



**European Protection Order
Briefing and suggested amendments
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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 current Spanish Presidency of the European Union, together with Belgium, Bulgaria, Estonia, Finland, France, Italy, Hungary, Poland, Portugal, Romania, and Sweden has presented an initiative for a European Protection Order (EPO). This briefing considers the implications of such an order and the proposed mechanisms for how it is envisaged to be effective. Where we do not comment on a particular provision, this should not be taken as agreement with its contents.
3. In summary we consider that:
 - The initiative is a positive step towards ensuring protection for vulnerable victims of harassment and abusive domestic relations, particularly women and children, in the EU;
 - Whilst there is no substantial empirical evidence to suggest large numbers of cases of movement across EU borders of this type of crime, there is evidence of violence and of risk;
 - The instrument can only extend to cooperation in criminal matters;
 - A 'protection measure' must be limited to a final order delivered in the issuing state, and conducted according to fair trial principles;
 - A protection measure should include a prohibition on contacting the protected person, but otherwise a non-exhaustive list of terms is appropriate in the directive;
 - The obligation on the executing state to recognise the EPO must be subject to domestic law;
 - The EPO should be re-termed 'certificate' to reflect the fact that the EPO is not the order and the law is not harmonised;
 - The process should involve three stages: 1) the issuing state protection order 2) the EPO and 3) the executing state protection order. This is to ensure that the executing judicial authority is able to verify that the order and its terms comply with domestic law;

- The third stage should ensure that the affected person has the opportunity to make representations about how the terms of the order will affect them;
- Where the order is breached in the executing state, the executing state must have responsibility for prosecution;
- The grounds for refusal are far too narrow and should, where applicable, reflect the full set adopted in previous mutual recognition instruments.

The aims of the European Protection Order

4. We agree with the recitals to the initiative that not only does Article 82(2)(c) Treaty on the Functioning of the European Union (TFEU) provide a treaty base for a legal act in this area, but the priorities identified in the Stockholm Programme and Justice and Home Affairs (JHA) November Council Conclusions underline the importance of safeguarding victims of crime. The evidential basis is not supported by an empirical study. However, it is well known that domestic violence, the main type of crime for which this order will be utilised, occurs in every member state of the Union. What is more, people exercise their freedom of movement around the Union in ever increasing numbers. There is no reason to presume that these figures cannot cross fertilise. Anecdotal accounts suggest that where it is known that protected persons have moved to another EU member state and are followed by the subject of the order, the consequences have been serious and even fatal.¹
5. We therefore support the aims and need for the initiative in principle. However, there are difficulties with the scope of the instrument proposed. Member states have widely ranging approaches to what can be grouped under the term 'protection order'. These can be civil, criminal, pre and post findings, or any combination of the above. Indeed, the UK has orders of all types on its statute books and a further proposal for Domestic Violence Protection Orders and Domestic Violence Protection Notices are currently making their way through the UK parliamentary process.²
6. The Treaty base for the initiative is Article 82(2)(c),

¹ Initial accounts provided by Victim Support Europe (VSE) and available on request in initial form. A fatal case involves a Czech national moving to the UK.

² Crime and Security Bill 2010, clauses 23 to 30.

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

...

(c) the rights of victims of crime

7. The base falls squarely within the criminal cooperation sphere. This is evidenced on the face of the initiative in the preamble. The initiative is not, therefore, one encompassing civil cooperation. Indeed, it could not be as all civil measures must be proposed by the Commission.³
8. Consequently, the only option is for the instrument to apply to criminal sanctions. It will therefore be an act designed to 'lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions'⁴ relating to *criminal* protection orders.
9. However, because the initiative must be adopted as a *directive*,⁵ whilst it is binding as to the result to be achieved, the choice of form and method used to introduce it into national law is left to the member state.⁶ Furthermore, art 82(2) concludes,

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

³ Pursuant to art 294 TFEU. Criminal matters may be presented by a Council initiative pursuant to art 76(b) TFEU where there is a coalition of one quarter of the member states, as is the case here.

⁴ Art 82(1)(a)

⁵ Art 82(2)

⁶ Art 288 TFEU

10. Therefore, whilst the instrument adopted by the Parliament and Council must be restricted to recognition of criminal orders, member states are free to implement the legislation more widely, so as to recognise the application of an EPO in circumstances where domestic legislation would only entail a civil measure. If they do not do so, the EPO can only apply in that member state where a criminal measure would be ordered in similar circumstances.
11. It should be noted that there are four instruments already in force where orders from one member state may entail recognition of a protection order.⁷ Two of these measures are civil and could be utilised for these purposes.
12. Such an approach is complex, piecemeal and the transposing legislation of the directive may not be uniform as a result. The Commission has embarked on a programme of review of victims' rights instruments. We note that the Commission recently said in relation to the EPO,⁸

Free movement within the EU should not be impeded because a person risks losing the protection available to them in their home country. However, there is a problem with the scope of the instrument. Protection measures can be made in both civil and criminal proceedings and covering only one - the criminal law - aspect of protection measures will reduce the benefit of any EU action. We must tackle this serious issue in a fully co-ordinated manner. The Commission will carry out an impact assessment and an evaluation of existing rules and will present a comprehensive package of measures in 2011 to protect victims' rights.

⁷ 1. Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L 337, 16.12.2008, p. 102:

2. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L 294, 11.11.2009, p. 20:

3. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); and,

4. Council Regulation (EC) No 2201/2003 of 27 November 2003 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children, repealing Regulation (EC) No 1347/2000 (Brussels II bis Regulation)

⁸ JHA Council 25 – 26 February 2010 in Brussels, *Europa press release*, Brussels, 24 February 2010.

13. If the instrument is to achieve comprehensive protection of victims, it may be prudent to wait for the package of measures that the Commission proposes in 2011 before continuing any further with this initiative. However, the initiative has been presented by the member states, and must be given due consideration.

Scope of instrument

Article 2

14. In Article 2(2) it is stated that an EPO will only be issued when a 'protection measure' has been previously adopted in the issuing state. Article 1(2) defines 'protection measure' as:

a decision adopted by a competent authority of a member state imposing on a person causing danger one or more obligations or prohibitions referred to in Article 2(2), provided that the infringement of such obligations or prohibitions constitutes a criminal offence under the law of the member state concerned or may otherwise be punishable by a deprivation of liberty in the member state.

We consider that the definition of a protection measure is too wide to ensure legal certainty. In order for a measure to be necessary, a final judicial decision must have been made. This decision can only have been made by examining the allegations brought by the person seeking protection and any representations that the affected person has had an opportunity to make as to those allegations. It is imperative that this process has taken place prior to the issue of an EPO. This is because in order for the judicial authority in the executing state to adhere to mutual recognition principles, it will not be able to review the factual allegations made in the application for protection measures, and will have to treat the decision which forms the basis of the EPO as a final order. The process envisaged under the EPO is a very similar one to the framework decisions on recognition of judgments imposing sentences,⁹ (the

⁹ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, p. 27 and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102.

sentencing framework decisions). Both define 'judgment' as a final decision or order of the court in the issuing state.

15. The 'protection measure' in our view must therefore be limited to a final order imposed by a judicial authority. Otherwise, interim orders imposed by police officers on mere allegations of complainants will fall within the definition. If the instrument is wide enough to encapsulate measures, it will breach art 47 of the EU Charter on Fundamental Rights (the Charter):¹⁰

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

16. With respect to the obligations or prohibitions, art 2(2) appears to limit the scope of the instrument by proscribing five terms, one or more of which must appear in the order. Not all of these refer directly to the protected person. The article is in some respects too narrow and in others too flexible. The most important provision that will be required on any EPO received will be one in a form of words amounting to 'the person must not contact directly or indirectly the protected person.' It should otherwise allow for the flexibility of the particular circumstances of each order and provide a non-exhaustive list of other example obligations or prohibitions.

Article 3

17. The obligation in art 3 to recognise the EPO must be in accordance with the domestic law of the executing member state and the rights of the subject of the order to free movement pursuant to art 18 TFEU and 45 of the Charter.

Article 5

18. Article 5(1) clarifies that an EPO, logically, will only be issued at the request of the protected person. We consider it necessary for this process to take place before a judicial authority, for the reasons set out at paragraphs 13 and 14 above. The reference to art 3(1) as providing the verification for issuance of an EPO seems to be incorrect. It would seem that the reference should be to art 2.

¹⁰ Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p.1.

19. We agree with the practical obligation upon the (judicial) authority in art 5(3) to inform the protected person of the possibility for issuance of an EPO. This is the best mechanism through which to give the instrument practical effect. It will also be incumbent upon member states to ensure that readily accessible information about the EPO is publicly available to protected persons who may decide in the future to move to another member state.

Article 8

20. Art 8 raises the issue of how the EPO is to be treated by the executing state. The article envisages a two step process, namely, 1) the domestic protection order, and, 2) the EPO. This presupposes that the EPO will simply apply domestically. In our view this is unworkable both in relation to compliance with national law, since this is neither a harmonisation instrument, nor a regulation, and in relation to the obligation in art 47 of the Charter.
21. In fact, art 8(1) is constrained by this tension in that it still requires the competent executing authority to recognise the measures that would be available under its national law.¹¹
22. In our view, the complication is caused by how the instrument seeks to treat the issuing state's request. The term 'European protection order' suggests that the request itself is the order. Since there is no harmonisation of injunctive obligations and prohibitions for criminal acts of this nature in the European Union, this cannot be the case. The *domestic* order is the judgment which the executing state is being asked to recognise. The EPO can only be a request. Furthermore, it can only be a request to recognise that the alleged facts raised by the protected person have been determined by a judicial authority in the issuing member state. The terms of the order will only be absolute where domestic law in the executing state can apply them, or their equivalent.
23. In our view, it would be appropriate to rename the EPO to reflect that the request is not itself an order *per se*. In previous instruments this type of request has been

¹¹ At art 8(1)(a)

referred to as a 'certificate'¹² or a 'warrant'.¹³ We consider that the most appropriate term in this context is 'certificate' because a warrant requires something to be obtained, whereas the recognition of a judgment requires no action unless the order is breached. We will continue to use the abbreviation EPO in this briefing, however, in order to maintain consistency. It will be necessary in our view to adopt a three stage process in order to properly understand the instrument: 1) the issuing state domestic protection order, 2) the EPO and 3) the executing state domestic protection order.

24. In our view the third stage is crucial, not only to ensure that the measure and its terms are applicable under domestic law, but also to ensure that the affected person is made aware of the order. Art 8(1)(b) states that the affected person shall be informed only be 'where appropriate'. It is hard to imagine a scenario when notifying the person will not be appropriate, if the order is to have any effect. It is a trite principle of legal certainty, embedded in art 49(1) of the Charter,¹⁴ and in art 6(3)(a) of the European Convention on Human Rights¹⁵ that for an order to be enforceable the parties must be aware of it.
25. We agree with the provision in art 8(1)(c) which provides the executing state with the power to take urgent and provisional measures in order to ensure the continued protection of the protected person. This measure is likely to become a standard part of recognising an order. But for the executing state to reach a final decision on the order and its terms, the affected person must be given the opportunity to make representations about the affect it will have upon their life and freedom of movement. Both aspects are obligatory considerations under the Charter at arts 7 (right to respect for private and family life) and 45 (right to move and reside freely within the territory of the member states) respectively, but may also impact upon other Charter rights, such as arts 14 (right to education) and 15(2) (freedom to seek employment, to

¹² See the sentencing framework decisions.

¹³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1 and Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72.

¹⁴ "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable."

¹⁵ Which requires a defendant 'to be informed promptly, in a language which he understands, and in detail, of the nature and cause of the accusation against him'.

work, to exercise the right of establishment and to provide services in any member state).

26. Practically speaking, this will usually require the executing judicial authority to inform the affected person that an interim order has been made in the executing state. It should give an appropriate period of time to allow the person to respond, either seeking to make oral or written submissions about the order. It should, in accordance with art 47 of the Charter, entitle the affected person to obtain the assistance of a lawyer and provide for legal aid if necessary.
27. Whilst there may be concern that this would defeat the object of the order, i.e. to protect the person concerned because the affected person would then know where they are, we offer three appropriate replies:
 - (1) The protected person will only apply for an order if they are concerned that the affected person may already know, or have the capacity to ascertain where they are; otherwise there would be no reason to seek an order. If the protected person needs to move to escape the person, they will make every effort to disappear, (which may be supported or even engineered by the domestic state they are in). This scenario will not involve seeking an order of this type;
 - (2) The notification from the executing authority will not need to provide any information other than the terms of the interim order, referring by way of explanation, back to the issuing state's domestic order. The terms of the order can be phrased without providing a particular geographic identifier, but rather adopt a wide and generalised prohibition of 'not to contact directly or indirectly' the protected person. If there are particular terms, such as where there are children involved, again, it is likely that the affected person will already know where the protected person is;
 - (3) Whilst the Charter rights of the affected person must be balanced against the protected person's rights, a fair trial requires equality of arms. In the recent case of *A and others v United Kingdom*,¹⁶ the Grand Chamber of the European Court of Human Rights held that the inability of four detainees to effectively challenge the evidence against them, due to the use of secret evidence and special advocates, amounted to a violation of their right to liberty under Article 5(4) of the European

¹⁶ Application no. 3455/05, judgment 19th February 2009.

Convention on Human Rights. In our view, the principle applies to the question in issue here.

28. The purpose of art 8(1)(d) is unclear. If the fact of a breach is to be provided to the issuing state simply for its records,¹⁷ this should be clarified. If it is so that the executing state may take enforcement proceedings against the affected person, we do not agree that the obligation to do so should fall upon the issuing state. This is because the territoriality principle would be invoked, namely that the offence did not occur in the issuing state. Indeed, it does not appear to be the intention of the instrument, when arts 10 (subsequent decisions in the issuing state) and 13 (governing law) are considered, both of which specify that the executing state will have an ongoing authority to amend the protection measure and to take subsequent appropriate action. Practically speaking, if the breach occurs in the executing state, and thus the evidence to prove it is located there, and the terms breached are under the new order, the issuing state will not be able to prosecute without immense difficulty. If the affected person has returned to the issuing state, a European arrest warrant may be appropriate, together with a European supervision order, but an obligation upon the issuing state to prosecute should not be entertained..

Article 9

29. The grounds for refusal in the article are limited. They do not consider whether:
- (1) The issuing state's protection order was obtained *in absentia*;¹⁸
 - (2) Executing state law may recognise a term in the order, or may have the means to monitor it;
 - (3) A limitation period may apply in the executing state;
 - (4) There may be only a short period left to run on the order, rendering its recognition ineffectual;

¹⁷ In accordance with article 2 of Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9.12.2005, p. 33, 34 'Each central authority shall, without delay, inform the central authorities of the other Member States of criminal convictions and subsequent measures in respect of nationals of those Member States entered in the criminal record.'

¹⁸ An obligation now required by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p24.

(5) Conversely, the issuing state's order may apply for a lengthy duration which in the executing state would be unlawful.

30. We consider each of the above matters to be essential elements that should be included in the article, as can be found in the previous mutual recognition instruments that have been adopted. The dialogue process envisaged in art 9(3) must extend to the presentation by the executing state of alternative obligations and prohibitions that would accord with its domestic law.

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