Proposal for an EU Regulation on mutual recognition of protection measures in civil matters

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Introduction and Summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The proposed regulation follows the proposal for a directive on a European protection order (EPO) which has been before the Council and the Parliament since January 2010. The instrument could not consider civil orders since it was a member state initiative. Many member states, including the UK, use a variety of measures to ensure protection of persons who either allege or are found to have been subjected to harassment and sometimes additionally violence. We welcomed the EPO in principle as it attempts to ensure that persons who move between the internal borders of the EU remain protected.[1] However, we were concerned that in practice, as the instrument was drafted, it may not in fact afford such protection at all. Equally, there was little way of challenging the measure if a person suspected of causing the harassment wished to do so.

3. We have the same concerns in relation to this measure. Whilst JUSTICE believes that it will not require much change in the UK given the array of services and orders available here for affected people, there is a need to ensure that people travelling from the UK are protected by their injunctive orders (be they civil or criminal measures) in other countries and that persons alleged to cause risk can effectively challenge orders made against them. As such we think that the UK should opt in to this measure and use its negotiating position to make it effective in practice.

Article 1 Scope

4. The Stockholm Programme identified that protection of victims of crime was a priority for the EU and a package of measures have been proposed to achieve this aim. The EPO intended to provide a protection measure for victims of harassment and abuse

[1] Our response to the consultation can be found here http://www.justice.org.uk/data/files/resources/182/European_Protection_Order_JUSTICE_briefing_and_amendments_feb10.pdf

but could not cover all measures as many member states protect victims with civil orders.

5. This measure intends to cover that gap, but because it has been presented as a civil measure, it reflects other civil cooperation instruments in the area of freedom security and justice rather than criminal measures. This type of instrument cannot be treated in the same way as contractual and commercial measures. Whilst an injunction through the civil courts is a less severe measure than a criminal bail restriction or post conviction restraining order, nevertheless findings are made about conduct which is criminal in nature and the orders can carry criminal sanctions when breached. The risk of harm to victims on breach is a much more serious consequence of this order than other civil matters. As such, much more consideration needs to be given to how this measure will work with existing measures in the domestic law of the member states, how orders can be enforced, and how they can be challenged by the persons they are imposed upon. There needs to be more coherence between this measure and the EPO.

Article 2 Definitions; Article 10 Fundamental Rights Safeguard

6. A 'protection measure' is widely defined to ensure that it encompasses as many of the different approaches available in the member states as possible. This is necessary. However we are concerned that the final sentence provides that '*It shall include measures ordered without the person causing the risk being summoned to appear.*' Whilst it is important to have emergency without notice orders in domestic law, these cover a limited purpose of ensuring an affected person is not subjected to immediate harm. These orders are usually limited to three days, must be served on the alleged perpetrator and must return to court with the opportunity for both parties to make representation on the allegations and findings of fact to be made. Articles 47 and 48 of the Charter of Fundamental Rights (CFR) require an opportunity for a defence to be put forward. In our view, this article does not comply with the Charter.

7. It also conflicts with article 10(2) which attempts to protect against *in absentia* judgments. However, article 10(3) provides a confusing obligation that where the measure is intended to operate without notice, the person '*has a right to challenge the measure under the law of the member state of origin.*' It is not clear whether the safeguard in article 10 therefore prevents measures of this kind being recognised, or whether it is recognised until such point as a challenge in the member state of origin

is finalised. Nevertheless, if the member state of origin allows measures to be applied *in absentia*, it is difficult to see how any such challenge could be successful. As such, article 10 as drafted provides no effective protection against the obligation upon a member state of recognition to give effect to an *in absentia* judgment in accordance with the article 2 definition.

8. In any event, realistically an affected person is unlikely to leave the issuing country before a final order has been made unless they need to flee. In these circumstances they are very unlikely to want the alleged perpetrator to know of where they are going (such notification being essential in this instrument). In our view, this measure should not apply to an order unless it is final because the receiving member state is expected to accept the order of the issuing state without reviewing the facts.

Article 3 Jurisdiction

9. The concerns expressed above in relation to article 1 and 2 are repeated here. Much more information is needed about which authority is able to make the domestic order in the member state of origin. In our view the order should only be recognised in another member state if it is made by a judicial authority as findings of fact should have been made in order to impose the restriction upon the person causing the risk.

Article 4 Recognition

10. Unlike the EPO a measure shall be recognised without any special procedure and *without any possibility of opposing its recognition*. This is most concerning as the terms of an order may be difficult or simply impossible for the person causing the risk to comply with. Articles 47 and 48 CFR require the opportunity for a defence to be heard and the right to an effective remedy. In our view, this measure does not comply with those requirements as drafted.

Article 5 Certificate

11. This measure is entirely impractical for persons subjected to harassment and harm. Again, it reflects the language of contractual and commercial arrangements. The affected person should not be expected to invoke the order in the other member state, this should happen automatically upon the order being made in the member state of origin by the order being placed on the Schengen Information System. When

the affected person crosses the border into the receiving member state the order should automatically apply.

12. The alternative in reality is a terrified victim attending a local police station in a country where they may not know the language or procedure and attempting to explain what the order is. This offers no protection at all. The standard form of certificate in the Annex gives no assistance to the affected person in this regard. It should provide a simple and easy to understand explanation of what the form is, what protection it provides and how it can be used in another member state. Furthermore, the mutual recognition instruments enacted for cooperation in criminal matters are arranged with tick boxes and headings which can easily be understood irrespective of the language so that the officer who receives the order can attempt to action it immediately. This standard form is woefully inadequate.

Article 9 Enforcement

13. It is unclear what this article intends to cover as recital 11 states that the measure does not deal with criminal sanctions; these will continue to be dealt with by the law of each member state. Enforcement does not therefore in this context mean responding to breach, but rather ensuring that the order itself can work in practice. It is difficult to think of any measures that would need intervention prior to breach since all measures will be akin to a direction not to contact the affected person.

14. The absence of any article dealing with breach and sanctions in this measure is of real concern. In order for the protection measure to have any force it must be supported by a commitment in the member state of recognition to respond to any breach effectively. Without this, an affected person will believe that they are protected, but all they really have is a piece of paper. It is imperative that if any effort is to be made in this area, member states are committed to responding equivalently and appropriately to breach.

15. It is equally important that the person causing the risk is made aware that there will be equivalent sanctions for breach of the order throughout the member states and what those sanctions will be – this is acknowledged in article 13 but is ineffective without a requirement to provide sanctions in the member state of recognition.

Article 12 Refusal, suspension or withdrawal of recognition or enforcement

16. Article 12(1) provides that a request for recognition may be refused where it is irreconcilable with a decision taken in the member state of recognition. This is to be made on application by the person causing the risk. It is not clear where this would arise and further clarification is needed (there is none in the explanatory memorandum). If it refers to *ne bis in idem,* since the incident of harm has occurred in the member state of origin and required a protection measure, it is difficult to see when this would apply, though of course this safeguard is provided for under article 50 CFR in any event and must be recognised.

17. Article 12(2) provides for the measure being withdrawn in the member state of origin but, as with article 5, expects the person causing the risk to apply for the measure to be withdrawn in the member state of recognition. Again, this is entirely impractical and the onus should not be on the person to apply. The court of origin should inform the member state of recognition immediately that it has withdrawn the order and the recognition must cease upon receipt. This is easily arranged if an article is drafted to require the recognising member state to inform the court of origin that it is giving effect to the measure and for any suspension or withdrawal to be notified to it. The procedure is far more onerous if the person is expected to make an application to a competent authority.

Article 13 Notice

18. The requirement of notice is to be welcomed and in our view is a necessary prerequisite to any order. However, we would reiterate that the right to an effective remedy and to mount a defence as set out in articles 47 and 48 CFR are not provided without a mechanism for the person causing the risk to be able to challenge the protection measure – both as to an *in absentia* judgment and to terms that they cannot comply with.

Article 21 Information made available to the public

19. We welcome the obligation to provide information about the laws and procedures in place in a member state. However, much more needs to be done to make this measure effective. A public information campaign must follow adoption of the regulation, at EU and domestic level so that people who may wish to use these

orders can benefit from their protection quickly and effectively, in line with the priorities in the Stockholm Programme. Training of law enforcement personnel is necessary to ensure that the measure is fully understood and the protection it provides is taken seriously throughout the EU.

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