INTERDISCIPLINARY JUDICIAL COOPERATION: MUTUAL RECOGNITION OF PROTECTION MEASURES IN EUROPEAN UNION

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Abstract

Violence under multiple forms has become an increasingly worrying phenomenon in current society, leading to adoption of various legislative instruments, in order to effectively combat it.

According to particularities of each state, there is a wide variety of instruments adopted at national level, different either in name (interdiction orders, protection orders, restrictive orders, etc.), as well as juridical nature (civil or criminal). The same variety also appears at EU level, related to the type of legislation (mandatory or not; primary or secondary) and the area it covers (civil or criminal). The panel of legislative instruments is completed by a series of international conventions on preventing and combating violence.

In this large context, the purpose of the article is to analyze interdisciplinary issues related to judicial cooperation within European Union in civil and criminal matters, for the particular case of protection measures adopted by different authorities of Member States.

The principle is that exercise of the right of free circulation and establishment in European Union imposes that protection granted to an individual in a Member State should be maintained and continued in any other Member State to which that person travels or moves. In particular, this goal is achieved by recognition in a Member State of the effects of judgments providing protection measures handed down in another Member State.

The objectives of this study are to identify the relevant compulsory EU legal instruments in the field of civil and criminal areas, as well as a comparative perspective concerning the relation between previously identified EU law and national legislations and their sphere of application. Equally, the comparative approach will extend to establishing the main issues specific to exequatur procedure both at EU and national level.

Keywords: *judicial cooperation, mutual recognition, protection measures, civil matters, criminal matters*

1. Introduction

The goal of the present study is to analyze interdisciplinary issues related to judicial cooperation within European Union in civil and criminal matters, for the particular case of protection measures adopted in different Member States.

The subject presents significant importance, as victims of (repetitive) violence have an increased need for protection against offenders, which lead to adoption of a large panel of various instruments at national, European Union and international level.

A comparative perspective over these legal instruments concludes that one way of safeguarding is to issue protection orders, a juridical instrument which appears in national legislations of all Member States of European Union.

There are, however, discrepancies among national protection order laws and quite various domestic approaches[1].

At the same time, it should be ensured that the legitimate exercise by citizens of European Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3 Para 2 of the Treaty on European Union (TEU)[2] and Article 21 Treaty on the Functioning of the European Union (TFEU)[3], does not result in a loss of their protection.

It was therefore necessary to adopt at EU level binding legal instruments, in order to ensure mutual recognition in all Member States of protection measures adopted by different domestic authorities.

In this context, the study will identify the relevant mandatory EU legal instruments in the field of civil and criminal areas, their sphere of application, and also how they interact with national legislations.

Equally, the study will take into discussion the the main issues specific to exequatur procedure both at EU and national level.

Where having been expressed, juridical opinions will be pointed out, in close connection to discussion of relevant case-law.

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[1] The "POEMS" project, co-funded by the Daphne program of the European Union, focused on mapping the law on protection orders in 27 EU Member States. This project and its final report, as well as the related recommendations, are available along with the country fiches at the following link: http://poems-project.com/results/country-data, last accession on 01.03.2019, 13,54.

[2] Consolidated version published in the Official Journal C 326, 26 October 2012, pp. 13 - 46.

[3] Consolidated version published in the Official Journal C 326, 26 October 2012, pp. 47 - 200.

2. Content

2.1. The framework of judicial cooperation in civil and criminal matters

As European Union has the objective of developing and maintaining an area of freedom, security and justice, according to provisions within the Treaty of Amsterdam[4], the gradual establishment of this area implied measures to improve, simplify and expedite effective judicial cooperation between Member States in civil and commercial matters, as well as criminal matters.

By Council Decision no. 2001/1470/EC from 28 May 2001[5] there was established a European Judicial Network in civil and commercial matters, which began operating on 1 December 2002[6].

Similar to the area of civil and commercial matters, a European Judicial Network functions in criminal matters, created by Joint Action of 29 June 1998[7], and adopted by the Council on the basis of Article K.3 of the TEU.

At legislative level, there were different types of juridical instruments, all of them promoting the idea that the main tool for facilitating access to cross-border justice is the principle of mutual recognition[8] (based on mutual trust between Member States and direct judicial cooperation among national courts).

TFEU structures the themes belonging to the European area of freedom, security and justice in four domains, related to border control policies, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation[9].

The legal basis of judicial cooperation in civil matters is Article 81 Para 1 of the TFEU.

Articles 82 to 86 of the same TFEU provide legal basis of judicial cooperation in criminal matters.

Also, Article 5 of the TEU has generally been used to justify the Union's competence to legislate at EU level. According to Article 5, the principles of subsidiarity and proportionality are applied when European Union uses its competence to legislate a specific matter.

2.2. EU legal instruments on mutual recogition of protection measures. National and international legal instruments

Going in-depth from the general framework, a new specific mechanism was conceived, composed of two EU legal instruments, one applying in civil matters, and the other in criminal area.

The main legal cooperation instrument in civil area is the regulation (part of secondary legislation, mandatory, directly applicable, capable of complete direct effect[10]).

Based on these characteristics, regulations are frequently compared to national laws, and part of juridical literature has referred to them as "European law"[11].

In particular for cooperation in protection measures, the relevant legal instrument is Regulation (EU) no. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters of the European Parliament and of the Council[12] ("the Regulation").

In Romania, there were established measures necessary for application of the Regulation by Law no. 206/2016 for completing the Government Emergency Ordinance no. 119/2006 on certain measures necessary for the application of some Community regulations from the date of Romania's accession to the European Union, as well as for the modification and completion of the Law on Public Notaries and Notarial Activity no. 36/1995[13].

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[4] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2nd October 1997, published in the Official Journal C 340, 1o November 1997, pp. 1 - 144. The Treaty of Amsterdam introduced a significant change of perspective in civil and commercial matters by virtue of Title IV, as the matter was brought under the so-called first pillar, and consequently from intergovernmental sphere to Community level.

[5] Published in the Official Journal L 174, 27 June 2001, pp. 25 - 31.

[6] Denmark, in accordance to Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, did not participate in the adoption of this decision, and therefore is not bound by it, nor subject to its application.

[7] Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, published in the Official Journal, L 191, 7 July 1998, pp. 4 – 7.

[8] "Traditionally, *Cassis de Dijon* (CJ, Decision pronounced on 20.02.1979, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* – our note) is considered to be the first case where the Court established the principle of mutual recognition. (...) Although the case law, such as Cassis de Dijon, created in practice the principle of mutual recognition, the term 'mutual recognition' has not been used in the Court's rulings until recently." (A. Sievälä, *Mutual recognition of protection measures in the European Union: Equal protection to all EU citizens*?, Master Thesis, 2016, University of Eastern Finland, p. 37, available on-line at the following link: http://epublications.uef.fi/pub/urn_nbn_fi_uef-20140819/urn_nbn_fi_uef-20140819.pdf, last accession 02.03.2019, 20,21).

[9] Prior to the Treaty of Lisbon, the last two domains belonged to the former third pillar of EU.

[10] Vertical ascendent direct effect (particulars invoke regulations against Member States), vertical descendent direct effect (Member States invoke regulations against particulars), and also horizontal direct effect (regulations may be invoked between/among particulars).

[11] H.-W. Arndt, *Europarecht*, VII[th] Edition, C.F. Muller Publishing House, Heidelberg, 2004, p. 82; A. Ghideanu (authors A. Ghideanu & others), *Cooperation between Member States for the purposes of solving the civil cases regarding the wrongful removal or retention of a child. European Seminar Manual*, SITECH Publishing House, Craiova, 2018, p. 75: "Regulations are somehow equivalent to „Acts of Parliament", in the sense that what they say is law and they do not need to be mediated into national law by means of implementing measures".

[12] Published in the Official Journal L 181, 29 June 2013, pp. 4 – 12. According to Recitals 40 and 41 of the Regulation, United Kingdom and Ireland have notified their wish to take part in the adoption and application of the Regulation; Denmark is not taking part in the adoption of the Regulation and is not bound by it or subject to its application.

[13] Published in the Official Gazzette of Romania no. 898/09.11.2016. In this context, it is important to point out that, even if regulations are directly applicable, national authorities are allowed to take the measures provided for by the regulations themselves or measures which prove

With respect to criminal matters, under the former third pillar (police and judicial cooperation in criminal matters mentioned before), the legal instrument for cooperation was the framework decision, as a form of intergovernmental cooperation[14].

Framework decisions were somehow similar to directives, as they required Member States to achieve particular results without dictating the means of achieving that result. By contrast to directives, framework decisions were not capable of direct effect[15], and failure to transpose a framework decision into domestic law could not lead to enforcement proceedings by the European Commission.

As the old "pillar structure" disappeared under the Treaty of Lisbon[16], the "abolition" of the former third pillar led to a change of legislative instruments in the field of criminal law, transgressing towards the instruments specific to the former first pillar (regulations, directives, decisions).

In particular for protection measures in criminal area, there was adopted Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order[17] ("the Directive")[18].

Directives are EU juridical instruments of secondary legislation, mandatory, not directly applicable, possessing restricted direct effect[19].

In transposition of the above mentioned Directive, Romanian legislator adopted Law no. 151/2016 on the European protection order, as well as for amending and completing some normative acts[20], applying only to measures adopted in criminal field (Article 1 b).

On the other hand, Law no. 217/2003 on the prevention and combating of domestic violence[21] deals protection measures in civil area, as already established by Romanian Constitutional Court in decision no. 264/27.04.2017[22].

As elements of comparative domestic law, it is interesting to note that, in Spanish legislation, there are legiferated "restriction orders" which belong to the sphere of criminal law[23]; in Bulgaria, for example, the legislator has incorporated the implementing rules of the Directive into the law on family violence[24].

At international level, the most significant instrument is the Council of Europe Convention on preventing and combating violence against women and domestic violence[25] (known as "Istanbul Convention"),

necessary given the shortcomings of the regulations (T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H. Beck Publishing House, Bucharest, 2007, p. 213).

[14] A. Ghideanu (authors A. Ghideanu & others), *op. cit.*, p. 76: "A framework decision was a kind of legislative act of the European Union used exclusively within the EU's competences in police and judicial co-operation in criminal justice matters".

[15] ECJ (Grand Chamber), Decision adopted on 05.11.2012, C-42/11, case *João Pedro Lopes Da Silva Jorge* (proceedings concerning the execution of a European arrest warrant): "(53) (...) although framework decisions may not, as laid down in Article 34(2)(b) EU, entail direct effect, their binding character nevertheless places on national authorities, and particularly national courts, an obligation to interpret national law in conformity. (54) When national courts apply domestic law they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it."

[16] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, published in the Official Journal C 306, 17 December 2007, pp. 1 – 202.

[17] Published in the Official Journal L 338, 21 December 2011, pp. 2 – 18. According to Recitals 40 - 42 of the Directive, United Kingdom has notified the wish to take part in the adoption and application of the Directive; Denmark and Ireland are not taking part in the adoption of the Directive and are not bound by it or subject to its application.

[18] The *rationale temporis* in adopting two distinct EU legal instruments was explained as follows (A. Sievälä, *op. cit.*, p. 30): "The Directive on the European protection order, which was accepted in December 2011, created a mechanism for mutual recognition of protection measures in criminal matters. However (…) this was not enough. (…) Since the Directive only enabled mutual recognition of protection measures which have been adopted based on a crime or the possibility of a crime, those systems which give the possibility to issue a protection measure protecting from other than criminal acts were left outside of the scope. (…) The Regulation on mutual recognition of protection measures in civil matters filled this gap, at least a part of it. The Regulation was adopted 18 months later than the Directive, in June 2013."

[19] Only vertical ascendent direct effect (particulars can invoke directives against Member States), in consideration of non-transposition/wrong transposition of directives by Member States.

[20] Published in the Official Gazzette of Romania no. 545/20.07.2016.

[21] Published in the Official Gazzette of Romania no. 367/29.05.2003, republished in the Official Gazzette of Romania no. 365/30.05.2012 and no. 205/24.03.2014.

[22] Published in the Official Gazzette of Romania no. 468/22.06.2017. As stated in pt. 15 of this decision: "The rationale for introducing the law on the protection order is (…) the creation of an effective *civil legal instrument* for preventing and combating domestic violence, similar to those used in other EU legislation, as there is only criminal law protection in domestic law against domestic violence and it is exercised under very restrictive conditions." (our underline)

[23] Tribunal no. 1 for causes of violence against women, Arganda del Rey, Spain, case no. 28014004 – 2018/0009796, sentence no. 1272 pronounced on 04.12.2018, not published, made reference to Article 57 of Spanish Criminal Code, related to Article 544 bis of Spanish Procedural Criminal Code.

[24] D.-M. Șandru, I. Alexe, P. Dobrică, *Studiu legislativ și sociologic privind măsurile de protecție în materie civilă*, Editura Universitară, Bucharest, 2017, p. 56. A. Sievälä, *op. cit*, p. 16: "A study in 2011 found at the time there were 27 different protection order schemes in practice within the European Union – meaning that each of the then existing 27 Member States had their own system. The protection measure systems of the Member States can roughly be divided into two groups. In some countries protection orders or similar measures can be issued in civil matters, whereas in other countries they can only be adopted in criminal matters." (pp. 18 - 19).

[25] The Istanbul Convention was opened for signature on 11 May 2011, in Istanbul, Turkey and came into force on 1 August 2014. For an on-line text, see the following link: https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e, last accession on 02.03.2019, 12,24.

which has been ratified by European Union[26], but not all Member States[27].

The Istanbul Convention deals only with violence against women and domestic violence and recommends that: "Parties shall take the necessary legislative or other measures to ensure that appropriate *restraining* or *protection orders* are available to victims of all forms of violence covered by the scope of this Convention"[28]. (our underline)

It is important to note that (similar to EU legislation) the Convention does not impose a certain legal nature of the measures adopted at national level by means of restriction/protection orders (civil, criminal, etc.) establishing only that the orders should be available irrespective of, or in addition to other legal proceedings[29].

2.3. Relation between EU legal instruments on mutual recognition of protection measures and national law of Member States

2.3.1. Direct/non-direct application

Direct applicability means that EU law does not require transposition measures adopted internally by Member States.

As laid down in Article 288 Para 2 of TFEU: "A regulation shall have general application. It shall be binding in its entirety and *directly applicable* in all Member States". (our underline)

Direct applicability of regulations has been unanimously accepted in juridical literature[30] and case-law of the Court of Justice in Luxemburg from the very beginning[31].

By contrast, in accordance to Article 288 alin. Para 3 of TFEU: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall *leave to the national authorities the choice of form and methods*". (our underline)

In consequence, directives are not direct applicable and need adoption of national transposition measures („a procedure similar to adoption of Government decisions in order to ensure application of laws and ordinances"[32]).

It should be highlighted in this context that the role of regulations and directives is different, as regulations are designed to ensure *uniformity* by their direct application, whereas directives aim to *harmonize* domestic legislations (indicating the directory lines and the result to be achieved, but at the same time leaving states a discretion regarding the implementing measures to be adopted[33]).

Criminal area has always been a delicate matter for each Member State, and therefore the option of the EU legislator to adopt a directive in this field is justified[34].

On the other hand, a clear reason for adoption of a directive (instead of a regulation) can be found in Article 82 Para 2 of the TFEU, according to which mutual recognition of judgements and judicial decisions in the area of judicial cooperation in criminal matters are to be dealt with by means of directives.

By contrast to criminal area and according to Recital 4 of the Regulation applicable in civil matters: "In order to attain the objective of free movement of protection measures, it is necessary and appropriate that the rules governing the recognition and, where applicable, enforcement of protection measures *be governed by a legal instrument of the Union which is binding and directly applicable*". (our underline)

2.3.2. Direct/non-direct effect

Direct effect has been defined as the attribute of EU law to create rights in the patrimony of natural and legal persons, which they can invoke directly before national courts, against other natural or legal persons or public authorities and the state.

Unlike direct applicability, direct effect of regulations can not be deduced from Article 288 TFEU, and was tehrefore consacrated by the case law of the Luxembourg Court of Justice[35].

The same case-law established that regulations have complete direct effect (both vertical and

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[26] On 13 June 2017, European Commissioner Věra Jourová (Gender Equality) signed the Istanbul Convention on behalf of the European Union.

[27] România has signed the Istanbul Convention on June 2014 and ratified it by Law no. 30/2016 on the ratification of the Council of Europe Convention on the Prevention and the fight against violence against women and domestic violence, adopted at Istanbul on May 11, 2011, published in the Official Gazzette of Romania no. 224/25.03.2016. The Convention entered into force for Romania on September 2016. For an analysis of the Istanbul Convention, see A. Portaru, *Convenția de la Istanbul: analiză și implicații*, available on-line at the following link: https://www.juridice.ro/459023/conventia-de-la-istanbul.html, last accession on 02.03.2019, 12,09.

[28] Article 53 Para 1 of the Istanbul Convention.

[29] Article 53 Para 2 of the Istanbul Convention.

[30] French doctrine – G. Isaac, M. Blanquet, *Droit général de l'Union Européenne,* IXth Edition, Dalloz Publishing House, 2006, p. 204; English doctrine – P. Craig, G. de Búrca, *EU Law, Text, Cases And Materials*, IVth Edition, Oxford University Press, 2007, p. 84; Romanian juridical literature – A. Fuerea, *Drept comunitar european. Partea generală,* All Beck Publishing House, Bucharest, 2003, p. 156.

[31] CJ, Decision adopted on 07.02.1973, C-39/72, case *Commission v. Italy*; CJ, Decision adopted on 10.10.1973, C-34/73, case *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*.

[32] A. Fuerea, *Drept comunitar european. Partea Generală, op.cit.,* p. 113.

[33] Directives respect thus the particularities of each national legal system. Nevertheless, national transposition measures must be legally binding (CJ, Decision adopted on 25.05.1982, C-96/81, case *Commission v. Kingdom of the Netherlands*).

[34] According to Recitals 7 and 8 of the Directive: "In order to attain these objectives, *this Directive should set out rules* (...). This Directive *takes account of the different legal traditions of the Member States* (...)". (our underline)

[35] CJ, Decision adopted on 14.12.1971, C-43/71, case Politi S.A.S. v. Ministry of Finance of Italy; CJ, Decision adopted on 17.09.2002, C-253/00, case Antonio Muñoz y Cia SA și Superior Fruiticola SA v. Frumar Ltd și Redbridge Produce Marketing Ltd.

horizontal), conclusion to which juridical literature fully agreed[36].

Foundation of direct effect of directives is also exclusively jurisprudential, based on the idea of state fault for non-transposition or wrong transposition[37].

As a consequence, directives cannot have but vertical ascendent direct effect (only particulars can invoke directives against Member States)[38].

2.3.3. EU case-law

The study of EU case-law in civil matters has not led to identification of requests for preliminary rulings on interpretation or validity of the Regulation[39], based on Article 267 of the TFEU[40].

In criminal matters, there has been identified a single request, denied by the Luxemburg Court for reasons of clear lack of competence[41].

In this context, we consider important to point out that the preliminary ruling procedure has been qualified as an instrument of cooperation between national courts and the Court in Luxemburg[42], which might have been useful in case of EU legal instruments regulating recognition of protection measures, for reasons to be presented further on.

2.4. Sphere of application - delimitation between civil and criminal matters

Decision to legiferate civil and criminal matters concerning protection measures in two different EU binding legal instrument, doubled by the multitude of national laws providing protection measures either in civil or criminal area, will create difficulties for national courts in deciding to apply the Regulation or the Directive.

Undertaking a comparative approach between the Regulation and the Directive, we consider that delimitation between "civil" and "criminal" matters is not clear enough.

Juridical literature[43] supports our opinion, proposing, e.g., that delimitation might depend on the degree of danger in the conduct that led to adoption of the measure establishing the protection order.

According to both the Regulation and the Directive, the civil, administrative or criminal nature of the authority ordering a protection measure should not be determinative for the purpose of assessing the civil/criminal character of a protection measure[44].

In addition, the Regulation stipulates that: "The notion of civil matters should be interpreted autonomously, in accordance with the principles of Union law"[45].

As there have not yet been preliminary rulings on interpretation of the Regulation or the Directive concerning protection measures, we consider appropriate to shortly present the EU case-law dealing with the concept of autonomy of the notion "civil and commercial matters" in case of other regulations, covering different matters in civil area.

Establishing the sphere of application of the concept of "civil and commercial matters" in a case concerning application of Regulation no. 2201/2003[46], the Court explained[47] that it "must be regarded as an *independent concept to be interpreted by referring, first, to the objectives and scheme* of the Brussels

[36] Towards the conclusion of complete direct effect of EU regulations - A. Groza, R. Bischin, Regulamentul comunitar - o analiză din perspectiva principiilor aplicării dreptului comunitar, Romanian Journal of Community Law no. 4/2009, pp. 64 - 65, taking over from C. Toader, Constituționalizarea dreptului comunitar. Rolul Curții de Justiție a Comunităților Europene, Romanian Journal of Community Law no. 2/2008, p. 19; T. Ștefan, B. Andreșan - Grigoriu, op. cit., p. 214; O. Ținca, Drept Comunitar General, 3rd Edition, Lumina Lex Publishing House, Bucharest, 2005, p. 305; J. P. Jacqué, Droit Institutionnel de l'Union Européenne, 5th Edition, Dalloz Publishing House, 2009, p. 592; C. Blumann, L. Dubouis, Droit Institutionnel de l'Union Européenne, 3rd Edition, LexisNexis Litec Publishing House, Paris, 2007, p. 453.

[37] G. Isaac, M. Blanquet, op. cit., p. 277: "direct effect of directives (...) appear in a particular «pathological» juridical context, namely when they have not been transposed in due time or have been incorectly transposed".

[38] If transposition measures have been taken by Member States in time and corectly, effects of directives apply to particulars based on national measures and there is no need for particulars to protect their rights by means of the theory of direct effect (CJ, Decision adopted on 15.07.1982, C-270/81, case Felicitas Rickmers - Linie KG & Co. c. Finanzamt für Verkehrsteuem).

[39] For similar conclusions, D.-M. Șandru, I. Alexe, P. Dobrică, op. cit., p. 48.

[40] Article 267 of the TFEU stipulates: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

[41] ECJ, Ordinance adopted on 16.12.2016, C-484/16, case *Semeraro*.

[42] CJ, Decision adopted on 22.11.2005, C-144/04, case *Mangold*.

[43] M. Bogdan, Some reflections on the scope of application of the EU Regulation no 606/2013 on mutual recognition of protection measures in civil matters, Yearbook of Private International Law, vol. 16/2014-2015, pp. 406 and following.

[44] Recitals 10 of the Regulation and the Directive.

[45] Recital 10 of the Regulation. For discussions concerning the area of application of the Regulation, Guillaume Payan, *Le Règlement européen n˚ 606/2013 du 12 juin 2013, relatif à la reconnaissance mutuelle des mesures de protection en matière civile: entrée en application d'un Règlement passé quasiment inaperçu*, Lexbase Hebdo édition privée n˚ 603 du 5 mars 2015, N° Lexbase: N6208BUH, pp. 1 - 2, shortly presented in D.-M. Șandru, I. Alexe, P. Dobrică, *op. cit.*, p. 32.

[46] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003, pp. 1 - 29.

[47] ECJ, Decision adopted on 27.11.2007, C-435/06, case *Korkein hallinto-oikeus (Finland)*.

Convention *and, second, to the general principles which stem from the corpus of the national legal systems* (…) Since the term 'civil matters' is to be *interpreted with regard to the objectives* of Regulation (…) the uniform application of Regulation No 2201/2003 in the Member States, which requires that the scope of that regulation be defined by Community law and not by national law, is capable of ensuring that the objectives pursued by that regulation" (our underline).

In a more recent ruling related to Regulation no. 44/2001[48], the Luxemburg Court stated[49]: "It follows from settled case-law of the Court that that scope is defined essentially by the *elements which characterise the nature of the legal relationships between the parties* to the dispute *or the subject-matter* thereof (see, in particular, Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 39, and *Sapir and Others*, paragraph 32)".

Stressing once again the importance of theleological interpretation, the Court underlined the necessity to take into consideration the *scope* of the EU (and not domestic) legal instruments, doubled by *general principles which stem from the corpus of the national legal systems* and a concrete analyse of *elements which characterise the nature of the legal relationships between the parties or the subject-matter*.

Applying these directory lines in order to establish the delimitation between civil and criminal matters in protection measures, it can easily be seen that the first criteria is not relevant, as the objectives of the Regulation, respectively the Directive are formulated in almost identical terms[50].

On the other hand, applying the second criteria which refers to national legal systems and concrete elements of the case, leads to a delimitation according to domestic law.

In practice[51] there have already appeared cases where the character of the protection measure was determined according to national law of the Member State of origin/issuing Member State, and this orientation of case-law seems to find support in juridical literature[52].

Indeed, it seems sensible to draw the line between the Regulation and the Directive by following a simple reasoning: if the protection measure was adopted to protect a person from an act which is criminalised in the issuing Member State, the Directive should apply; all the other situations should fall under the application of the Regulation.

Moreover, this line of reasoning avoids eventual situations when protection measures adopted in Member States should not fall under the application either of the Regulation, or the Directive (e.g., administrative character of the measure under national law).

Nevertheless, it should not be forgotten that in the beginning the Court made reference to EU law when determining the scope (and therefore sphere of application) of EU legal instruments, wchich is also reasonable in order to ensure uniformity.

References for preliminary rulings should be very useful in this context, also taking into consideration that the speedines of recognition procedure is esential in the area of protection measures (or, the first and very important element which defines functional civil or criminal competence of the national court seized with the exequatur procedure is the legal instrument to be applied: the Regulation or the Directive).

2.5. Exequatur procedure

2.5.1. Decisions subject to mutual recognition (court decisions/extrajudicial decisions)

As a general rule, Article 81 Para 1 of TFEU stipulates that "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of *judgments* and of *decisions in extrajudicial cases*". (our underline)

According to Article 3 Para 1 of the Regulation, "protection measure" means "*any decision, whatever it may be called*, ordered by the issuing authority of the Member State of origin (…)". (our underline)

In addition, Recital 13 of the Regulation provides that: "In order to take account of the various types of authorities which order protection measures in civil matters in the Member States (…) *this Regulation should apply to decisions of both judicial authorities and administrative authorities* provided that the latter offer guarantees with regard, in particular, to their impartiality and to the right of the parties to judicial review. In no event should police authorities be considered as issuing authorities within the meaning of this Regulation". (our underline)

Corroborating the provisions aforementioned, it results that the principle of mutual recognition of

[48] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in the Official Journal L 12, 16 January 2001, pp. 1 - 23.

[49] ECJ, Decision adopted on 12.09.2013, C-49/12, case *Sunico and others*.

[50] The Regulation provides in Recital 6 that it "should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion".

Similarly, the Directive applies to protection measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person's life or physical, psychological and sexual integrity (recital 9 of the Directive).

[51] Prahova Tribunal, case no. 41/105/2019, criminal sentence no. 16 pronounced on 18.01.2019, not published; Prahova Tribunal, case no. 7579/105/2017, criminal sentence no. 546 pronounced on 14.11.2017, not published.

[52] A. Sievälä, *op. cit.*, p. 21: "The limitation to decisions in criminal matters means that the Directive applies only to protection measures which have been given to protect a person against crimes. Therefore, if actions such as stalking are *not criminalised in the criminal law of the Member State*, the Directive does not apply." (our underline)

protection measures in civil matters covers both judicial, and extrajudicial decisions.

The situation is different in criminal matters, starting from the very legal basis for cooperation in this area.

Article 82 Para 1 of TFEU stipulates that "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of *judgments* and *judicial decisions*". (our underline)

Subsequently, the Directive provides no exception from this rule.

It is therefore clear that only judicial decisions can make the object of recognition in criminal area.

2.5.2. Mandatory (or not) character of the exequatur procedure

According to Article 4 Para 1 of the Regulation: "A protection measure ordered in a Member State shall be recognised in the other Member States without any special procedure being required and shall be enforceable without a declaration of enforceability being required".

Subsequently, Para 2 of the same Article enumerates the acts necessary to be presented when a protected person wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin.

Based on the provisions mentioned above, juridical literature[53] expressed opinion that the exequatur procedure is necessary under the Regulation.

In our opinion, the exequatur procedure is not necessary, as it results from a logical interpretation of Article 4 Para 1 of the Regulation, which stipulates that recognition is granted "*without any special procedure being required*".

In addition, theleological interpretation of Recital 4 of the Regulation leads to the same conclusion: "Mutual trust in the administration of justice in the Union and the aim of ensuring quicker and less costly circulation of protection measures within the Union justify the principle according to which *protection measures ordered in one Member State are recognised in all other Member States without any special procedure being required* ". (our underline).

Nevertheless, if a person asks for recognition of a judgement, this application should be analized (and not rejected *de plano*, related to arguments presented above) according to rules provided in Articles 4 – 14 of the Regulation (this was the solution adopted by national case-law in case of other regulations)[54].

On the contrary, in criminal matters the exequatur procedure is mandatory, acording to Article 9 Para 1 of the Directive: "Upon receipt of a European protection order transmitted in accordance with Article 8, the competent authority of the executing State *shall, without undue delay, recognise* that order (…)." (our underline)

2.5.3. Changing the character of the protection measure through the exequatur procedure

When Member States recognise protection measures adopted in other Member States, the procedure always reffers to protection measures granted on different grounds by different domestic authorities.

As national protection measure systems are very different, a natural question raises: the character of the protection measure as it derives from the national legislation under which it was approved can be changed by the process of recognition (e.g., a measure belonging to the criminal area in the issuing Member State can be recognized in the form of a civil measure in the addressed Member State)?

As clearly stated in Recitals 14 and 20 of the Regulation, the type and civil nature of the protection measure may not be affected by adjustment of factual elements[55].

In the same line of reasoning, Article 10 Para 1 (c) of the Directive states that the competent authority of the executing State may refuse to recognise the European protection order if it relates to an act that does not constitute a criminal offence under the law of the executing State (the principle of double criminality as a ground for non-recognition).

By corroborating the provisions aforementioned in a literal interpretation, we conclude that the legal nature of the protection measure (civil or criminal) cannot be changed by process of recognition[56].

Systematic and theleological interpretation lead to the same conclusion, as both EU and national legal instruments legiferate separately civil and criminal protection measures.

2.5.4. Differencies concerning the exequatur procedure in civil and criminal matters

The framework construed by the Regulation and the Directive related to recognition in one Member State of protection measures adopted in another Member State is similar.

In both cases, the EU legislator starts from the same premises (existence of a protection measure adopted in one Member State) and afterwards figures a mechanism of recognition implying two states (the

[53] D.-M. Șandru, I. Alexe, P. Dobrică, *op. cit.*, p. 62.

[54] Similar provisions in Regulations nos 44/2001 and 2201/2003 resulted in Romanian case-law in occasional denial of the exequatur procedure, justified on lack of interest for the applicant, as recognition operates *de jure*. Nevertheless, the case-law generally admitted the *possibility* to follow the exequatur procedure in consideration of practical difficulties encountered by applicants with different national authorities when having requested recognition *de jure*, without presenting an exequatur judgement.

[55] "Based on the principle of mutual recognition, protection measures ordered in civil matters in the Member State of origin should be recognised in the Member State addressed as protection measures in civil matters in accordance with this Regulation" (Recital 14 of the Regulation); "(...) the type and civil nature of the protection measure may not be affected by such adjustment" (Recital 20 of the Regulation).

[56] A. Sievälä, *op. cit.*, p. 54: "(…) the form in which a protection measure is transferred from one Member State to another is defined by the nature of the matter in that State (…)".

Member State where measure was adopted and the Member State where it is to be recognised)[57].

Also, both the Directive and the Regulation emphasise as a general rule that this procedure does not require the Member States to change their national systems for ordering protection measures.

In general, it is accepted that the framework in civil and criminal matters is similar "since all the different types of protection measures found within the area of the Union are a part of the same entirety and since the idea has been to adopt a coherent system of mutual recognition of protection measures. By creating two fundamentally different systems depending on the nature the protection measure has in the national system the Union would have created a more complicated system which would have put the citizens and the Member States of the Union in different positions"[58].

Apart from the same general framework, there are nevertheless important differencies in substance and procedure, the most significant of which shall be presented below.

Substancial differencies

The first and most important different element between civil and criminal areas related to recognition of protection measures is *adjustment of factual elements* in recognition of civil measures, respectively *approximation of laws* in criminal measures.

According to Article 11 and Recital 20 of the Regulation, the addressed Member State has the right to adjust the factual elements of the protection measure where such adjustment is necessary in order for the recognition of the protection measure to be effective in practical terms.

As provided by Recital 20 of the Regulation, factual actual elements 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.

Therefore, the adjustment is to be done according to the national law of the addressed Member State, but limited to the elements provided by the Regulation.

As for procedural aspects, Article 11 pts 2 and 5 of the Regulation states that the procedure for the adjustment of the protection measure shall be governed by the law of the Member State addressed, exempt for the suspensive effect of the appeal, if stated by domestic law.

The protected person, as well as the person causing danger must be informed about these adjustments, and they have the right to appeal against them.

On the other hand, according to Recital 20 of the Directive: "Since, in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, *it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under this Directive*. Therefore, *the competent authority in the executing State is not required in all cases to take the same protection measure as those which were adopted in the issuing State*, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case in order to provide continued protection". (our underline)

Nevertheless, as pointed out before, this cannot lead to a change of the civil/criminal original character of the protection measure, but only to adoption of the closest measure belonging to the same sphere.

Secondly, there are significant differencies related to grounds for non-recognition under Regulation, respectively the Directive, which can result in different degrees of effectiveness of these EU legal instruments.

The Regulation (Article 13) allows refusal of recognition only in two cases: if the recognition was "manifestly contrary to public policy in the Member State addressed" or "irreconcilable with a judgment given or recognised in the Member State addressed".

The grounds for non-recognition under the Directive are much broader (Article 10 Para 1 provides nine grounds, the majority of them related to the national law of the executing State, thus reducing a protected person's possibility to get protection in some Member States).

Also, there are questions related to respect of principle of equality, deriving from a situation when a person who has been granted protection in one Member State exercises the right of free movement and continuation of the protection in the other Member State depends on national legislation of the latter.

Procedural differencies

According to the principle of procedural autonomy of Member States, procedural aspects fall within the margins of appreciation of national legislators.

As a consequence, an exequatur procedure for recognition in Romania of juridical effects of protection measures adopted in civil matters in another Member State is to be solved by pronouncing a judgement, according to rules indicated in Articles 1093 – 1101 of Romanian Procedural Civil Code[59].

Applying the same principle in criminal area, an exequatur procedure is to be solved by pronouncing a judgement, according the rules indicated in Article 13 of national Law. no. 151/2016 on the European protection order, as well as for amending and completing some normative acts.

[57] As stated in the Regulation, the "Member State of origin" means the Member State in which the protection measure is ordered, and "Member State addressed" means the Member State in which the recognition is sought (Article 3 Paras 5 and 6 of the Regulation). According to the Directive, the "issuing state" is the Member State which has adopted the protection measure, and the "executing state", is the Member State to which a European protection order has been forwarded for recognition (Article 2 Paras 5 and 6 of the Directive).

[58] A. Sievälä, *op. cit.*, p. 40.

[59] Law no. 134/2010, published in the Official Gazette of Romania no. 606/23.08.2012.

By contrast to the Regulation[60], the Directive also establishes in Article 7 and Annex I a special form for issuing a European protection order, clearly identifying the information to be filled-in (this standard form has also been indicated as Annex 1 to Law. no. 151/2016).

We consider that, for reasons of uniformity and speediness, a similar standardized form should be conceived as an Annex to the Regulation.

3. Conclusions

There is a significant amount of variation in national legislations of Member States related to protection measure systems. The level of protection measures (civil or criminal), and also the criteria under which protection may be granted vary from one Member State to another.

At EU level, there is a legitimate right for citizens of European Union to move and reside freely within the territory of all Member States.

In this context, the aim of the EU legislator was to ensure continuous protection of victims within the common area of justice, freedom and security, and at the same time to make sure that persons in need of protection may exercise their right to free movement without losing the protection[61].

In order to reach this goal, it construed a mechanism based on mutual recognition of protection measures adopted in one Member State in all other Member States[62], by adopting a Regulation for civil matters and a Directive for criminal matters.

The principle of mutual recognition is based on mutual trust and direct judicial cooperation among national courts. It follows as a general direction that Member States are to recognise the validity of decisions pronounced in other Member States and give them the same juridical value and effects as if they were national decisions.

Apart from the general framework, important aspects are still in question, and there are also significant elements specific to each EU legal instrument, either in substance or procedure.

It is of great importance that a clear limit concerning the sphere of application of the Regulation, respectively the Directive is not established in the corpus of these legal instruments (functional competence of domestic courts seized with exequatur of protection measures and application of either the Regulation or the Directive depend on this).

As a consequence, juridical literature and the case-law argued that the legal nature of a protection measure is to be appreciated in accordance to national laws, and this legal nature cannot be changed through the exequatur procedure.

There are also specific elements attached to the substance of each EU instrument, some of them deriving from their different juridical nature (Regulation, respectively Directive).

The first and most important different element relates to adjustment of factual elements in civil measures (restrictively indicated by the Regulation), respectively approximation of laws in criminal measures (on which Member States have a margin of appreciation). As stated, regulations have the function of ensuring uniformity (allow less at the appreciation of Member States), and Diretives are used to harmonise (there is always a margin of appreciation for Member States).

Secondly, the grounds for non-recognition under the Directive applicable in criminal matters are much broader than those allowed by the Regulation for civil cases. Since the possibility to refuse recognition in criminal area is significantly broader, the effectiveness of the Directive in ensuring the cross-border protection may be smaller than the effectiveness of the Regulation.

Also, the possibility to refuse recognition on grounds related to national law which has been left to Member States in criminal matters (e.g., refusal to recognize measures based on acts which are not crimes according to the legislation of the executing State) clearly has implications on effectiveness.

If grounds for non-recognition provided by the Directive would have been reduced to those stipulated by the Regulation, the practical impact of the whole mechanism of mutual recognition of protection measures would have been stronger.

There are also formal/procedural differencies, which might affect uniformity and speediness in cross-border recognition of protection measures.

To this respect, a similar standardized form as the one indicated in Article 7 and Annex I to the Directive should be conceived as an Annex to the Regulation.

Standard forms unify the process of issuing and recognising protection measures in Member States and and smooth mutual recognition of protection measures within the European Union.

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[60] The Regulation does not include a ready-made form to be filled in in case of protection measures in civil area (according to Article 19 of the Regultion, this kind of a form will be established by the Commission). At present, Article 5 of the Regulation reffers only to a certificate, indicated by Article 2 as one of the documents necessary to be provided when a protected person wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin.

[61] Thus, a person in need of protection will not have to apply for a new protection measure in the new Member State of residence when exercising the right to free movement.

[62] A. Sievälä, *op. cit.*, p. 38: "The Directive on the European protection order and the Regulation on mutual recognition of protection measures in civil matters extend the principle of mutual recognition to cover protection measures. The ground for this is the same as it has been with the principle of mutual recognition all along, both in the case law and the legislation of the Union: to ensure the functioning of the free market. In addition to this, the special nature of the position of crime victims and other persons in need of protection has also been used in reasoning the creation of the new mechanism for mutual recognition of protection measures. This fits well with the growing importance of fundamental rights in the EU".

At national level, harmonising the criteria for adopting a protection measure within domestic legislations of Member States would help[63].

Finally, the whole mechanism on mutual recognition of protection measures is rather new and not sufficiently applied in practice, and therefore professional training of magistrates in this area should be useful[64].

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[63] This is a situation which, at least at the moment, cannot be changed in criminal area. One the one hand, each Member State has its own criminal system; on the other hand, EU and Member States have shared competence in the area of freedom, security and justice related to enacting EU legislation within this field.

[64] Recital 31 of the Directive states that "Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States should consider requesting those responsible for the training of judges, prosecutors, police and judicial staff involved in the procedures aimed at issuing or recognising a European protection order to provide appropriate training (...)." It should be mentioned that the Regulation does not include any referral to training of magistrates.

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