 86 See Article 9(1) of the EPO DIRECTIVE.

gree possible”<sup>87</sup>. In this regard, consider for instance the case of a UK “victim”, benefiting from the protection offered by conditional bail, who decides to move to Italy and therefore obtains a protection order. As known, the only protection measures that may be issued in Italy upon recognition of an EPO are the ones set forth in Articles 282-bis and 282-ter of the Italian Code of Criminal Procedure. While in the UK system, bail allows an extensive recourse to electronic monitoring (so-called “tagging”), in the Italian system “monitoring methods by electronic means or other technical devices” are not admissible with regards to the precautionary measures ordering the “prohibition to approach the places frequently visited by the victim” under Article 282-ter and the “removal from the family home” under Article 282-bis of the Italian Code of Criminal Procedure, but only with reference to a list of specific crimes (see Article 282-bis(6) of the Italian Code of Criminal Procedure), which does not include stalking pursuant to Article 612-bis of the Italian Criminal Code. Hence, the level of protection offered to the UK victim on Italian territory will be “lower” than the one ensured in his or her own domestic legal system, even though the measures adopted in Italy technically *correspond* to those ordered in the issuing State. Upon implementation of the EPO DIRECTIVE, said “correspondence” requirement was, for that matter, further loosened in a number of Member States, which state that a protection measure corresponding to “the one originally ordered” in the issuing State is merely required in the “most serious cases”, inasmuch as the executing State is simply called to identify an “appropriate” protection of the victim<sup>88</sup>. Hence, by demanding the *same* (or at least *similar*)<sup>89</sup> level of protection among the different Member States through the adoption of *identical* (or at least *similar*) protection measures, rather than measures that

- 87 See Article 9(2) of the EPO DIRECTIVE. This way, the executing State “has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case in order to provide continued protection to the protected person in the light of the protection measure adopted in the issuing State as described in the European protection order.” (Recital 20 of the DIRECTIVE).
- 88 See Article 1 *Gesetz zum Europäischen Gewaltschutzverfahren (EU-Gewaltschutzverfahrensgesetz-EUGewSbVG)* of 5 December 2014.
- 89 The European Implementation Assessment (p. 47) shows some level of perplexity even with regards to “similar” protection measures, by subtly criticizing the missing “request” for the *same* level of protection by means of *identical* protection measures: “Given the fact that the relevant criterion is not that the executing State applies identical protection measures as the ones adopted by the issuing State, but measures offering an equivalent level of protection (...) the executing State has a certain discretionary margin to decide which are the equivalent measures available under its national law. The relevant criterion therefore is not the identical nature of the protection measures, but the ability to guarantee a protection that is “equivalent” to the one provided to the protected person in the issuing State, based on national provisions intended for a “similar case”. The executing State should provide the victim an equivalent protection for analogous cases according to its internal law. For this reason, it is highly recommendable for the EPO to be accompanied by the maximum information available regarding the facts and circumstances that justified the protection measures adopted by the issuing State. In this respect, the Directive even considers that if this information is incomplete, the authority of the executing State may request the missing information from the issu-

simply “correspond” (Article 9(2) of the EPO DIRECTIVE) and are “appropriate and adequate under its national law” (Recital 20 EPO DIRECTIVE), the EPO DIRECTIVE would have imposed on the States a greater degree of harmonization of their respective domestic legislations, thereby increasing the level of protection offered to victims<sup>90</sup>. Likewise, it should not be underestimated that the margin of discretion left to the Member States by the EPO DIRECTIVE may, at times, be the harbinger of differentiated treatments, and thus discriminations, in the protection of victims within the EU: precisely what the EPO DIRECTIVE should have avoided<sup>91</sup>;

- furthermore, *additional* and *different* measures compared to the ones set forth in the EPO DIRECTIVE, and possibly existing in particularly *virtuous* Member States, cannot be extended to other Member States where such measures are not provided for; thus States with inadequate systems of victim protection are released from the obligation to bring their protection measures up to par with the other Member States<sup>92</sup>;
- the EPO is, by law, only effective in the issuing State and in the executing State, and it is not therefore “un instrumento jurídico que dictado por un Estado miembro de la Unión Europea desplegara su eficacia en todo el territorio de la Unión”<sup>93</sup>;
- lastly, the level of protection of a victim largely depends on the procedural time frames and rules of each individual Member State, as well as to the commitment made by each of these States to counter all the different forms of violence. In this

ing State. The adoption of similar protection measures excludes a priori all other measures that have been granted to the victim under the law of the issuing State, e.g. assistance or family support measures. Therefore, there could be deemed some discrimination between the victim moving to the executing State compared with victims enjoying protection measures initiated by that State, in relation to supplementary assistance measures”.

90 See VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 284.

91 See Council of the EU, *Initiative for a Directive of the European Parliament and the Council on the European Protection Order, explanatory memorandum*, Brussels, 6 January 2010: “to prevent any discrimination between the victim moving to the executing State compared with victims enjoying protection measures initiated by that State”.

92 See SECHI P., *Vittime di reato e processo penale: il contesto sovranazionale*, (in) *Cass. Pen.*, 2017, II, pp. 850 ff. Along these lines, see also VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 284: on the other hand, applying the *similarity* requirement to protection measures “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”. Lastly, see VAN DER AA S. – SOSA L. – NIEMI J. – FERREIRA A. – BALDRY A., *Challenges to the european protection order: mutual recognition in the light of different national protection systems*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 11.

93 See also RODRÍGUEZ LAINZ, “La Orden Europea de Protección”, *Diario La Ley*, No. 7854, 2012, p. 6.

regard, it may incidentally be noted how the Italian legal system, for example, is not as complete and articulated as the German and UK systems, which have been committed to the protection of victims/offended parties for decades<sup>94</sup>; on the contrary, Italy has often failed to provide not only appropriate and timely responses to serious and widespread phenomena of violence, but also a full protection to the victims<sup>95</sup>. With regards to the first aspect, the European Court of Human Rights found Italy “in violation of the right to life and prohibition of inhuman and degrading treatment, as well as in violation of the prohibition of discrimination”<sup>96</sup>. The Strasbourg Court’s case law is well settled that all Member States are under a “positive obligation to adopt protection measures directed at safeguarding an individual whose life is at risk”<sup>97</sup>.

It stands to reason that the absence of common rules prescribing in a clear and uniform manner not only the measures aiming to protect the victims of violent conducts, but also the offences to be countered, is the first, major obstacle standing in the way of an effective and full enforcement of the European Protection Order.

In addition to the above issues, a further challenge stems from the *coexistence*, and potential *overlapping*, of the EPO DIRECTIVE with the EPM REGULATION<sup>98</sup> and VICTIMS’

- 94 With regards to the German legal system, see PARLATO L., *La disciplina tedesca (e quella austriaca) sull’ordine di protezione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 196. For the state of affairs in the UK legal system, see MEZZOLLA V., *La tutela delle vittime di reato e l’attuazione della Direttiva 2011/99/UE*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, which makes reference to the Police and Criminal Evidence Act of 1984, the Family Law Act of 1996, the Protection from Harassment Act of 1997, the Domestic Violence, Crime and Victims Act of 2004, the Crime and Security Act of 2010. For an overview of the main rules and regulations governing victim protection in the Austrian legal system, see SOYER R., *Opferrechte in Österreich*, (in) *StraFo*, 2014, pp. 235 ff..
- 95 See ALLEGREZZA S., *La riscoperta della vittima nella giustizia penale europea* (in) *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, (a cura di) ALLEGREZZA S. – BELLUTA H. – GIALUZ M. – LUPARIA L., Torino, 2012, p. 3: “With regards to the rights at the service and in support of victims, besides a few virtuous States, there are many delays and defaults; needless to say Italy is at the tail end of Europe”.
- 96 ECHR, *TALPIS v. ITALY*, (Section I), 2 March 2017; in the case at hand, Italy was condemned on the basis that, despite a formal complaint against illegal conducts (namely ill-treatment and injuries) had been filed, the Italian authorities had failed to adopt any measure ensuring due protection to the victim, thereby allowing – in practice – the continuation of “dangerous conducts” which led to the murder of one of the victims.
- 97 SECHI P., *Vittime di reato e processo penale: il contesto sovranazionale*, (in) *Cass. Pen.*, 2017, II, pp. 850 ff. See also ECtHR, *OPUZ v. TURKEY*, Judgment 9 June 2009; ECtHR, *KONTOVÁ v. SLOVAKIA*, Judgment 31 May 2007.
- 98 See, on this point, VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the european member states*, (in) *Wolf Legal Publisher*, 2015, p. 216: “The civil Regulation is more extensive in that it includes places where the endangered person works – the EPO only covers areas where the

RIGHTS DIRECTIVE<sup>99</sup>. At first glance, there seem to be a number of *coordination* problems. By way of illustration, Article 5(a) of the EPO DIRECTIVE includes, among the applicable protection measures, the “prohibition from entering certain localities, places or defined areas where the protected person resides or visits”, whereas the EPM REGULATION contemplates, in Article 3(1)(a), the “prohibition or regulation on entering the place where the protected person resides, works or regularly visits or stays”. Thus, compared to the EPO DIRECTIVE, the protection offered – in civil matters – by the EPM REGULATION is: (i) on the one hand, more extensive, as it includes places where the victim simply works without necessarily residing or staying, while the EPO DIRECTIVE only includes places where the victim resides or stays for a certain period of time; and (ii) on the other, harder to obtain, in that the visits must be “regular”, which is not a requirement under the EPO DIRECTIVE. Furthermore, it should be noted that the EPO DIRECTIVE makes no mention to the duration of the recognition by means of a protection order, whereas Article 4(4) of the EPM REGULATION states that recognition shall have a maximum duration of 12 months, “regardless of whether the original protection measure possibly had a longer duration”<sup>100</sup>. It would have been reasonable to expect that the EPM REGULATION and the EPO DIRECTIVE would have provided victims with a different range and scope of protection, consistently with the principles of proportionality and subsidiarity; yet, on the contrary, it seems that the EPO DIRECTIVE and the EPM REGULATION ensure a “variable-geometry” scope of protection that is not entirely coordinated.

Furthermore, with regards to the issues relating to the requirements, note should also be taken of the fact that, in theory, a comprehensive protection of the victim would impose not to disclose the actual place in which he or she intends to reside<sup>101</sup>, least of all to the person causing the “danger”; nonetheless, it is unimaginable how, for

victim resides or visits – but it is more limited in that the victim has to visit these places regularly. This is not a requirement under the EPO. What happens if the civil protection order prohibits entering a place that the victim only occasionally visits? And how often does a victim have to visit a certain area before it amounts to ‘regular’ visits? All these differences can have implications in practice, causing confusion on the part of the Member States and affecting the protection of the endangered person”.

99 See European Implementation Assessment, p. 19: “This dual system is undoubtedly a source of confusion for legal actors intervening in the process of issuing and/or executing protection orders at the EU level, but also for the victims”.

100 MOIOLI C., *Le nuove misure “europée” di protezione delle vittime di reato in materia penale e civile*, (in) [www.eurojus.it](http://www.eurojus.it), 2015, p. 3.

101 See MORGAGE CORTES M., *La Orden europea de proteccion como instrumento tuitivo de las victimas de violencia de genero*, (in) *Cuaderno Electrónico de Estudios Jurídicos*, 2014, III, p. 107: “Desde el inicio de las negociaciones, existió preocupación por el riesgo que podría suponer la comunicación al agresor de la localización de la víctima. Sin embargo, esto parece haber sido en principio solventado en el considerando 22 de la Directiva, que, aunque incide en el deber de informar de todas las medidas adoptadas a la persona causante del peligro, precisa que deberá tenerse en cuenta el interés de la persona protegida en que no se revele su domicilio ni en que ningún otro dato de contacto se incluya en la prohibición o restricción impuestas a la persona causante de delito. Por tanto, en un principio, los datos de localización exacta de la víctima deberán permanecer secretos”.

example, a judge may order the “prohibition from entering certain localities, places or defined areas where the protected person resides or visits” without at the same time communicating *precisely* the new place where the protected person will be residing or staying<sup>102</sup>. Therefore: the aim is to protect the victim, yet the “stalker” is provided with important information on the victim’s location. However, any breach of a protection order and the underlying protection measures generally constitutes a criminal offence, and the respect for fundamental legal principles – first and foremost the rule of law – would in any case require that such information be provided to the person causing danger, so that the latter be (or ought to be) fully *aware* of the relevant criminal rule.

### 5.2. Issues relating to the issuing stage

With reference to the issuing stage, the following issues may be highlighted:

- firstly, the fact that each victim must submit his or her own independent request<sup>103</sup>: no provision expressly admits the possibility of filing “collective” requests, which would, on the contrary, be ideal for family units, for instance<sup>104</sup>; the need to submit multiple requests for just as many protection orders entails a number of obvious complications, namely the burden to initiate multiple procedures and the increase in the overall time frame, all to the detriment of the person in need of protection;

102 The Italian Supreme Court of Cassation (see Cass. pen., sent. 22 gennaio 2015, Rv. 262456) has repeatedly stated that “a decision ordering the prohibition to approach the places frequently visited by the offended party, under Article 282-ter of the Code of Criminal Procedure, must necessarily define in detail the places to which access is denied, as this is the only way in which the protective measure may enable to monitor compliance with the prescriptions that are instrumental to the type of protection the law intends to ensure, thereby avoiding to impose on the suspect any unspecified obligation “not to do” in relation to said places, whose identification, at that point, would ultimately be left to the offended party”, RECCHIONE S., *Il riconoscimento dell’ordine di protezione europeo*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 93.

103 Of a different opinion is CUETO MORENO C., *La Orden europea de proteccion. Su transposicion en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Union europea*, (in) *ReDCE*, XXI, 2014, p. 229: “en la medida en que el art. 130.1 del Proyecto de Ley hace referencia a “víctimas o posibles víctimas”, parece admitirse la posibilidad de que una sola medida de protección (y, por ende, una sola OEP derivada de la misma) esté destinada a proteger a varias personas, si bien en todo caso deberá tratarse de sujetos pasivos de delitos que pongan en peligro “su vida, su integridad física o psicológica, su dignidad, su libertad individual o su integridad sexual””.

104 No detailed regulations seem to have been adopted with regards to the possibility stated in Recital 12 of the EPO DIRECTIVE, pursuant to which “if a protection measure, as defined in this Directive, is adopted for the protection of a relative of the main protected person, a European protection order may also be requested by and issued in respect of that relative, subject to the conditions laid down in this Directive”.

- secondly, the Epo Directive fails to specify which national authority is responsible for issuing the protection measure and the related protection order – even if an overly “shy” preference is expressed for the judicial authorities – and whether it should *necessarily* be the criminal justice authority<sup>105</sup>. The Epo Directive does not therefore exclude that the European Protection Order – and protection measures – in some Member States may be issued by authorities other than a criminal court: this is the case, for instance, of the German legal system, where protection measures are civil law instruments<sup>106</sup> and are thus made by civil courts<sup>107</sup>. Undoubtedly, each Member State is “free” to designate, “under its national law”, the authority that is competent for issuing the protection measures and possible Epo (as well as to carry out the recognition procedure). Nonetheless, the possibility – granted by the Epo Directive to the Member States – to assign such powers to authorities other than a criminal court, and even to a non-judicial authority, is not entirely convincing on the following grounds: (a) firstly, a protection order implies a protection measure, which has been defined as a “decision in criminal matters”<sup>108</sup>

105 See Article 1 of the EPO DIRECTIVE: “This Directive 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...”. See European Implementation Assessment, p. 40: “Article 1 of the Directive seems to express a preference for judicial bodies when it states that EPOs may be issued by ‘a judicial or equivalent authority in a Member State’, but does not exclude other authorities. The main problem arises when the executing State has to recognise an EPO imposing protection measures that originally were adopted by non-criminal authorities or even non-judicial agents or bodies of the issuing State». See, lastly, LADRÓN DE GUEVARA J.B., European protection order: analogies and differences with the Spanish protection order, (in) *Dir. pen. cont.*, 2014, p. 4: “but the question that could be raised by issuing a European protection order that is, whether the authority should always be judicial or other administrative authority, because he cannot forget that the content of the order will necessarily contain prohibitions or restrictions on freedom of movement of causing danger”.

106 “The protection measures provided for at the domestic level, by an act of 2001, exclusively regard civil matters and do not, therefore, fall within the scope of application of Directive 2011/99/EU”, PARLATO L., *La disciplina tedesca (e quella austriaca) sull’ordine di protezione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 200.

107 German legislation – See Article 1 *Gesetz zum Europäischen Gewaltschutzverfahren (EU-Gewaltschutzverfahrensgesetz-EUGewShVG)* of 5 December 2014 – confers the competence to deal with all matters regarding “european protection orders to the judicial authorities competent for family law cases and non-contentious jurisdiction. The identification of an exclusive jurisdiction, which is affected by the foregoing civil-orientation of the relevant instrument in the German legal system, takes this field completely out of the hands of the criminal justice authorities”, PARLATO L., *La disciplina tedesca (e quella austriaca) sull’ordine di protezione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 201.

108 See Article 2(1)(2) EPO DIRECTIVE.

“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 (...) following criminal conduct, or alleged criminal conduct”<sup>109</sup>, and therefore assigning the above powers precisely to criminal courts would appear not only more appropriate in terms of “jurisdiction”, but also more consistent with the rationale of the Directive itself<sup>110</sup>; (b) secondly, a civil- or administrative-based issuing procedure does not necessarily ensure compliance with the same principles governing criminal matters (such as the principles of due process, rule of law or presumption of innocence), thereby entailing a level of guarantee, for *both* the victim and the alleged perpetrator, that is inferior to the one ensured by criminal procedure laws; (c) lastly, it should be noted that the protection order – as the underlying protection measure – affects, to a more or less significant degree, a fundamental right of the person allegedly causing danger that is personal liberty, especially with regards to freedom of movement, resulting in a restriction or even deprivation thereof<sup>111</sup>. Likewise, it should not be underestimated that in the constitutional traditions of some Member States the possibility to restrict said fundamental freedom is subject to the rule of law (“...only in the cases and upon the terms set forth by the law...”), and of jurisdiction (“...if not by a reasoned decision issued by the judicial authority...”) <sup>112</sup>. Thus, designating competent authorities – pursuant to Article 3 of the EPO Directive – other than criminal courts could determine a lower level of guarantee and protection for all the individuals involved in the EPO procedure. It is not a coincidence, for that matter, that even Member States such as the United Kingdom, which provide for administrative law protection measures<sup>113</sup>, have, *in any case*, vested the (criminal) judicial authority, namely the Magistrates’ Court and the Crown Court, with the powers outlined by the EPO Directive.

109 See Article 1 EPO DIRECTIVE.

110 See Recital 10 (“This Directive applies to protection measures adopted in criminal matters...”) and Recital 11 (“This Directive is intended to apply to protection measures adopted in favour of victims, or possible victims, of crimes.”) EPO DIRECTIVE.

111 For an in-depth analysis of the right to liberty, pursuant to Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of the freedom of movement, pursuant to Article 2 of Protocol No. 4 of the above Convention, see the case law of the European Court of Human Rights, and particularly *GUZZARDI v. Italy* of 6 November 1980 (application no. 7367/76), *RAIMONDO v. Italy* of 22 February 1994 (application no. 12954/87) and, lastly, *DE TOMMASO v. Italy* of 23 February 2017 (application no. 43395/09).

112 See, for instance, Article 13(2) of the Italian Constitution: “no form of detention, inspection or search of persons, nor any other restriction of personal liberty, shall be admitted, if not by a reasoned decision of the judicial authority and solely in the cases and upon the terms set forth by the law”.

113 The English system provides for a number of protection measures as administrative law instruments which are, thus, issued by the police (such as the *Domestic Violence Protection Notice*).

- the absence of any indication as to the time limits and methods by which the victim is to be informed of the possibility to request an Epo<sup>114</sup>, and as to the type of information to be provided;
- the absence of any indication regarding the required time frame for issuing an Epo;
- the absence of specific indications as to the time limits within which the issued Epo is to be transmitted to the executing State for the purpose of recognition;
- seemingly, the Epo Directive only sees to the protection of victims who *remain* in another Member State for a certain period of time<sup>115</sup>, thereby leaving out all those victims who “commute” within the EU on a daily basis for work or study, for instance<sup>116</sup>;
- lastly, no provision specifically states the possibility to – simultaneously – issue an Epo for more than one executing State<sup>117</sup>, or the possibility for a protection measure to be valid in more than one jurisdiction at the same time (in the issuing State and in the executing State)<sup>118</sup>.

114 See the European Implementation Assessment, p. 36: “Providing information to the protected person is an essential element for the effectiveness of the EPO, and it is clear that this information is not adequately provided to victims”.

115 See Article 6(1) of the EPO DIRECTIVE: “When deciding upon the issuing of a European protection order, the competent authority in the issuing State shall take into account, inter alia, the length of the period or periods that the protected person intends to stay in the executing State (...)”.

116 See VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the European member states*, (in) *Wolf Legal Publisher*, 2015, p. 219: “There are numerous persons who cross borders on a daily basis in order to travel between their place of residence and their place of work or full-time study. Authorizing these persons to apply for an EPO would expand its range, especially in the border regions. The problem is that, based on the text of the EPO, one cannot deduce whether the EPO applies to these situations and to these endangered persons as well. It is plausible that the EPO was drafted with a more ‘static’ situation in mind, that is to say, the victim remaining relatively stationary in the other Member State, thus not covering victims who travel back and forth on a regular basis. Since the Directive remains silent on this particular issue, it is left up to the Member States to decide”.

117 See CUETO MORENO C., *La Orden europea de proteccion. Su transposicion en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Union europea*, (in) *ReDCE*, XXI, 2014, p. 225: “Así, y en la medida en que el art. 6 de la Directiva (...) exige para la emisión de una OEP que la persona protegida decida residir o permanecer, o resida o permanezca ya efectivamente en otro Estado miembro, la OEP verá en principio su eficacia limitada al territorio de ese Estado y sólo del mismo, por cuanto como regla general, y con la excepción contemplada en el art. 136, parece excluirse que pueda adoptarse una misma OEP simultáneamente en relación a varios Estados”.

118 VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the European Member States*, (in) *Wolf Legal Publisher*, 2015, p. 219: these are circumstances “in which the victim needs protection simultaneously in both jurisdictions, because only some of the conditions ‘travel’ along with the victim to another Member State. Think, for instance, of the situation in which the original protection order not only prohibited the offender to enter the street where the victim lives, but also the street of her parents’ place of residence. The victim who moves to another Member State may prefer an EPO covering her new address in the executing State, while, at the same time, retaining the prohibition in relation to her parent’s place in the is-

### 5.3. Issues relating to the recognition and execution stages

The recognition and execution stages, on the other hand, present the following issues:

- the absence of clear deadlines – common to all Member States – within which the request for the recognition of an EPO is to be assessed and decided upon by the competent authorities of the executing State: the original wording of the draft DIRECTIVE imposed a 20-day time limit, which was later replaced by the more uncertain indication “without undue delay”<sup>119</sup>; finally, the DIRECTIVE reads “with the same priority which would be applicable in a similar national case, taking into consideration any 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”<sup>120</sup>;
- the impossibility to automatically extend protection measures beyond the national boundaries of the issuing State<sup>121</sup>: as noted earlier, given that the EPO is a mechanism of mutual recognition, based on how it has been outlined by the EPO DIRECTIVE, it entails: (i) uncertainty as to whether the order will actually be recognized by the executing State; (ii) an (inevitably) longer time frame for obtaining *corresponding* protection measures in the executing State; (iii) and, finally, a greater *danger* for the victim in the event that he or she has already moved to the executing State.
  - The above issue poses a serious obstacle to removing any *discrimination* within the EU, which would – evidently – require the automatic and immediate extension of the protection measures ordered in the issuing State to within the boundaries of the executing State<sup>122</sup>, by virtue of the mutual *trust* among the Member States. In other words, victim protection needs would be truly and fully ensured without any *discrimination* among the Member States if – all

suing State. In other words, can only part of the original protection measure be recognized and transposed to the new state, while the other part remains effective in the Member State of origin? It is not clear whether the EPO procedure allows for such ‘splitting’ of the protection order, or whether it is a ‘package deal’”.

119 See Article 9(1) of the EPO DIRECTIVE. See European Implementation Assessment, p. 42: “This unspecific time limit might leave the victim unprotected at the beginning of her/his stay in the executing State. For this reason, Member States ought to respect the spirit of the Directive, which aims to provide protection to the victim as soon as possible, and recognise the protection measures immediately”.

120 See Article 15 of the EPO DIRECTIVE.

121 See CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. X.

122 See, for the contrary opinion, CAMALDO L., *Novità sovranazionali*, (in) *Processo penale e Giustizia*, II, 2012, p. 18.

conditions met – the extension of the protection measures made under a protection order, were automatic<sup>123</sup>, rather than subject to “recognition”<sup>124</sup>;

- the existence of many grounds for refusal<sup>125</sup> – “remnants” of “sovereign tendencies”<sup>126</sup> – which inevitably (and *drastically*) reduce the “mutual trust” among the Member States<sup>127</sup>. One of the main reasons for refusal regards the so-called double criminality requirement: recognition is refused if “the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State”<sup>128</sup>. This principle may potentially cause a significant short-circuit in the instrument’s enforcement<sup>129</sup>, considering that some of the most frequent, dangerous and relevant offences against which protection orders are requested (above all stalking) are criminalized and prosecuted only in *some* Member States<sup>130</sup>. The ironic consequence is that *precisely* those victims who are in greater need of pro-

123 See ERVO L., *La Orden Europea de protección: eficacia europea o un simple sialogo de besugos?*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de género y cooperación judicial penal en Europa*, (directo da) MARTINEZ GARCIA E., Valencia, 2016, p. 207.

124 See CUETO MORENO C., *La Orden europea de protección. Su transposición en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Unión europea*, (in) ReDCE, XXI, 2014, p. 225: “*sin embargo, aunque en abstracto dichas medidas pueden desplegar sus efectos en todos los Estados miembros, la eficacia territorial de la OEP es en la práctica mucho más limitada, tanto que aquellos se restringen al territorio del Estado (...) de ejecución que acuerde su reconocimiento*”.

125 These grounds for refusal will, in practice, constitute “*obstáculos verdaderamente difíciles de superar (...) y ello por la disparidad de los plazos entre los Estados miembros*”, così GALLEGRO SÁNCHEZ G., *La violencia contra la mujer en la Unión Europea. La Directiva 2011/99/UE: La Orden Europea de Protección*, (in) *Revista de Jurisprudencia*, 2012, IV, p. 5.

126 In the same terms CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. X “It seems as though pulling the brakes on mutual recognition in the matters at hand serves the purpose of safeguarding national jurisdictional and ministerial authority. To a certain degree, since we are dealing with criminal law, the choice appears to be in line with the tradition of States that show reluctance when it comes to relinquishing their sovereign authority”.

127 See CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L’ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. X.

128 Article 10(1)(c) of the EPO DIRECTIVE.

129 Criticism on this point by, among others, MORGAGE CORTES M., *La Orden europea de protección como instrumento tutivo de las víctimas de violencia de género*, (in) *Cuaderno Electrónico de Estudios Jurídicos*, 2014, III, p. 106.

130 See CUETO MORENO C., *La Orden europea de protección. Su transposición en el proyecto de ley de reconocimiento mutuo de resoluciones penales en la Unión europea*, (in) ReDCE, XXI, 2014, p. 247: “*además, y particularmente por lo que respecta a hechos constitutivos de violencia por género, es posible que esta causa de denegación del reconocimiento pueda invocarse por aquellos Estados que no han tipificado expresamente como delito autónomo este tipo de conductas, lo que colocaría a las víctimas o presuntas víctimas de estos hechos en una situación de desprotección en caso de desplazarse a dichos países*”.

tection would be irreparably left without<sup>131</sup>. Once again, it must be acknowledged that the European Protection Order, as an instrument of mutual recognition, pays the very high price of a “lack of harmonisation in criminal matters within the EU”<sup>132</sup>;

- uncertainty regarding the practical consequences of a refusal to recognize an EPO under Article 10 of the EPO DIRECTIVE; the Italian legal system – for instance – merely states the possibility to challenge, before the Supreme Court of Cassation, the judgment by which the Court of Appeal decides upon the recognition of an EPO, specifying that “in the event that recognition of a European Protection Order is refused, the judicial authority shall give notice of such refusal to the Ministry of Justice, which, in turn, shall inform the competent authority of the issuing State without undue delay”<sup>133</sup>;
- the heterogeneity of the protection measures existing in the different domestic legal systems, acknowledged and even validated by the European legislator<sup>134</sup>, caus-

131 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 279: “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”. See also PEYRÓ LLOPIS A., *La protección de las víctimas en la Unión Europea: la Orden Europea de Protección*, (in) *Revista española de Derecho Europeo*, XLVI, 2013, p. 26.

132 The European Implementation Assessment p. 46. In the same terms, see also VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 286: “It merely distracts from the real problem here. The EPO only handles 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”.

133 See Article 9(4) of Legislative Decree No. 9/2015.

134 Consider Recital 20 of the EPO DIRECTIVE: “Since, in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under this Directive. Therefore, the competent authority in the executing State is not required in all cases to take the same protection measure as those which were adopted in the issuing State, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case in order to provide continued protection to the protected person in the light of the protection measure adopted in the issuing State as described in the European protection order”. In the literature, see FREIXES T. – ROMÀN L., *Protection of the Gender-based violence victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order*, Publicacions Universitat Rovira i Virgili, Publicacion Universitat Autònoma de Barcelona, 2014, p. 8: “the heterogeneity of the existing protection measures regarding gender violence in the Member States, a corollary of their different legal, historical, geographical and political traditions, instead of uniting them often separate the 28 Member States, provoking quite a few problems, especially when one seeks – as is the case here – the harmonisation of victim protection in the EU”.

es significant complications in the recognition and execution procedures<sup>135</sup>, and is “one of the main obstacles for the practical application”<sup>136</sup> of the EPO DIRECTIVE: for example, it goes without saying that it is “very complicated for a Member State to recognize a criminal pre-trial protection order and to substitute it by a native equivalent if there are no criminal pre-trial protection orders available in the national legal order”<sup>137</sup>. Furthermore, consider the case of a UK victim, benefiting from a restraining order and a related protection order, who decides to move to Italy; how can said victim continue to benefit from the same level of protection if restraining orders are a post-trial protection measure while in Italy precautionary measures are – by their very legal definition – pre-trial protection measures? Not to mention how complicated it may be to convert civil protection measures – typically adopted in the German legal system, for instance<sup>138</sup> – into criminal protection measures;

- the absence of any indication regarding the procedures for the practical enforcement of the protection measures made under an EPO, since this aspect is entirely left to the discretion of the individual domestic legal systems.

135 See also Freixes T. – Romàn L., *Protection of the Gender-based violence victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order*, Publicacions Universitat Rovira i Virgili, Publicacion Universitat Autònoma de Barcelona, 2014, p. 16.

136 Consider that some Member States do not provide for the possibility to order a protection measure before a final verdict has been issued, see VAN DER AA S., *Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?*, (in) *European Journal on Criminal Policy and Research*, 2012, p. 194.

137 VAN DER AA S., *Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?*, (in) *European Journal on Criminal Policy and Research*, 2012, p. 197. See also RECCHIONE S., *Il riconoscimento dell'ordine di protezione europeo*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 95: “the Directive (...) imposes on the executing State a burden of “transformation” of the foreign protection measure into a national measure”, but the exercise of this “transformation power” must in any case comply with the “principle of conservation” of the protection, which entails the “prohibition to adopt a more severe measure upon execution: in other words, the transformation is limited by the respect for the homogeneity of the restrictions”.

138 See VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the European Member States*, (in) *Wolf Legal Publisher*, 2015, p. 234: “The general picture is that most jurisdictions have the possibility to impose the three prohibitions mentioned in the EPO and the EPM: the prohibition to contact the protected person; the prohibition to enter certain areas, and the prohibition to approach the protected person. Still, there are Member States that do not have all these options present, at least not in all areas of law. Furthermore, in Member States where all three prohibitions are available, they do not always exactly match the formulation and extent proposed by the EPO Directive”.

## 6. Conclusions

The analysis conducted herein firstly highlights the overly generic legal framework outlined by the EPO DIRECTIVE<sup>139</sup>; gaps of uncertainty, for that matter, neither rectified nor bridged by the Member States upon implementation. Indeed, careful examination reveals a rather superficial degree of implementation of the DIRECTIVE<sup>140</sup>: many Member States have merely transposed the relevant provisions into national law, without however adopting any clear and extensive detailed regulations.

The absence of comprehensive and clear rules at the European level and, especially, at the national level, leaves many issues unresolved still to this day: consider the absence of clear time frames common to all Member States for the request, issuance and transmission of an EPO; not to mention for its recognition in the executing State. The scale of this deficiency is such that the European Parliament called on the Commission and on the Member States to set “a clear and short time frame of two weeks for the competent authorities of the Member States when issuing and notifying about EPOs in order to avoid increasing the uncertainty of protected persons and the pressure they are under”<sup>141</sup>. In this regard, it would be advisable that the Member States set forth a clear time frame at least with reference to the recognition of EPOs. Furthermore, the grounds for non-recognition should be reduced (in particular, with reference to the double criminality clause), with the purpose of finally putting an end to the persisting mutual distrust among the national systems within the EU. Along these lines, it would also appear vital to establish an obligation for the Member States to ensure that cross-border victims may benefit from all the protection measures existing in the respective legal systems; as it would be crucial to expressly admit the possibility to request a protection order for more than one person and for more than one executing State, and to clearly entitle to an EPO all those victims crossing borders within the EU on a daily basis – and not just those who intend to reside or stay in another Member State.

Lastly: the national transposing laws of some Member States are potentially burdened with severe discriminations. The existing loopholes in the EPO DIRECTIVE have enabled Member States to maintain, beneath appearances<sup>142</sup>, marked and significant

139 See also DUTTA A., *Grenzüberschreitender Gewaltschutz in der Europäischen Union*, (in *FamRZ*, 2015, p. 92.

140 Besides, a testimony to the little consideration shown upon implementation is the fact that “in most Member States there are no central registry systems for EPO, thus creating difficulties in data collection on the enforcement of the EPO”, despite the collection of data is imposed by Article 22 of the EPO DIRECTIVE (see European Implementation Assessment, p. 18).

141 European Parliament, *Resolution of 19 April 2018 on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI))*, 19.4.2018, P8\_TA-PROV(2018)0189, par. 22.

142 European Parliament, *Report on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI))*, Committee on Civil Liberties, Justice and Home Affairs Committee on Women's Rights and Gender Equality, 14.3.2018 (A8-0065/2018), p. 4: “All Member States provide for some form of criminal and/or civil protection orders. However, despite an apparent similarity in the way in which these measures are issued, a

discrepancies, especially with regards to the measures that may be issued under a protection order. This excessive heterogeneity in the national protection measures, arising from the fact that only some measures – on the one side – entitle the victim to request an EPO and – on the other – may be issued by way of execution of a foreign protection order, are the harbinger of severe discriminations and serious short circuits in the enforcement of the EPO instrument.

In conclusion, while the main objectives pursued by means of the European Protection Order are three<sup>143</sup>:

1. “to prevent a further offence by the offender or presumed offender in the State to which the victim moves (i.e., the executing State);
2. to provide the victim with a guarantee of protection in the Member State to which he/she moves which is similar to that provided in the Member State which adopted the protection measure;
3. to prevent any discrimination between the victim moving to the executing State compared with victims enjoying protection measures initiated by that State”,

a careful examination of the legal framework outlined by the EPO DIRECTIVE and of the degree of implementation thereof by the Member States reveals the failure to achieve (at least) the objectives described under points 2 and 3.

In the first place (objective no. 2): the EPO DIRECTIVE does not in itself impose an obligation to ensure identical protection measures in the issuing State and in the executing State, but merely a bland duty to enforce “corresponding” measures. Specifically, the wording of Article 9 of the Directive imposes that the executing State adopt measures that simply *correspond* to the measures adopted in the issuing State<sup>144</sup>, without necessarily having to meet a *similarity* requirement.

Moreover (objective no. 3): it is known that the DIRECTIVE intended to exclude any differential treatment, within the executing State, between *national* victims and *cross-border* victims, by imposing that the latter be ensured the same protection measures applicable to national victims, as well as the same procedural time frames<sup>145</sup>; nonetheless, as demonstrated, the European legislator’s intentions have been foiled by the un-

wide variety of measures exist across the Member States. Furthermore, the way in which they are applied in practice differs greatly”.

143 The European Implementation Assessment, p. 13. See LUDOVICI L., *L’ordine di protezione europeo*, (in) *Il nuovo volto della giustizia penale*, (a cura di) BACCARI G.M. – MANCUSO E.M. – LA REGINA K., Padova, 2015, p. 354: “this directive is aimed at ensuring that the same protection measure granted to one person in the State in which he or she resides, or has his or her domicile, against criminal acts that may endanger their life, physical, psychological or sexual integrity, dignity and personal liberty, also be ensured in any other Member State of the EU where the person intends to permanently or temporarily move”.

144 See Article 9(2) of the EPO DIRECTIVE: “The measure adopted by the competent authority of the executing State... shall, to the highest degree possible, correspond to the protection measure adopted in the issuing State”.

145 See Article 9(1) of the EPO DIRECTIVE: “(...) the competent authority of the executing State shall (...) take a decision adopting any measure that would be available under its national

satisfactory degree of implementation achieved by some Member States, whose legal systems, examined herein, are vitiated by significant limitations precisely with regards to the protection measures that may be made for the benefit of cross-border victims.

Thus:

- not only is the EPO DIRECTIVE not capable – on its own – of preventing discriminations between the national victims of the different Member States within the EU (such that UK victims continue to enjoy a higher level of protection than the one ensured in Italy to Italian victims), but,
- it also fails to prevent an unequal treatment between national victims and cross-border victims *within* the same Member State.

In conclusion, the European Protection Order does not appear in itself sufficient to ensure identical standards of protection to all victims throughout the EU territory, as – rather significant – discrepancies continue to persist among the national legal systems<sup>146</sup>, and even within the same legal order. Therefore, until an effective and sufficient degree of harmonization between the national legislations is achieved, first and foremost in criminal matters<sup>147</sup>, with particular regards to the range and type of protection measures provided for, an instrument such as the European Protection Order is

law in a similar case in order to ensure the protection of the protected person (...)” and Article 15 of the EPO DIRECTIVE: “A European protection order shall be recognised with the same priority which would be applicable in a similar national case (...)”.

146 See, among many others, PARLATO L., *La disciplina tedesca (e quella austriaca) sull'ordine di protezione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. 211. The same criticism has been expressed, in the German literature, by CAMPBELL C., *Neues EU-Gewaltschutzverfahrensgesetz zum 11.1.2015*, (in) *NJW-Spezial*, 2014, p. 709, as by KEMPER R., *Internationaler Gewaltschutz im Wandel*, (in) *FuR*, 2015, p. 222.

147 In the same terms, CERESA-GASTALDO M. – BELLUTA H., *Introduzione*, (in) AA. VV., *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, (a cura di) H. BELLUTA – M. CERESA-GASTALDO, Torino, 2016, p. X. See also ERVO L., *La Orden Europea de protección: eficacia europea o un simple sialogo de besugos?*, (in) AA. VV., *La Orden de Protección Europea. La protección de víctimas de violencia de genero y cooperacion judicial penal en Europa*, (diretto da) MARTINEZ GARCIA E., Valencia, 2016, p. 208. Lastly, see KEMPER R., *Internationaler Gewaltschutz im Wandel*, (in) *FuR*, 2015, p. 222.

likely to remain purely “symbolic”<sup>148</sup>; a mechanism, that is, “which may look good on paper, but has fundamental flaws in practice”<sup>149</sup>.



## Strafbare Strafverfolgung

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- 148 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 268. Proof of inefficiencies are also highlighted in the study by VAN DER AA S. – NIEMI J. – SOSA L. – FERREIRA A. – BALDRY A., *Mapping the legislation and assessing the impact of protection orders in the European Member States*, (in) *Wolf Legal Publisher*, 2015, p. 113.
- 149 VAN DER AA S. – OUWERKERK J., *The European Protection Order: No Time to Waste or a Waste of Time?*, (in) *European Journal of Crime, Criminal Law and Criminal Justice*, 2011, XIX, p. 268.