

**DO YOU PRACTICE WHAT (E)U PREACH?  
TURNING THE RIGHT OF THE VICTIMS TO (EXTRATERRITORIAL) PROTECTION  
FROM ENTITLEMENT INTO REALITY<sup>1</sup>**

*by*

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## **1. Introduction**

Victims of crime, which have in some way a cross-border dimension, usually experience the exact same needs and challenges as victims in general. Nonetheless, it is undeniable that they suffer a further burden due to the additional layers of complexity and vulnerability factors resulting from the interaction with a foreign jurisdiction - whether linguistic, legal and practical - which end up hindering access to justice, impairing victims' ability to participate in the proceedings and ultimately lessening their actual chances of being protected from further victimisation.

Among them, people who suffer from so-called recurrent or course of conduct crimes experience greater fragility. These offences involve a persistent pattern of behaviour, composed of repeated actions over time - whether of a similar or different nature - that shows a continuity of purpose and implicate the exercise of coercive power and control in some way. These are always perpetrated by the same offender against the same victim, who is therefore particularly exposed to repeated victimisation, intimidation and retaliation.

In order to address this peculiar situation and ensure that victims can receive appropriate protection, States usually provide for specific remedies – usually labelled as protection orders – which include substantive measures aimed at avoiding contact between the person suffering the crime and the offender (or alleged one), thus preventing violence from reoccurring. Such orders, however, are only effective on the territory of the State in which they have been issued. For the victims to maintain the safeguards already granted when moving abroad – whether temporarily or permanently – it is usually required to instigate a new proceeding, which includes providing evidence again and hope in the positive outcome of a second trial, which is by no means guaranteed.

Within the European legal and political space, founded on the four fundamental freedoms and relying on a common area of justice, there can be many situations in which individuals under constant threat of violence might need to move or stay in another Member State. Consequently, there is a transnational dimension in victims' protection that necessitates attention to ensure that the legitimate exercise of the victims' right to move and reside freely within the territory of the Union does not result in a loss of their security. The EU has addressed this problem by adopting legal tools aimed at setting conditions for the mutual recognition of national protection measures, both in the civil and criminal matter, thus allowing the person who has been granted a protection order in a Member State to continue to benefit from this protection when moving or travelling abroad. Despite good intentions, the practical application of these instruments remain, nonetheless, far from having reached its full potential.

Against this background, this explorative study will describe the challenges faced by victims of recurrent crime in accessing justice, especially in a cross-border setting, and how EU institutions have approached the problems related to the extraterritorial application of domestic protection orders. The relevant legal tools will be then analysed as part of the broader bulk of legislation covering victims' rights to describe their potential and the flaws that are supposed to have led to their striking underutilisation. Lastly, IT solutions will be presented that may improve the practical application of the mutual recognition legal instruments and ultimately help victims in achieving their justice goals while not foreseeing any action implying changes to the legal framework into force.

## **2. Portraying victims of recurrent crimes and the challenges they face ... when crossing borders**

Cross-border victimisation is a nuanced concept encompassing a variety of situations. Beyond victims of crimes that are borderless by nature – such as trafficking in human beings (THB), international terrorism or cybercrime - even victims of crimes having a domestic scale can be covered by this notion, in so far as they reside in one State, while the criminal proceeding takes place in another country having jurisdiction over the offence perpetrated. There is a transnational dimension also where - during the

proceeding, or after the latter has come to an end - victims need or want to move abroad for a fresh start or work-related reasons, whether temporarily or permanently.

Mostly, the challenges encountered by victims in a cross-border setting are no different from those faced by victims in general.<sup>2</sup> By and large, when entering into contact with the criminal justice system, they all need being recognised and treated with respect and dignity, informed about the guarantees they are entitled to and how to enforce them. They also deserve protection from secondary victimisation, to be reassured concerning their safety, and benefit from assistance before, during and even after the trial has come to an end.<sup>3</sup>

However, it is undeniable that cross-border victimisation involves additional obstacles.<sup>4</sup> Some of them are more obvious. One only has to think of the problems caused by language barriers, which certainly play an important role when trying to ask for help and during proceedings, or the (deceptively) simple practical difficulties resulting from non-violent offences (e.g. not having an identity card or means of payment), the impact of which can be quite great, especially when one is abroad for short periods of time. Other challenges may be less evident but equally - if not more - disruptive. Coping with the immediate consequences of trauma, for example, can be more difficult when one is far from one's social support network; reaching authorities and service providers becomes more difficult when one is not familiar with the national legal system and the locally available territorial support network; interacting with professionals can be more frustrating if there are differences in the respective cultural backgrounds that shape how the crime is perceived and then dealt with.

In essence, the need to interact with a foreign jurisdiction leads to many additional “vulnerability factors”, which end up hindering access to justice, impairing victims’ ability to participate in the proceedings and ultimately lessening their actual chances of being protected from further victimisation. Notably, as far as protection is concerned, further layers of complexity come into play when dealing with victims of specific types of crime who are particularly exposed to repeated victimisation, intimidation and retaliation. This is the case of victims suffering offences with an “ongoing” or “course of conduct” nature. These latter are crimes perpetrated by the same offender against the same person, which involve a persistent pattern of behaviour, composed of repeated actions over time (whether of a similar or different nature) that shows a continuity of purpose and implicate the exercise of coercive power and control in some way. Such recurrent offences can potentially arise in many forms of crime; nevertheless, in practice, they occur mainly in specific cases of gender-based violence (GBV) affecting women (e.g. intimate partner violence, domestic violence, stalking, harassment or sexual assault).

These individuals deserve attention – above all in cross-border situations - because their experience of victimisation is peculiar compared to that of victims of other types of violent crime. While the latter usually want justice, and are then ostensibly eager to cooperate with the authorities, victims of recurrent forms of crime are mostly reluctant to participate in the criminal justice process. Notoriously, among the multitude of complex factors deterring them from reporting, fear of retaliation, further violence or escalation of violence can play a major role.<sup>5</sup> In these cases, resorting to the police is perceived as a measure of last resort, even because this may actually mean putting their safety at risk. Research on domestic violence, for instance, has shown that ending a relationship and initiating legal action against

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<sup>2</sup> R. Janoff-Bulman, The aftermath of victimization: Rebuilding shattered assumptions, in: C.R. Figley (Ed.), *Trauma and Its Wake. Volume I: The Study and Treatment of Post-Traumatic Stress Disorder*, New York: Brunner/Mazel, 1985, pp. 15-35; M. Bard, D. Sangrey, *The crime victim's book* (2nd ed.), New York: Brunner/Mazel, 1986.

<sup>3</sup> V. Artinopoulou (et al.), *Towards a victim-centered police response. Training Manual, PROTASIS – Polis Training Skills* (JUST/2015/RDAP/AG/VICT/9318), 2018, available at [http://www.eurocrime.eu/wp-content/uploads/2019/01/PROTASIS\\_Training-Manual.pdf](http://www.eurocrime.eu/wp-content/uploads/2019/01/PROTASIS_Training-Manual.pdf)

<sup>4</sup> UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*. UN: Vienna, 2011, available at [http://www.un.org/en/terrorism/ctitf/pdfs/victims\\_rights\\_e-book\\_en.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf) [accessed 22 September 2015]

<sup>5</sup> R. Amato, D. Carnevali (Forthcoming), *The calm after the storm? The tricky path for restoring the normality of individual rights enjoyment in Intimate Partner Violence cases*, in *Oñati Socio-Legal Series*.

the perpetrator can increase the victims' risk of being re-abused and sustain severe injury or death at the hands of their intimate partners.<sup>6</sup> Consequently, their primary concern when seeking legal intervention usually is not retribution<sup>7</sup> but simply “to be left in peace” and obtain protection for themselves and their children (if any).

Therefore, for these victims, turning to justice is not only about getting a fair punishment for the aggressor and, hopefully, compensation for the damage suffered. For these victims, reliance on justice means trusting in a system that allows them to take back control of their lives and regain the privilege of feeling safe. For this reason, appropriate and effective measures to respond to this need are of utmost importance for at least two reasons: in the short term, they are necessary to protect victims from immediate danger or to prevent further violence against them during proceedings and the post-trial phase; while, in a broader context, they play a fundamental role in strengthening trust in the justice system and its ability to respond effectively to the needs of victims themselves, thus encouraging their legitimate pursuit of justice goals.<sup>8</sup>

In order to address this need, since the mid-1970s, many countries have made available legal tools - usually labelled as protection orders - that are meant to avoid contact between the victim and the perpetrator.<sup>9</sup> These measures vary significantly from State to State. They can have different nature – whether criminal, civil or administrative - and be either temporarily or permanently valid. Despite that, they all pursue the same ultimate goal of preventing future assaults, intimidation and retaliation on the part of the abuser so as to protect the victims from further criminal acts that may endanger their life, physical, psychological and sexual integrity, dignity and personal liberty.<sup>10</sup> Nowadays, the term “protection orders” is used as an umbrella category including a wide range of substantive measures that basically prohibit, restrain or prescribe certain types of behaviour, with the aim to prevent violence from reoccurring.<sup>11</sup> Generally, civil measures take the form of restraining orders that serve a precautionary purpose or are aimed at stopping the wrongful act; while as part of the criminal proceeding, these can be issued as an alternative to pre-trial detention or as part of the sentence (e.g. to complement a prison sentence, as a condition to suspend it or to order conditional release). Protection measures can also be adopted in emergency situations (e.g. emergency barring order) to safeguard the victim from immediate danger.<sup>12</sup> Thanks to subsequent legislative developments, their application has been extended to all individuals at higher risk of repeat victimisation.<sup>13</sup> Nevertheless, in practice, they mainly represent a fast legal remedy to protect victims of GBV, especially victims of domestic violence, who are likely to suffer post-separation abuse, harassment, threats and even domestic killings by ex-partners.

By and large, protection orders represent a vehicle through which the justice system can alter the environment in which the violence occurs by expanding and strengthening the remedies available to

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<sup>6</sup> A. Klein, *Practical Implications of Current Domestic Violence Research, Part II: Prosecution*, National Institute of Justice, United States of America (2008); Long, J., Mallios, C. and Murphy, S., “Model Policy for Prosecutors and Judges on Imposing, Modifying and Lifting Criminal No Contact Orders”, The Battered Women’s Justice Project (2010).

<sup>7</sup> J. Stubbs, Domestic violence and women’s safety: Feminist challenges to restorative justice, in *Legal Studies Research Paper* n. 08/16, 2008; H. Johnson et al., *Violence against women: An international perspective*, Springer, 2008.

<sup>8</sup> R. Amato, D. Carnevali (Forthcoming), The calm after the storm? The tricky path for restoring the normality of individual rights enjoyment in Intimate Partner Violence cases, in *Oñati Socio-Legal Series*.

<sup>9</sup> S. van der Aa, K. Lens, F. Klerx, A. Bosma & M. van den Bosch, Aard, omvang en handhaving van beschermingsbevelen in Nederland, Den Haag: WODC 2013, p. 143, quoted in [https://pure.uvt.nl/ws/portalfiles/portal/7505615/Project\\_Handbook\\_final.pdf](https://pure.uvt.nl/ws/portalfiles/portal/7505615/Project_Handbook_final.pdf), p. 114.

<sup>10</sup> E. Cerrato et al., *European Protection Order, European Implementation Assessment*, EPRS Study, 2017, p. 7

<sup>11</sup> R. Römken, Legal protective provisions or protection orders, Document prepared for the Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO), 21 May 2010, available at <https://rm.coe.int/1680593fcc>

<sup>12</sup> E. Sellier, A. Weyembergh, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*. Study, Policy Department for Citizens’ Rights and Constitutional Affairs, 2018, pp. 161 ss.

<sup>13</sup> *Supra* note 10.

victims. By reducing the risk of continued victimisation, such measures are likely to produce positive changes in the lives of victims and their families. Research has indeed long shown that from the victim's perspective, protection orders are valuable tools in safeguarding them against repeated incidents and consequently in helping them regain a sense of well-being. Even when issued only on a temporary basis, in the absence of following permanent ones, these measures have proved to be useful in deterring the abusive behaviour in the long run and also in educating victims about the actions they may take to protect themselves (as an example, women with a temporary order may be encouraged to return to court asking for a permanent order).<sup>14</sup>

But, what happens when the victims who has been granted of these protection measures must or want to move abroad?

Protection orders are normally only effective on the territory of the State in which they have been adopted. Therefore, if victims decide to move to another country, in order to maintain the safeguards that have been already granted, they are generally required to instigate a new proceeding, provide evidence again, and basically hope in the positive outcome of a second trial, which is by no means guaranteed.

In a borderless Union, founded on the principle of freedom of movement, there can be many situations in which individuals in need of protection, because under constant threat of violence, might want or need to spend some time in another Member State, such as visiting family, travelling for holidays, or working (especially when commuting or living in cross-border areas). Victims might also decide to establish themselves in another State to start afresh. Therefore, there is a strong transnational dimension in victims' protection that require specific attention. Within a common area of justice, it is necessary to guarantee that the protection originally provided is maintained in any other Member State to which the persons move without having to go through time-consuming procedures. This will ensure that the legitimate exercise of their right to move and reside freely within the territory of the Union does not result in a loss of their security.<sup>15</sup>

This problem has been firstly dealt with at the EU level by elaborating legal tools focused on both probation and supervision measures. The latter have been adopted to set conditions for the mutual recognition of judgments and decisions, which relate *inter alia* to the obligation to avoid contact with certain persons, and the obligation not to enter certain localities, places or defined areas in the issuing or executing State.<sup>16</sup> These obligations can surely be imposed in cases affecting victims of recurrent crimes, including GBV; however, they both are designed from the perspective of the (alleged) offender of a criminal act, thus taking as their starting point that the latter must have returned, or must have consented to return to the Member State in which s/he is lawfully and ordinarily residing. They rather do not cater for the possibility that the victim wants to move to another State, while continuing to benefit from the measure that has been imposed on the offender.<sup>17</sup> With a view to covering this legal vacuum and complement the instruments already in place in this field, specific provisions have been put in place - as part of a legal package aimed at strengthening the rights of victims of crime in the EU - so as to provide the legal basis for the mutual recognition of protection measures and allow the person who has been

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<sup>14</sup> L. Susan et Al, Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence, National Center for State Courts Research Report, 1997.

<sup>15</sup> Treaty on European Union (TEU), Art. 3(2) and Treaty of Functioning of the European Union TFEU, Art. 21.

<sup>16</sup> 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 and 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.

<sup>17</sup> Questionnaire to delegations in view of the possible presentation by Spain and other Member States of an initiative for a Council Framework Decision on the European Protection Order, Brussels, 23 September 2009, 13577/09, COPEN 176, available at <https://data.consilium.europa.eu/doc/document/ST-13577-2009-INIT/en/pdf>

granted a protection order in a Member State to continue to benefit from this protection when moving or travelling abroad.

As it will be better explained below, despite well-intentioned, these measures remain, however, under-used in practice and their practical application is still far from having reached its full potential. Such a result is not only surprising but even worrying, considering the scale of GBV crime-related problems as well as the number of victims who benefit from domestic protection measures and who probably travel across the EU on a regular or occasional basis.<sup>18</sup> Against this background, in the following paragraphs, these measures will be analysed as part of the broader supranational legal framework on victim's rights, with the aim to clarify the rationale behind this broader trend of underutilisation and identify solutions that may improve their practical application while not foreseeing any action implying changes to the legal framework into force.

### **3. The legal response. A stronger legal framework for victims (crossing-borders) in the EU**

Overall, victims of crime have been on the EU agenda for more than three decades now.<sup>19</sup> However, it is only with the reform process started in 2011 that the EU Institutions began to focus on the many layers of complexity characterising victim's status and necessities.<sup>20</sup> For a long time, the European action in this field was indeed just a corollary of the full functioning of the fundamental freedoms; therefore, attention was almost exclusively paid on the access to national compensation systems in cross-border situations, thus overlooking the victim's need for a comprehensive and effective protection.<sup>21</sup>

The first steps towards a political and cultural change were taken with the 1999 *Communication of the Commission on Crime Victims in the EU*,<sup>22</sup> which has lent political visibility to this topic and encouraged the development of legislation aimed at making sure that victims' basic rights are respected in the administration of justice. In the aftermath, the first hard law measures were introduced to provide minimum guarantees in criminal proceedings<sup>23</sup> and an explicit obligation for the Member States to put in place compensation schemes for violent intentional crimes together with mechanisms to facilitate

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<sup>18</sup> Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, Brussels, 11.5.2020, COM(2020) 187 final.

<sup>19</sup> Resolutions on Compensation for Victims of Acts of Violence, adopted by the European Parliament on 13 March 1981, (p. 77) and on 12 September 1989 (p. 32).

<sup>20</sup> G. Gamberini, *Les politiques supranationales européennes ou l'âme ambiguë de l'harmonisations*, in: G., Giudicelli-Delage, C. Lazerges (Ed) *La victime sur la scène pénale en Europe*, 2008, p. 163; G. Arnone, *Le vittime dei reati nella legislazione e nella giurisprudenza dell'Unione Europea*, in: AAVV, *Processo penale e vittima di reato prospettive internazionali, europee e nazionali*, I Quaderni europei, Centro di documentazione europea - Università di Catania - Online WorkingPaper 2010/n. 26, Dicembre 2010; C. Amalfitano, *L'azione dell'Unione europea per la tutela delle vittime di reato*, in: *Diritto dell'Unione Europea*, 2011, vol. 3, pp. [643-682]; M. Venturoli, *La tutela della vittima nelle fonti europee*, in: *Diritto Penale Contemporaneo*, 3-4/2012, pag. 88 and 90ss; P. Gaeta, *La tutela delle vittime del reato nel Diritto dell'Unione Europea: spunti per una ricostruzione storico-sistematica*, in *Cassazione Penale*, n. 07/08, 2012, [2700-2714]; D. Savy, *La vittima dei reati nell'Unione europea. Le esigenze di tutela dei diritti fondamentali e la complementarietà della disciplina penale e civile*, 2013, p. 37; S. Allegrezza, H. Belluta, M. Gialuz, L. Luparia, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, 2012.

<sup>21</sup> Action Plan of the Council and the Commission 3 December 1998; European Council of Tampere – Conclusions of the Presidency, 1999; Case 186/87 *Cowan vs Trésor Public*; C-164/07 *James Wood vs Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*, para 16.

<sup>22</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - Crime victims in the European Union - Reflexions on standards and action COM(1999) 349 def, 14.7.1999; European Parliament resolution on the Commission communication to the Council, the European Parliament and the Economic and Social Committee on crime victims in the European Union: Reflexions on standards and action (COM(1999) 349 - C5-0119/1999 - 1999/2122(COS)).

<sup>23</sup> Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.

compensation claims in cross-border cases.<sup>24</sup> In this respect, however, the Lisbon Treaty has represented the very turning point. This latter has indeed not only provided a clear legal basis to develop common standards and smooth cross-border cooperation,<sup>25</sup> but has also conferred the EU Charter of Fundamental Rights binding value, thus enhancing protection for victims through provisions detailing civil, political and social rights, as well as measures prohibiting discrimination. The new legal and political scenario has thus made it possible to set up a directly binding and properly enforceable legal framework, thanks to which victims can be granted participation in the proceeding, minimum level of formal and substantial protection as well as assistance and support.<sup>26</sup>

The Victims' Rights Directive<sup>27</sup> is now the cornerstone of this supranational system of guarantees. This is credited with having brought about a ground-breaking approach to victimization,<sup>28</sup> by introducing measures that are broad and inclusive in their scope<sup>29</sup> and rely on a holistic perspective.<sup>30</sup> Accordingly, respecting the dignity and integrity of the victim is essential to avoid being exposed to forms of injustice across the board<sup>31</sup> and is a fundamental element of the good administration of justice. A sensitive handling of the case, the proper interpretation of the context in which the crime occurred, the better understanding of victim's condition, can indeed all play a role in minimising secondary victimisation, while improving the quality of evidence the victims can provide, thus facilitating a good outcome of the criminal proceedings.<sup>32</sup>

Consistently with this angle, emphasis is placed on a comprehensive set of cross-cutting measures aimed at boosting the right to understand and be understood, which go beyond a general duty to provide information. These instead focus on the quality and certainty of communications,<sup>33</sup> requiring national authorities to proactively help victims by providing them information about their rights, ensuring guidance on how to enforce them,<sup>34</sup> and assistance to overcome difficulties they may encounter. Likewise, participation guarantees have been strengthened,<sup>35</sup> by focusing on procedural justice requirements that

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<sup>24</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

<sup>25</sup> Treaty of Functioning of the European Union, art 82 (1) (2).

<sup>26</sup> T. Freixes, L. Román (Eds), Protection of the gender-based violence victims in the European Union. Preliminary study of the Directive 2011/99/EU on the European protection order, 2014, pp 31 ss.

<sup>27</sup> Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>28</sup> T. Rafaci, New Perspectives for the Protection of the Victims in the EU, in: S. Ruggeri (Ed.), Human Rights in European Criminal Law, 2015, p. 217; M. Gialuz, La protezione della vittima tra Corte EDU e Corte di Giustizia, in: L. Lupària (Ed), Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali, [pp. 19-29].

<sup>29</sup> Directive 2012/29/UE, Art. 2 (1), Recitals 19 and 52. On this topic: S. R. Buczma, An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union, in: ERA Forum, 2013/ 14 [235–250], p. 242; DG Justice Guidance document related to the transposition and implementation of Victims' Directive 2012/29/EU – Implementation strategy, 2013.

<sup>30</sup> Directive 2012/29/EU, Recital 9.

<sup>31</sup> M. S. Laxminarayan, The heterogeneity of crime victims: Variations in procedural and outcome preferences. Wolf Legal Publishers, 2012, available at [https://pure.uvt.nl/ws/portalfiles/portal/1458201/Laxminarayan\\_heterogeneity\\_19-11-2012\\_emb\\_t#page=58](https://pure.uvt.nl/ws/portalfiles/portal/1458201/Laxminarayan_heterogeneity_19-11-2012_emb_t#page=58)

<sup>32</sup> DG Justice Guidance document, supra note 18, p. 42.

<sup>33</sup> Directive 2012/29/UE, Recital 34. On this topic see, A. Diamante, La Direttiva 2012/29/UE che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato. Origini, ratio, principi e contenuti della Direttiva recepita dal D. Lgs. 212/2015, in: Giustizia Penale, 3/2016.

<sup>34</sup> Directive 2012/29/UE, Art. 8 (2)

<sup>35</sup> Rafaci, supra note 17, p. 217; Gialuz, supra note 17; M. Jacquelin, La partecipazione delle vittime nel processo penale francese: stato dei luoghi e nuovi scenari, in Lupària (Ed), supra note 17, p. 84 ss; A. Novokmet, The right of the victim to a review of a decision not to prosecute as set out in article 11 of the Directive 2012/29/EU and assessment of its transposition in Germany, Italy, France and Croatia, in: Utrecht Law Review, 2016, 12 (1), [86-108]; S. Allegrezza, Il ruolo della vittima nella Direttiva 2012/29/UE, in: Lupària (Ed), supra note 17, p. 6; Gaeta, supra note 11, p 2713.

address the quality of the interaction between the victims and the justice system.<sup>36</sup> A case in point is the right to be heard and to provide evidence.<sup>37</sup> This latter is meant to offer a *milieu d'accomplissement*, where the victim is recognised on a social and procedural level as a person with an interest in the criminal process and its outcome and who can also contribute to establishing the facts.<sup>38</sup> However, within this normative setting, protection rights are those that probably best convey the innovative nature of the Directive and one of its most significant achievements. Overall, these are based on the understanding that all persons who suffered abuse experience different reactions to crime. Consequently, protection should be tailored to the personal characteristics of the victim, the type and circumstances of the crime, and the relationship between the victim and the offender.<sup>39</sup> A case-by-case approach is, thus, requested not only to minimise the risk of secondary victimisation throughout the trial. This is also deemed necessary to determine if victims are particularly vulnerable to repeat victimisation, intimidation or retaliation and so decide if special protection measures should be applied (e.g. interim injunctions, protection or restraining orders may be of particular importance in situations of GBV and violence in close relationships).<sup>40</sup>

Domestic protection measures are actually not explicitly dealt with by the Victim's Rights Directive, which does not harmonise the national legislation regulating this specific matter, but only invites the Member States to make such measures available to victims. However, some guidance as to what should be deemed a minimum is indirectly provided by other EU legal tools, which are an integral part of the victim's rights package and complement the above bulk of provisions. Notably, the Directive 2011/99/EU on the European Protection Order ('EPO Directive') and its complementary counterpart in civil matters ('EPO Civil Regulation'),<sup>41</sup> which are both covered in the following paragraphs, serve this function and, starting from 2015, enable circulation of civil and criminal protection measures between the Member States having created the legal basis for these protection orders to be mutually recognised and executed.

### 3.1 The EU extraterritorial system of victims' protection

Starting from the presumption that cross-border victimisation leads to more vulnerability and burden, the EU law requires the Member States to observe a guarantee of equal treatment among nationals,<sup>42</sup> based on which victims should benefit from the same level of protection no matter which State they are visiting or living in. Consequently, additional specific remedies apply to address some of the complications usually resulting from contact with a foreign jurisdiction. Interestingly, beyond the guarantees provided to minimise communication barriers for non-native speakers<sup>43</sup> and those

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<sup>36</sup> DG Justice Guidance document, supra note 18, p. 9; Commission Staff Working Paper Impact Assessment SEC(2011) 580 final, 18.5.2011, para 2.2.4. Issue 4 and 3.1.

<sup>37</sup> Directive 2012/29/EU, Art. 10. On this topic: Allegrezza, supra note 25.

<sup>38</sup> G. Illuminati, *La vittima come testimone*, in: Lupària (Ed), supra note 17, [pp. 63-77], p. 66. Allegrezza, supra note 25, p 7 and 13ss; J. Milquet, *Strengthening victims' rights: from compensation to reparation*, 2019, p. 170; I. Wieczorek, *A needed balance between Security Liberty and Justice. Positive signals arrive from the field of victim's rights*, in *European Criminal Law Review*, v. 2, 2012, [141-157], p. 146. See also A. Garapon, *La dimension cérémonielle de la reconnaissance dans la justice*, in: *Revue d'éthique et de théologie morale*, 2014/HS (n° 281), [pp. 73-87], p. 84.

<sup>39</sup> Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime [COM(2011) 275 final], p. 9.

<sup>40</sup> Directive 2012/29/UE, Recital 52. See also DG Justice Guidance Document, supra note 18, p. 39 and 40.

<sup>41</sup> Regulation 606/2013/EU on the mutual recognition of protection measures in civil matters

<sup>42</sup> These measures also cover third country nationals or stateless persons who have been victimized in the territory of the EU Member States or who have fallen victims of crime outside their borders, whilst the criminal proceeding is taking place within the EU. See Directive 2012/29/EU, art. 17 and Recitals 10 and 13.

<sup>43</sup> Directive 2012/29/EU, arts 5 (3) and 7 and Recital 9, 21, 34, 35 and 36. On this topic: S. van der Aa, *The right to protection*, in *Superior Council of Magistracy of Romania, Strengthening judicial cooperation to protect victims of crime: Handbook*, 2014, p. 27, available at [https://pure.uvt.nl/ws/portalfiles/portal/7505615/Project\\_Handbook\\_final.pdf](https://pure.uvt.nl/ws/portalfiles/portal/7505615/Project_Handbook_final.pdf). LUPARIA L.,



encouraging recourse to ICT to conduct hearings,<sup>44</sup> a variety of measures have been put in place with the aim to ease for cross-border victims receive protection, through smoother cooperation between competent national authorities.

In particular, transnational collaboration mechanisms have been adopted with the aim to extend the protection of victims affected by recurrent types of crime, who are at greater risk of repeat victimisation, intimidation and retaliation. Notably, two different instruments have been created to this end:<sup>45</sup> the Directive 2011/99/EU (EPO Directive) provides for a cooperation scheme that allows the mutual recognition of protection measures in the criminal matter, while the Regulation 606/2013 (EPO Regulation) operates according to the same aims and methods in the civil field. The rationale underlying both these legal tools is not harmonising national laws. They are rather meant at creating a system through which an existing national protection measure can be recognised and executed in a State other than the one where this has been originally issued so that victims can continue to rely on such an entitlement when crossing borders.<sup>46</sup> Remarkably, both instruments basically pursue a common goal by using similar means. As a matter of fact, where there exist serious grounds for considering that person's life, integrity, liberty, or security is at risk, they provide for the following three types of protection measures to be recognised, namely:

- i)* a prohibition from entering certain places where the protected person resides, works, regularly visits or stays;
- ii)* a prohibition or regulation of contacting, in any form, with the protected person;
- iii)* a prohibition or regulation on approaching the protected person closer than a prescribed distance.

Despite these common traits, because of the different legal basis on which they rest, their functioning lies on different mechanisms of cooperation.

- *Extra-territorial protection in the criminal field*

As far as the criminal domain is concerned, the extraterritorial application of the above safeguards is reliant upon the issuance of a European Protection Order (EPO), which is a document adopted in relation to a protection measure already in force in the issuing State and established according to the latter's internal domestic legislation. The procedure for obtaining an EPO and having it recognised abroad rests on the direct collaboration between national judicial (or equivalent) authorities with territorial responsibility designated by each Member State to act as issuing and executing agency. The Issuing Authority (IA), which operates in the State where the original protection measure has been adopted, is in charge to issue and transmit an EPO; while the Executing Authority (EA), which has jurisdiction in the receiving State, is called upon to recognise and execute such order. This direct interaction can only be mediated when, as a result of the organisation of the domestic judicial system, a central authority is designated for the administrative transmission and reception of any EPOs and the official correspondence relating thereto.<sup>47</sup>

Overall, the EU regime provides for a streamlined scheme, based on a simple three-step approach: a) the start-up phase, which is initiated by the victim and carried out in the issuing State, according to the law of the latter; b) the transmission stage during which the EPO is forwarded abroad according to the Directive requirements; c) the recognition and execution stage, which is carried out in the executing State pursuant to its internal legislation.

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Vittime dei reati e diritto all'assistenza linguistica, in FALBO C., VIEZZI M. (a cura di), Traduzione e interpretazione per la società e le istituzioni, 2014, pp. 97-104.

<sup>44</sup> Directive 2012/29/EU, art. 17 (1) b).

<sup>45</sup> Directive 2011/99/EU, Recital 10; Regulation 2013/606/EU, Recital 12.

<sup>46</sup> Directive 2011/99/EU, Recital 6; Regulation 2013/606/EU, Recital 3.

<sup>47</sup> Directive 2011/99/EU, art. 4 (2).

Any protected person, when deciding to reside or stay (or is already residing or staying) in another Member State, can apply for a domestic protection order to be recognised and enforced in the territory of the latter country.<sup>48</sup> The request must be submitted to the territorially competent IA, which is called to decide on the issuance of an EPO only after verifying that the protection measure in question falls within the three categories provided for by the EPO Directive and after taking into consideration a number of factors, including the length of the period(s) the protected person intends to stay abroad and the seriousness of the protection need. Notice, moreover, must be given to the person causing danger. S/he must indeed be allowed to exercise her/his right to be heard and challenge the protection measure if these guarantees have not been granted in the procedure leading to the adoption of the original protection measure. Where these conditions are met, a European order can be adopted using a predefined standard form that contains details of the applicant, the offender, the measure originally imposed, and a summary of the facts and circumstances that led to the adoption of the order. Where appropriate, occurrences which could influence the assessment of the danger faced by the protected person can also be indicated. The IA must translate such form into one of the official languages of the executing State or any other EU languages that such State has declared to accept.<sup>49</sup>

The IA can then directly transmit the EPO to the EA of the receiving State by any means that leaves a written record to establish its authenticity. Should the competent EA be not known, the IA can obtain the necessary information by making all the relevant enquiries, including via the contact points of the European Judicial Network,<sup>50</sup> the National Member of Eurojust or the National System for the Coordination of Eurojust operating locally.

Once the EPO has been forwarded, the recognition process should take place on the basis of a quasi-automatic pattern of collaboration based on which formalities must be minimised. As a matter of principle, though, the EA should - without undue delay – accept the existence and validity of the original protection measure, acknowledge the factual situation described in the form, and agree that protection should be provided and continue through a new national protection order issued in accordance with its domestic law.<sup>51</sup> Whenever possible, the exact same measure originally provided in the issuing State should be adopted. However, in the case that this is not feasible under domestic law, the EA must adopt any measure that would be available in a similar case, and that corresponds to the highest degree possible to the one initially provided for, in such a way as to prevent the crime from being committed again and avoid for the victim the need to start a new proceeding or re-produce evidence.

As for any other EU mutual recognition legal tool, to facilitate a quick execution process, national actors cannot raise barriers to cooperation on the basis of a “foreign argument”. Consequently, refusal to comply with the request can be opposed only if one or more of the grounds for refusal detailed in the EPO Directive apply. Should this be the case, the EA has the duty to inform both the IA and the protected person and to provide details about the possibility of requesting the adoption of a protection measure in accordance with its own national law and of any available applicable legal remedy against such a decision.

It is worth stressing that within this cooperation system, direct dialogue between national agencies is not only required to fulfil the obligations relating to the transmission of the European order. Also, this is strongly encouraged for consultation purposes,<sup>52</sup> with a view to smooth handling those hindrances that may occur when two different jurisdictions are called upon to interact during the recognition process. As

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<sup>48</sup> The request can also be submitted in the requested State. However, applying in the country in which the original domestic order has been adopted before leaving its territory allows strengthening the procedure further, since the request submitted in the executing State will be transferred to the issuing State, where the underlying proceedings were carried out and where the protection measures were adopted, the existence of which is a prerequisite for issuing an EPO.

<sup>49</sup> Directive 2011/99/EU, art. 17.

<sup>50</sup> Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network

<sup>51</sup> Directive 2011/99/EU, Recital 18.

<sup>52</sup> Directive 2011/99/EU, art. 16

an example, timely correspondence can be pivotal when gaps in the information provided risk hamper the completion of the procedure and the adoption of protective measures.<sup>53</sup> The same can be said regarding the variety of situations possibly occurring in the aftermath of the EPO's execution. Just think that the IA is the sole authority competent to adopt any decision about the renewal, review, modification, revocation and withdrawal of the protection measure and, consequently, the EPO. It follows that - should one of these scenarios occur - the EA ought to be notified without delay of any decision taken so as to allow the discontinuation or modification of the EPO. In the light of this new piece of information, the EA might also decide to refuse to enforce the modified prohibition or restriction, should the latter not fall within the types of measures covered by the Directive. On the other hand, in the event of a breach of the measures taken in the executing State following the recognition of an EPO,<sup>54</sup> the IA must promptly be informed, especially if there is no available domestic measure to be taken in the executing State related to that breach.

- *Extra-territorial protection in civil field*

When it comes to the civil field, having an EPO executed abroad is even more streamlined than in the criminal matter since the Regulation - like other cooperation instruments in the same area - provides for abolishing intermediate *exequatur* procedures. Under the civil regime, the recognition process does not even require interaction between national authorities. The procedural steps to be taken are kept to a minimum, thus conferring a high degree of self-reliance to the protected person who wishes to have a protection measure executed abroad. It is sufficient to ask the IA to issue an EU-wide standard Certificate<sup>55</sup> containing all necessary information and present such document – together with a copy of the original protection measure - to the Member State's competent authority. The only requirement to prior check for the IA to issue the Certificate is making sure that the protection measure has been brought to the notice of the person causing the risk.

Once this has been submitted to the foreign EA, recognition and execution are supposed to be completed automatically. No review pertaining to the substance, the nature and the essential elements of the measure imposed in the Member State of origin is allowed; only factual parts included in the Certificate can be adjusted in so far as these amendments are necessary for the recognition of the protection measure to be effective in practical terms in the Member State addressed.<sup>56</sup> Also, refusal is only allowed upon application by the person causing the risk, in the case such recognition is (a) manifestly contrary to public policy in the Member State addressed; or (b) irreconcilable with a judgment given or recognised in the Member State addressed.

#### **4. Fact checking victims' right to (extraterritorial) protection**

Although normative developments occurred during the last decade are remarkable, recent analysis<sup>57</sup> has made it clear that cross-border victims still face serious barriers when it comes to exercise their rights

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<sup>53</sup> Directive 2011/99/EU, art.9.4

<sup>54</sup> Directive 2011/99/EU, Form II

<sup>55</sup> The Certificate allows minimising the need for translation since the standard form is multilingual and contains only very few free-text fields that can be filled online using a dynamic form that is available on the European e-Justice Portal.

<sup>56</sup> Under the meaning of the Regulation, “factual elements” refer to include the address, the general location or the minimum distance the person causing the risk must keep from the protected person, the address or the general location. See Regulation 2013/606, Recital n. 20.

<sup>57</sup> See; Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)), 14 May 2018, [https://www.europarl.europa.eu/doceo/document/A-8-2018-0168\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0168_EN.html); The Victims' Rights Directive 2012/29/EU. European Implementation Assessment, PE 611.022, 2017, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS\\_STU\(2017\)611022\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU(2017)611022_EN.pdf); Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have

in the EU and that further progress is needed to reach the full potential of the current legal framework. By and large, the implementation of the victims' rights package is turned out to be unsatisfactory, and this is not only due to the incomplete or incorrect transposition of some key provisions.<sup>58 59</sup> Even where the relevant supranational rules have been (more or less) correctly integrated into the domestic legal order, a variety of factors still contribute to mitigating - if not making void - their effects.

Looking closely at the EPO Directive, this trend can be clearly seen. The national implementing provisions from all the Member States bound by this legal tool seem to be adequate overall, especially regarding the EPO issuance and recognition mechanism.<sup>60</sup> However, its practical application plainly shows a striking underutilisation of this instrument. Based on the 2020 Commission Report on the implementation of the EPO Directive, only 37 European order were issued and, out of these, only 15 were executed.<sup>61</sup> On the civil side, the situation seems to be even more problematic (to be assessed, at least), as no trace of civil protection orders under the Regulation has been found in the national registers.<sup>62</sup> Considering the potential number of victims who could benefit from the recognition of an EPO – whether civil or criminal - <sup>63</sup> the sub-optimal use of these instruments, years after their implementation date, raises growing concern about their effectiveness. The paucity of data at the EU level certainly makes it very challenging to attempt to identify the causes that both at the level of victims and at the level of authorities led to such an outcome. At any rate, hypotheses concerning the under-use of these instruments can at least be assumed on the basis of the results of the survey-based studies conducted in recent years.

In this respect, the **lack of previous harmonisation** is deemed to play a major role. As a matter of fact, the good functioning of EPOs heavily depends on the domestic regulation of the Member States governing protection measures. The basic requirement for seeking extraterritorial protection is indeed a pre-existing order that must be active and running in the issuing State. Similarly, an EPO can only be enforced in the requested State by adopting the provisions available under the national law of the latter. This pattern, however, operates within a context that is marked by huge variances.<sup>64</sup> Some States provide for both civil and criminal protection measures, depending on the type of proceedings at stake and the

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over the development of EU legislation, PE 604.977, 2018, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL\\_STU\(2018\)604977\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf); J. Milquet, Strengthening victims' rights: from compensation to reparation, 2019; Reports Fundamental Rights Agency on Justice for victims of violent crime, 2019, available at <https://fra.europa.eu/en/publication/2019/victims-rights-standards-criminal-justice-justice-victims-violent-crime-part-i#TabPubRelated>; Victim Support Europe, Project VOCIARE: Victims of Crime Implementation Analysis of Rights in Europe - Synthesis Report, 2019, [https://victimsupport.eu/activeapp/wp-content/files\\_mf/1564677465VOCIARE\\_Synthesis\\_Reportweb.pdf](https://victimsupport.eu/activeapp/wp-content/files_mf/1564677465VOCIARE_Synthesis_Reportweb.pdf)

<sup>58</sup> Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM/2020/188 final.

<sup>59</sup> The Commission had 21 on-going infringement proceedings for incomplete transposition of the Victims' Rights Directive against Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden at the time when the Strategy has been published. Based on the data provided in the EU Infringement procedure database [accessed 14 Jan 2021] the Commission has 12 on-going infringement proceedings.

<sup>60</sup> T. Wahl, Commission: Directive on European Protection Order Underused in Practice, 14 August 2020, Eurocrim, <https://eucriim.eu/news/commission-directive-european-protection-order-underused-practice/>; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, COM/2020/187 final

<sup>61</sup> Report COM/2020/187 final, supra note 63.

<sup>62</sup> Victim Support Europe, Cross-border Victimisation. Challenges and solutions with respect to the provision of support to victims of crime in a cross-border situation, 2017, <https://victimsupport.eu/activeapp/wp-content/uploads/2017/02/VSE-Cross-border-Victimisation-Report.pdf>

<sup>63</sup> Fundamental Rights Agency Report, Violence against women: an EU-wide survey, 2014; See also European Parliamentary Research Service, European Protection Order Directive 2011/99/EU - European Implementation Assessment, 2017.

<sup>64</sup> S. van de Aa et Al., Mapping the legislation and assessing the impact of Protection Orders in the European Member States, Wolf Legal Publishers, 2015.

stage of such proceedings;<sup>65</sup> while some other countries apply exclusively one or the other type of protection order. As an example, in Germany, protection orders can only be taken by the civil authority; whilst in Spain or Romania<sup>66</sup> they are entirely a matter for the criminal justice system.<sup>67</sup> There is also a group of States in which protection orders are neither of a purely civil nor a merely criminal nature.<sup>68</sup>

Although two separate complementing tools - the Directive and the Regulation - have been adopted precisely to cope with these widely divergent national approaches, and despite the fact that both of them do not require (in principle) legislative approximation, the prevailing feeling is that compatibility issues do arise, which may affect the application of these tools in practice. Paradoxically, relying on this dual track-mechanism is a source of confusion for users – whether legal actors intervening in the process and victims - because of the frictions may arise from carrying out proceedings that can be governed partly by criminal and partly by civil law. One has just to think that under the Regulation the recognition process is supposed to be much more straightforward than it would be under the Directive. The document conveying the request for recognition is a much more detailed certificate than the EPO form, against which a refusal can be opposed only in a very limited number of cases and which is not bound by the dual criminality requirement. Therefore, it is not so difficult to imagine that complications may arise at the execution stage, in those cases where the requested State has only criminal or civil measures at its disposal to extend the protection originally granted. The requested authority could be called upon to recognise and execute with a civil remedy, a protection order issued initially in the criminal field, and the smooth running of such a process cannot be taken for granted. Likewise, problems could occur when the EA is asked to enforce a measure issued by non-criminal or even non-judicial authorities.

Similar concerns also apply to the supervision and monitoring stages of such a process, which are among the most delicate and tricky ones even in their domestic setting. Monitoring techniques and mechanisms to supervise compliance with the protection orders vary to some extent from State to State. In some cases, opposite approaches are in place, and this is likely to create situations in which the degree of protection afforded can be uneven - potentially lower - even though the requested State comply with the terms laid down by the EU law. We can take into account, for example, the Spanish experience and compare it with the Cypriot one. In the former, along with the monitoring activity ensured by the police, a multitude of arrangements is available to serve this purpose, which ranges from emergency phone lines to a variety of electronic devices. At the other extreme, Cyprus does not provide for any supervision system.<sup>69</sup>

This scenario becomes even more complicated when considering the challenges associated with the way in which Member States have transposed the relevant legislation into their national legal systems. Responses to a study requested by the European Parliament in 2018 revealed that the ways in which both the Directive and the Regulation have been implemented have made them difficult to implement in practice. This, of course, applies especially to the EPO Directive, which - by its very nature - is likely to be affected by problems arising from incomplete or incorrect transposition. A particular case concerns the double criminality requirement, which in some Member States has been adopted as a mandatory ground for refusal, thus creating barriers in the practical use of an EPO when there are differences in the definition given to offences, especially those related to sexual violence.

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<sup>65</sup> As an example, in Hungary, Ireland, Italy, The Netherlands.

<sup>66</sup> In Romania, the civil court is only competent to issue restraining orders in domestic violence cases.

<sup>67</sup> E. Sellier, A. Weyembergh, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, 2018, (study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee).

<sup>68</sup> A case in point is Finland, where "quasi-criminal protection orders" can be issued, which are not necessarily connected to a criminal prosecution, however the violation of which constitutes a criminal offence.

<sup>69</sup> T. Freixes, L. Román (Eds), *Protection of the gender-based violence victims in the European Union. Preliminary study of the Directive 2011/99/EU on the European protection order*, 2014, p. 126; E. Sellier, A. Weyembergh, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*. Study, Policy Department for Citizens' Rights and Constitutional Affairs, 2018.

It follows that, despite the flexibility retained in the nature of the EPOs themselves, the lack of prior approximation together with the complex functioning of the cooperation instruments based on the principle of mutual recognition may help explain why the current system is not conducive to the effective application of EPOs. Unlike the EU legal instruments concerning defendants, there is an apparent disconnect between harmonisation and mutual recognition in the field of victims' rights. Except for a small mention in the preamble, no reference to mutual recognition and the EPO Directive can be found in the Victims' Rights Directive. Despite this, the latter instrument would actually have the potential to fill some of the gaps in the EPO Directive and the Regulation and to raise awareness of the benefits of using these instruments. As an example, the information to be provided by the authority to the victim is vital for the effectiveness of the EPO, not only because it makes individuals aware of the possibility to apply for it if necessary, but also throughout the entire process following the application. In addition, the EPO may involve victims being confronted with an unfamiliar legal system or language, placing them in a particularly vulnerable situation.

Replies to a survey-based study conducted a few years ago have shown that awareness among citizens of the rights available to victims and, especially, of the existence of EPO is significantly low and that in the Member States there has been no substantial effort to increase knowledge about these issues on the part of its potential target beneficiaries.<sup>70</sup> This finding, on the other hand, is supported by analysis focused on the Victims' Rights Directive that has brought to light not only many implementation-related gaps, but also many other shortcomings that have a role in frustrating the goal pursued by the EU legislator in practice. Among the latter, the following surely play a major role in this respect: poor timing and lack of an individual approach when providing information; absence of follow-up mechanisms allowing a second instance of contact with the victim; loose coordination among State and non-State actors playing a role in the information chain. Overall, excluding for some promising practices (a number of which, actually, undertaken by non-State actors through a bottom-up approach),<sup>71</sup> the "duty to inform" is interpreted as a mere bureaucratic demand to comply with. Information provided is often standardised, the language used technical and legal in nature, and adaptation to victims' communication needs mostly incidental, depending (sometimes heavily) on the level of expertise of the single professional.<sup>72</sup> It is therefore not surprising that victims are still largely unaware of the rights to which they are entitled and how to exercise them. This is particularly the case in cross-border situations, where shortcomings concerning the effective functioning of interpretation and translation guarantees come into play. Interaction with non-native speakers is rarely addressed in a systematic way. It is quite common for victims' language needs to be assumed through informal and intuitive assessments, due to the lack of specific assessment procedures, just as it is very common to have to rely on non-professional interpretation (especially in police contexts), due to the absence of accreditation systems for professionals.<sup>73</sup>

Since both the Regulation and the EPO Directive were not created to bring about convergence of these diversities, but to build on it through a mechanism of judicial cooperation, it follows that the practical effectiveness of EPOs depends to a large extent on the ability of the institutions to work together.

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<sup>70</sup> S. Pavlou, A. Shakos, ARTEMIS: Promoting the right of protection of women through the application of the EC Directive 2011/99/EU and the European Protection Order, D36 – Final Research Report, Ref. Ares(2020)6694668 - 13/11/2020, p 23 ss

<sup>71</sup> See Victim Support Europe, Project VOciare: Victims of Crime Implementation Analysis of Rights in Europe - Synthesis Report, 2019, p. 20 ss

<sup>72</sup> Ibid. See also Amato R., Carnevali D., Contini F., (2020) "Violenza di genere e domestica nella fase di emergenza covid19: un'esplorazione della risposta di giustizia attraverso il dialogo istituzionale" (Research report by IGSG-CNR for the Italian Ministry of Justice)

<sup>73</sup> M. Del Pozo-Triviño, C. Toledano-Buendía, Training interpreters to work with foreign gender violence victims in police, and court settings, *Language and Law / Linguagem e Direito*, Vol. 3(2), 2016, p. 192-203, [https://www.researchgate.net/publication/326439338\\_Training\\_interpreters\\_to\\_work\\_with\\_foreign\\_gender\\_violence\\_victims\\_in\\_police\\_and\\_court\\_settings](https://www.researchgate.net/publication/326439338_Training_interpreters_to_work_with_foreign_gender_violence_victims_in_police_and_court_settings)

It is only by ensuring optimal coordination between all actors involved in the entire EPO process - both nationally and in a cross-border context - and by strengthening mutual trust in each other's legal systems that these mechanisms can still be of practical relevance. In this respect, however, a significant coordination and communication deficit can be observed, not only between Member States, but also between actors operating within the same jurisdiction.

On the internal level, it is worth stressing that protection orders are a crucial component of the individual safety plan designed for the victim, whose successful planning and implementation strongly depend on the quality of the coordination between the justice and law enforcement authorities, on the one hand, with the other actors taking part in the territorial victim's support network (e.g. local victim support organisations, health system, social services, etc.).<sup>74</sup> Consequently, when such an activity is heavily reliant on ephemeral coordination between the agents involved, those preliminary layers of protection that are a pre-condition for transnational cooperation to work are not readily available. On the cross-national level, analysis conducted so far has shown that the deficit in communication and coordination identified proves detrimental to the effectiveness of the EPOs and ultimately to the protection of victims. Such a trend, after all, seems to be in line with cooperation experiences concerning other mutual recognition procedures, under which communication between transmitting and receiving agencies is often not smooth and effective. In this respect, the diversity and plurality characterising the competent authorities involved are certainly one of the factors that can prejudice the smooth running of the procedure, since the EPOs submission can be delayed or hindered in some way when the applicant (the competent authority in the criminal field and the victims themselves in the civil ones) is not aware of the authority competent to receive the request. Further complications may also result from the need to submit the EPO in the language accepted by the executing State and by the administrative burdens that mutual recognition procedures actually entail despite their supposedly simplifying purposes.

## **5. EPO: this unknown! Non-legal solutions to turn entitlements into realities**

The above results paint a rather unfortunate picture in which, despite regulatory developments that have paved the way for inter-European protection channels against recurrent forms of crime, the easiest solution to enforce a protection order abroad still seems to be the 'classic' one, i.e. to start a new procedure in the receiving Member State.<sup>75</sup>

In this regard, among the problems that are considered to have the greatest impact on the (under)use of the EPO are the critical issues arising from the lack of regulatory harmonisation between national systems. The latter has indeed raised many concerns about the actual functioning of this cooperation model in terms of compatibility of measures to be applied extraterritorially. These critical issues could only be addressed through legislative intervention and, therefore, against a political effort on the part of the States participating in the system. In the absence of such a development and without any indication that, at the moment, might suggest such a development, this paper will try to formulate hypotheses on possible adaptations, solutions and soft instruments that might be useful to increase the adoption of EPOs, even without regulatory changes.

The possible solutions to serve this purpose can be divided into two categories. The first one relates to organisational arrangements - and, more generally, measures based on the so-called human factor -

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<sup>74</sup> Amato R., Carnevali D., (Forthcoming in 2022) The calm after the storm? The tricky path for restoring the normality of individual rights enjoyment in Intimate Partner Violence cases, in Oñati Socio-Legal Series, (journal paper); Amato R., Carnevali D., Contini F., (2020) "Violenza di genere e domestica nella fase di emergenza covid19: un'esplorazione della risposta di giustizia attraverso il dialogo istituzionale" (Research report by IGSG-CNR for the Italian Ministry of Justice).

<sup>75</sup> As an example, in Germany procedures to ask for a national protection order are quite straightforward. See E. Sellier, A. Weyembergh, Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation, supra note 11.



which would be meant to increase specialisation and boost dialogue among professionals.<sup>76</sup> The second concerns technological applications that support cooperation in the field of justice and home affairs. In this article, we will focus only on the latter, exploring some e-justice information systems for cross-border communication that are supposed to have the potential to increase practitioners' general awareness of EPO procedures, making the procedural steps required by digitisation simpler and faster, thus ultimately improving extraterritorial protection for victims of recurrent crimes across Europe.

### 5.1 e-Justice information systems for cross-border communication

Based on the knowledge gained so far, technological improvements cannot be probably considered as a key factor for giving a new impetus to EPO procedures. Nevertheless, they have the potential to improve the knowledge of these tools, respecting the assumptions of simplicity and speed on which they rely and ultimately increase the security levels of the information exchanged.

Overall, such an approach would be consistent with the Union's broader strategy for the digitisation of justice in Europe, which acknowledges the crucial importance of the digital transformation of justice systems throughout the EU and, therefore, endorses the idea that in this area, a stronger effort should be made to grasp the opportunities offered by the digital age, albeit within safe and ethical boundaries.<sup>77</sup> Notably, in order to fully exploit the advantages of digital technologies in judicial proceedings, the objectives to be pursued should be twofold. The first one should focus on the national dimension and back up the Member States in addressing the transition of their national judicial systems to the digital age, by strengthening digital take-up by the different national judicial authorities and their cooperation. The second one should aim at further improving cross-border judicial cooperation at the European level by addressing, in particular, the further digitisation of justice services, the enhancement of secure and high-quality remote communication technologies (videoconferencing), and easier interconnection of national databases and registers and the better use of secure electronic transmission channels between competent authorities.

In this respect, it is worth pointing out that, on the basis of the analysis carried out so far by the EU institutions, there are three main areas of improvement on which to build in order to achieve the desired effects. The first concerns access to information to which users, be they lawyers or interested persons, are entitled, in particular access to registers and databases, where a particularly slow pace of digitisation has been noted. This also includes online access to judgments and online submission and follow-up of requests (in the context of criminal law, for example, victims can only access an electronic file in seven Member States, while defendants in nine countries).<sup>78</sup> The second improvement to be addressed concerns the transnational transmission and communication of documents. On the one hand, the means by which this task is carried out (both within and across borders) continue to be based on paper exchanges, thus generating inefficiencies as regards their speed, reliability, traceability and the costs incurred. The

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<sup>76</sup> As an example, organisational arrangements based on the human-factors have been adopted to supplement the operation of many mutual recognition instruments and mutual legal assistance procedures. On this topic see: Amato R., Velicogna M. (2020), "Encoding cross-border judicial cooperation in criminal matters: current practices and the rise of the EU e-Justice infrastructure", in "Operational Cooperation in the EU criminal law", "Droit de l'Union européenne. Colloque", Bruylant Larcier; Amato R., Dallara C. (2018), *Le reti giudiziarie nello spazio di giustizia e sicurezza europeo*, in Guarnieri C., Insolera G., Zilletti L., *Giurisdizioni europee e sistemi nazionali. Tendenze e criticità*, Carocci Editore, [pp. 27-54], ISBN 978-88-430-9108-9; Amato R. (2018), "Networking justice in the European Union", IRSIG CNR, ISBN 978-88-97439-12-7.

<sup>77</sup> European Commission, 2020 Strategic Foresight Report – Charting the course towards a more resilient Europe, 09 September 2020, [https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/strategic-foresight/2020-strategic-foresight-report\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/strategic-foresight/2020-strategic-foresight-report_en) and European Commission Communication on Digitalisation of Justice in the EU, 2 December 2020, COM 2020 710 final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>

<sup>78</sup> Staff Working Document (SWD(2020) 540) accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Digitalisation of justice in the European Union A toolbox of opportunities, COM/2020/710 final



significant lack of planning and coordination between States in designing and implementing national IT tools and solutions has in fact led to an increase in the use of paper files, thus hampering rapid cross-border interoperability.

In order to address the above issues and to enable effective cross-border communication, the European institutions believe that action should be taken on two fronts. Firstly, electronic access to documents and services offered by the judiciary should be provided, as - where available - these have proved valuable, even in difficult situations, such as the recent COVID-19 pandemic. In this respect, the EU Commission has suggested creating a My e-Justice space - within the e-Justice portal - to be used as an entry point with links to national services and documents for individuals and their legal representatives. On the other hand, making the digital channel a default option was considered necessary in cross-border judicial cooperation procedures.

With regard to the latter objective, it is worth noting that Member States have pursued several avenues for the digitisation of cross-border judicial cooperation in the last decade, most of which have taken place as bottom-up initiatives between States, associations of legal practitioners and the EU Commission. Among the solutions that this cooperation has produced, e-CODEX (e-Justice Communication via On-line Data Exchange) certainly has the greatest potential, also with regard to issues that specifically concern the procedures considered in this paper.

e-CODEX is a project “launched under the multiannual e-Justice action plan 2009-2013, mainly to promote the digitalisation of cross-border judicial proceedings and facilitate communication between Member States’ judicial authorities”.<sup>79</sup> This system is meant to ease secure communication in civil and criminal proceedings via a tailor-made solution for the cross-border exchange of electronic messages in the area of judicial cooperation. Its functioning relies on a decentralised platform interconnecting national systems and supporting cross-border judicial proceedings. Since this platform has been designed in line with the principle of procedural autonomy and is compliant with the principle of independence of the judiciary, it is particularly suitable to interconnect and make interoperable national systems characterised by varying legal, technological and organisational installed base.<sup>80</sup> On a technical and operational level, the e-CODEX platform is based on a decentralised architecture, allowing communication between national and European ICT systems through a network of access points, which can interact over the internet via a set of standard protocols. No central system is involved, and “a minimum level of organisational requirements” is needed. This means that each access point can be interconnected, for

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<sup>79</sup> On the e-CODEX project see: Carboni N., Velicogna M., (2011), Electronic data exchange within European Justice: e-CODEX challenges, threats and opportunities, in IJCA, vol. 4, p. 104; Borsari G. et al. (2012), D7.3 High Level Architecture Definition, e-CODEX deliverable, p. 8; Velicogna, M. (2014), Coming to Terms with Complexity Overload in Transborder e-Justice: The e-CODEX Platform. In *The circulation of agency in E-Justice* (pp. 309-330). Springer, Dordrecht; Velicogna M. (2015), e-CODEX and the Italian Piloting Experience, IRSIG-CNR Working Paper; Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at [https://www.e-codex.eu/sites/default/files/2018-09/Velicogna\\_Lupo-2016-from\\_drafting\\_common\\_rules\\_to\\_implementing\\_elect.pdf](https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf); Velicogna, M., & Steigenga, E. (2016, September). Can Complexity Theory Help Understanding Tomorrow E-Justice?, In *Conference on Complex Systems, Law and Complexity session*, Amsterdam; Velicogna, M., Lupo, G. (2017), From drafting common rules to implementing electronic European civil procedures: The rise of e-CODEX. In *From common rules to best practices in European Civil Procedure* (pp. 181-212). Nomos Verlagsgesellschaft mbH & Co. KG;

<sup>80</sup> “Installed base” refers to the “set of existing technological, legal and organizational components and their “capabilities [...] their users, operations and design communities”. Cft. Hanseth O., Lyytinen K. (2010), Design theory for dynamic complexity in information infrastructures: the case of building internet”, in *Journal of Information Technology*, 25(1), p.4; Lanzara G.F., *The Circulation of Agency, in Judicial Proceedings: Designing for Interoperability and Complexity*”, in Contini F., Lanzara G.F. (Eds), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 2014, 14. Quoted in Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at [https://www.e-codex.eu/sites/default/files/2018-09/Velicogna\\_Lupo-2016-from\\_drafting\\_common\\_rules\\_to\\_implementing\\_elect.pdf](https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf)

instance, to a national case management system and allow the secure mutual exchange of documents while:

- a) guaranteeing a secure environment for e-communication and exchange of documents between citizens, courts and public;
- b) keeping track of all phases marking the workflow; and
- c) ensuring the identification of the users.

With respect to the transmission of documents within the framework of specific procedures, such as the EPO one, the e-CODEX system can make available standardised digital forms that allow smoother communication between national systems.

e-CODEX has already been used in live cases in civil and criminal justice<sup>81</sup> and currently simplifies electronic communication between citizens and courts and between Member State administrations in different cross-border civil and criminal procedures. The experience gained so far shows that e-CODEX can support the exchange of requests among national jurisdictions and also backing the follow-up correspondence, ensure the correct identification of both the sender and the recipient, favour the coordination with the national rules, and establish common standards to support further processing of the transmitted data by the respective national case management systems.

Building on Member States' support and experience, this system is deemed to have the potential to become the leading digital solution for the secure transmission of electronic data in cross-border civil and criminal proceedings, not only concerning the fight against crime but also in the perspective of the victims' involvement in these proceedings. For this reason, its long-term sustainability, operational management and, hence, increased use are a priority for the Union. In the years to come, e-CODEX should be integrated within the European e-Justice Portal to enable citizens to electronically sign and send applications to competent courts in the Member States and ensure the digital management of specific cross-border procedures.<sup>82</sup>

At present, there do not seem to be any plans to extend e-CODEX to the management of European protection orders any time soon. At any rate, all the instruments currently covering victims' rights are listed among the legal tools falling within the scope of the new proposal for a *Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726*.

e-CODEX in this field would allow an easier (digital) way to carry out EPO proceedings and exchange legal information between the Member States. This platform has the potential indeed to replacing bureaucratic paperwork, regardless of any differences between domestic jurisdiction and such a scenario would be welcomed, in so far as it is supposed to have the potential to minimise some of the problems arising from the need for very different national systems to interact and cooperate. Based on the very limited information available so far, it seems that, at present, the cross-border transmission of EPOs is done by postal service or email. The use of e-Codex would certainly ensure higher standards in terms of transmission security and data protection, and confidentiality. Especially those concerning the location of the protected person.

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<sup>81</sup> Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at [https://www.e-codex.eu/sites/default/files/2018-09/Velicogna\\_Lupo-2016-from\\_drafting\\_common\\_rules\\_to\\_implementing\\_elect.pdf](https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf); Steigenga E., Taal S., Medici A., Velicogna M., Pro-CODEX Report Exploring the potential for a Service of Documents e-CODEX use case in The Netherlands, Finalized 12 June 2018.

<sup>82</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0712#footnote11>

## 6. Concluding remarks. Can IT contribute filling the gaps?

In the aftermath of a crime, for victims, the journey towards redress and reparation is riddled with challenges, especially when dealing with a foreign jurisdiction to achieve their justice goals. For this reason, to better cope with this additional hurdle, cross-border victims have been awarded increasingly strong rights. The EU legislator requires the Member States to observe a guarantee of equal treatment between foreign and domestic victims and, in order to have such a guarantee complied with and applied effectively, asks more than settling for declaratory statements in legislation. It rather compels the Member States to make genuine efforts to reduce the extra-burden cross-border victims may face and ensure they have equal access to justice as domestic victims.

In line with this approach, with a view to increasing the guarantees for victims of recurring crimes, who need (or want) legitimately enjoy their right to free movement, the EU has extended the legal framework on victims' rights by providing measures that create the legal conditions to have a protection order recognised and enforced in a Member State other than the issuing one. As explained above, this is a highly desirable legislative development because it addresses a particularly vulnerable category of victims, which is very sensitive not only to secondary but also to repeated victimisation. This is mostly the case of victims of GBV-related crimes, especially victims of domestic and intimate partner violence, whose experience of victimisation is peculiar due to the close relationship with the perpetrator and the risk of retaliation, further violence or escalation that may result from severing such a tie.

Since the primary concern of these victims when seeking legal intervention is having back control of their lives, relying on measures mandating the cessation or restriction of contact between victim and perpetrator is of paramount importance not only to avoid immediate danger or further violence to reoccur but also to strengthen trust in the justice system encouraging the legitimate pursuit of justice goals.

The EPO Directive and EPO Regulation have been adopted with this objective in mind. They both are instruments established to ensure that victims of such crimes can benefit from the extraterritorial application of protection orders previously adopted in the State where they use to live, without having to go through time-consuming procedures. These legal tools have not a harmonising function. As explained above, they do not provide for minimum standards of protection to be complied with, nor impose a duty on states to make such measures available under their legislation. In line with the extensive and long-standing body of law based on the principle of mutual recognition, they rather create the legal basis for judicial or (equivalent) authorities to cooperate across borders in order to recognise and enforce a protection measure, just as if it had been issued within the receiving jurisdiction.

The use of such a principle is now well established in judicial cooperation, and, albeit with ups and downs, the instruments applying it have become increasingly widespread. The European Arrest Warrant, for example, is considered to be the most "successful" of these tools due to its ever-increasing use. The reasons for such a success are manifold. Among these, certainly, is that these instruments are considered to be of great utility by the national authorities in the activity of prevention and fight against crime, today, less and less hindered by geographical and physical borders. In addition, an important role is to be ascribed to the clarifying action of the Court of Justice, which, through its jurisprudence, has provided guidance as to the use of these instruments, sometimes pointing out certain limits in their application. Finally, emphasis is certainly to be placed on the parallel legislative strand geared towards the regulatory harmonisation of procedural rights of accused persons and defendants. This latter has undoubtedly contributed to balancing the pervasive nature of the principle of mutual recognition by lessening fears about the need to comply with its terms almost blindly.

However, this trend is not confirmed when it comes to applying the same principle to the domain of victims' rights. The figures illustrating the deployment of the EPO are very limited, especially when compared to both the pool of potential beneficiaries and the time period since the implementation of these instruments. In recent years, specialised and grey literature has tried to understand the causes of

this poor performance, but the (almost) total lack of case studies to analyse has certainly not made the task easy. Nevertheless, a number of valid hypotheses have been suggested, mainly concerning the evident shortcomings of the legislation under review, first and foremost the lack of harmonisation of the relevant substantive law, together with gaps in the transposition and practical implementation of the victims' rights package taken as a whole. At the heart of the problem are also concerns about the overall effectiveness of protection measures, including when operating in their national context. For example, many European countries share problems related to the monitoring and supervision of protection orders, also because - in the absence of complementary tools, especially technological ones - they put a strain on the law enforcement capacity to control the territory.

Although the overall picture is not encouraging, better implementation of these instruments could have a significant impact on victims' experience with the justice system. Therefore, an effort should be made to envisage solutions within the current legislation. In particular, such non-legal solutions should stimulate dialogue between practitioners by addressing two fronts: (a) organisational arrangements and professional training, and (b) technological applications to support cooperation in the JHA field. This paper has focused on the latter issue, with the aim of exploring how some e-Justice information systems for cross-border communication can improve extraterritorial protection for victims of recurrent crimes across Europe by increasing practitioners' general awareness of EPO procedures and by making the procedural steps required by digitisation simpler and faster. This approach is consistent with the broader EU strategy for the digitisation of justice in Europe, which endorses the path towards the digital transformation of EU justice systems.

This paper has focused on the e-CODEX platform, which is receiving increasing attention from European institutions. On the one hand, due to its decentralised technical architecture, it is particularly suitable for interconnecting and making interoperable national systems with a different installed base of legal, technological and organisational requirements. On the other hand, on a practical level, it has proven to be a valuable tool to ensure a secure environment for electronic communication and exchange of documents between citizens, courts and the public, speeding up the procedural steps to be taken and reducing language barriers. Based on the experience gained, it is believed that this system has the potential to mitigate some of the shortcomings that currently affect the practical use of EPO procedures.

These results are the result of an exploratory study; therefore, further analysis and investigation of formal rules and actual practices is needed to assess the possible impact of these IT solutions on cross-border judicial cooperation instruments working in the field of victims' rights.