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# **The state of the art in stalking legislation.**

## **Reflections on European developments**

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&

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### **Executive summary**

*Although some European Member States have made important achievements with respect to anti-stalking legislation, significant deficiencies still exist. To begin with, the majority of Member States have not criminalized stalking at all, and the ones that have differ greatly as to certain constitutive elements of the crime of stalking. Stalking provisions vary, for instance, with respect to penalties imposed, the inclusion of a list of stalking tactics, requirements for prosecution, requisite intent on the part of the perpetrator, etcetera. Another aspect in which Member States diverge is the manner in which protection of (stalking) victims is constructed. This paper examines these issues in more detail and provides recommendations on how Member States should best design their anti-stalking and protection legislation. Looking at the US federal policy on stalking, it furthermore recommends on how the EU could stimulate the creation or modification of national anti-stalking legislation.*

### **Keywords:**

*Stalking, legislation, European Member States, protection orders, open method of coordination*

### **I. Introduction**

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Stalking or ‘persistent harassment in which one person repeatedly imposes on another unwanted communications and/or contacts’<sup>3</sup> is a pervasive problem. Prevalence estimates range from 4.5 to 23.4% of the population being affected<sup>4</sup> and its impact on victims psychological, social and occupational functioning can be devastating.<sup>5</sup> The criminalization of stalking is one of the fastest evolving legislative trends to spread across the world. What began in California in 1990 has inspired US states and several countries internationally to follow suit. However, where the American states were quickly convinced of the necessity to criminalize stalking – within less than four years all the 50 states and the district of Columbia had enacted anti-stalking legislation<sup>6</sup> – the European Member States are more hesitant. In 1997, Ireland and United Kingdom were the first in Europe to enact dedicated stalking legislation. Even to date, the majority of EU Member States have no specific anti-stalking legislation in place, and the ones that have differ greatly as to certain constitutive elements of the crime of stalking.

While the public recognition of the phenomenon of stalking and anti-stalking legislation dates back to the 1980s in the US and has generated much (comparative) literature in the US, the European developments started at least a decade later and have until now spurred comparatively little attention. Still, it is important to have a good overview of the current state-of-affairs in stalking legislation in the European Member States. A thorough analysis of the ‘do’s and don’ts’ in anti-stalking legislation can benefit not only the Member States that are contemplating the enactment of such legislation, but also the Member States that have already installed certain provisions. The latter states will be given the opportunity to compare their national anti-stalking laws against the (European) yardstick: does their national law live up to the standard or should certain changes be made?

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<sup>3</sup> P.E. Mullen, M. Pathé & R. Purcell, Stalking: New constructions of human behaviour, *Australian and New Zealand Journal of Psychiatry* (35) 2001, pp. 9-16.

<sup>4</sup> See: S. van der Aa, Stalking in the Netherlands. Nature and prevalence of the problem and the effectiveness of anti-stalking measures, Apeldoorn/Antwerpen/Portland: Maklu 2010, pp. 53-55 for an overview of large-scale studies on stalking prevalence in the general population.

<sup>5</sup> See, for instance, J.H. Kamphuis & P.M.G. Emmelkamp, Traumatic stress among support-seeking female victims of stalking, *American Journal of Psychiatry* (158) 2001, pp. 795-798; Also E. Blaauw, F.W. Winkel, E. Arensman, L. Sheridan & A. Freeve, The toll of stalking. The relationship between features of stalking and psychopathology of victims, *Journal of Interpersonal Violence* (17) 2002, pp. 50-63.

<sup>6</sup> R. Purcell, M. Pathé & P.E. Mullen, When do repeated intrusions become stalking?, *Journal of Forensic Psychiatry & Psychology* (15) 2004, pp. 571-583.

In the United States, the National Institute of Justice early on developed a model stalking code to encourage states to adopt proper anti-stalking legislation and to provide them with a template that was expected to withstand the anticipated constitutional challenges. As a result, many states amended their initial stalking statutes to bring them in line with the recommendations of the model code. Next to the model stalking code, the US also adopted a federal stalking law to tackle instances of inter-state stalking, it commissioned various studies to increase understanding and awareness of the problem, and it declared January National Stalking Awareness Month.<sup>7</sup> In Europe, not having a federal legal system and with limited competence of the European Commission to harmonize legislation in the criminal legal domain, including stalking,<sup>8</sup> there have not been similar supranational initiatives, at least not yet.

Besides criminalization per se, stalking of women is also addressed within the context of a wider debate on the role of international law, and whether violence against women, as gender based violence, could be legally considered as a violation of human rights law.<sup>9</sup> The debate is beyond the scope of this paper. It is relevant to mention here since some of the European developments address stalking in the context of a proposed new human rights instrument, emphasizing the so-called ‘three P’ approach, which not only focuses on prosecution (criminalization), but includes provisions of support and protective measures as well. On a wider European level, the recent (2011) Council of Europe *Convention on preventing and combating violence against women and domestic violence*, reflects an international effort to introduce a binding regional human rights instruments, and to enhance national legislation in this field. This will be discussed this paper, together with some other national European developments in the field of stalking. Our focus is on developments within the EU primarily.

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<sup>7</sup> P.G. Tjaden, Stalking policies and research in the United States: A twenty year retrospective, *European Journal on Criminal Policy and Research* (15) 2009, pp. 261-278.

<sup>8</sup> *European Commission*, Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence, Luxembourg: Publications Office of the European Union 2010.

<sup>9</sup> A core element in this debate is the question what is considered as a source of international law: the traditional argument acknowledges only binding treaties, where a new approach argues that *evidence* of international customary law should be acknowledged as well. In the traditional view there is no binding international law in Europe that addresses or prohibits violence against women *per se*. In the second approach a body of UN resolutions, declarations and jurisprudence of the European Court of Human Rights (on domestic violence, including stalking behaviour) could be considered as reflecting a developing norm that domestic violence, including stalking behaviour, could be considered as a human rights violation. See: B. Meyersfeld, *Domestic violence and international law*, Oxford: Hart Publishing 2010. Also: H. Charlesworth, C., Chinkin & S. Wright, *Feminist approaches to international law*, *The American Journal of International Law* (85) 1991, pp. 613-645.

The question is: Should and could attempts be made to (further) harmonize the anti-stalking legislation in the EU Member States and if so, how?

The aim of this paper is twofold: First, to reflect on the current state of affairs in stalking legislation in the EU Member States (section 2): Which Member States have enacted anti-stalking legislation and which Member States have not, how do legal definitions of stalking compare to each other, what similarities and differences can be discerned in the approach of Member States towards stalking, and what approach should be preferred if we take an integrated human rights based approach as starting point? Against that backdrop, not only the criminalization of stalking is taken into account, but attention is also paid to protective measures for victims, notably the possibility of obtaining civil and criminal restraining orders (section 3). For criminalization alone is not enough. Victims should also be able to apply for efficient protection from their assailant. The second aim is to see whether on a European level harmonization of national anti-stalking legislation might be feasible. To this end, the way in which the United States have tried to harmonize state legislation and the current initiatives on a European level are described first (section 4). After that, the most suitable legal basis for the EU to base its further involvement on is discussed (also section 4), followed by an overall conclusion (section 5).

## **II. The criminalization of stalking in the European Member States**

This section takes stock of the ways in which European countries have criminalized the conduct. In 2007, there was a first attempt at mapping the different approaches towards stalking in Europe. In the context of the Daphne Research Program, the Modena Group on Stalking collected information and analyzed the legal situation in the European Member States.<sup>10</sup> In a subsequent article, De Fazio updated the findings of the Modena Project.<sup>11</sup> The most recent study that looked into stalking legislation in the European Member States was the European Commission's feasibility study.<sup>12</sup> Based on a detailed analysis of the (legislative) approach in the 27 EU Member States to *inter alia* violence against women, including stalking, a comparative analysis was made of how a range of legislative and support measures

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<sup>10</sup> *Modena Group on Stalking*, Protecting women from the new crime of stalking; A comparison of legislative approaches within the European Union, University of Modena and Reggio Emilia 2007.

<sup>11</sup> *L. de Fazio*, The legal situation on stalking among the European member states, *European Journal on Criminal Policy and Research* (15) 2009, pp. 229-242.

<sup>12</sup> *European Commission* (fn. 8).

had been taken in the EU. The following section partly builds on the results of these three previous studies, but is mainly based on an in-depth analysis of the legal provisions on stalking (see Appendix).

In this section we will not discuss and compare all the constituent elements of the different legal stalking definitions that are used in the EU Member States. The definitions diverge widely. To analyze every one of them on a detailed level is beyond the scope of this paper. Instead, we will focus on what seem to be the most essential and overarching similarities and differences between the various legal stalking definitions.

### *1. Legislation of Member States on stalking*

The 27 EU Member States are virtually split in half when it comes to whether or not stalking has been criminalized. A total of thirteen countries (Austria, Belgium, the Czech Republic, Denmark, Germany, Italy, Luxemburg, Malta, the Netherlands, Ireland, Hungary, Poland, and the UK) have criminalized, and a slight majority of fourteen European Member States have *not* criminalized stalking at all. These latter states often contest the necessity of having specific legislation in place. They argue that the existing laws are perfectly able to deal with instances of stalking already and that there is no need for a separate criminalization of the conduct. In their opinion, the combination between existing criminal law and (civil) protection order provisions should suffice to effectively counter stalking behaviour. Another reason why some Member States have not criminalized stalking is that the phenomenon is not considered a social problem.<sup>13</sup> In those countries, the topic of stalking has not (yet) given rise to much public and academic debate, thereby failing to provide the necessary impetus for legislative change. The lack of any sustained public debate or activism regarding stalking was found to be one of the main reasons why some countries lack specific legislation on stalking.<sup>14</sup> Some Member States that have not adopted specific criminal anti-stalking legislation encounter problems in bringing the problem under the attention of the police. In the feasibility study two problems in relation to the lack of specific anti-stalking legislation could be identified:<sup>15</sup>

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<sup>13</sup> *De Fazio*, European Journal on Criminal Policy and Research 2009, pp. 229-242.

<sup>14</sup> *European Commission* (fn. 8), pp. 66-70.

<sup>15</sup> *European Commission* (fn. 8), pp. 66-70.

- The generic criminal and civil law provisions are not efficient in combating stalking. The lack of a specific provision, for example, causes the police to wait for escalations and remain inactive in the early stages of the harassment, even if other provisions are applicable.
- The generic provisions do not cover stalking in its entirety, they do not cover certain forms of stalking, and/or they do not cover certain victims of stalking.

These problems have inspired the other Member States to criminalize stalking. Characteristic of the European situation is that there is a lot of variance in the way these Member States have defined the conduct and in the way prosecution is set up. However, before the legislative definitions are compared, a caveat needs to be made. The following analysis is based on a close reading of the anti-stalking provisions. It could be that in national practice, case law or parliamentary debates have introduced additional criteria. It was beyond the scope of this paper to structurally check for. Another problem could be that, despite due care, mistakes might have been made in translating and interpreting the legal provisions. Taking these limitations into account, if we look at the legal definitions of stalking (see Appendix), several commonalities can be discerned:

- 1) With the exception of Belgium, all legal definitions require a ‘course of conduct’ or ‘repetitive behaviour’, not single incidents. However, although according to Belgian law one incident can suffice, the Belgian Supreme court has ruled that the behaviour needs to be repetitive in order to qualify as stalking, making the difference in definition virtually theoretical.
- 2) All the legal definitions use open or broad concepts, such as ‘harassment’ or ‘pursuit’, which require further interpretation by the courts. This broad terminology is used in an attempt to capture the variety of stalking tactics. More narrowly defined provisions exclude certain stalking behaviours and enable stalkers to easily circumvent prosecution. However necessary, notably to fully capture the wide range of stalking behaviours and the ‘course of conduct’-element, it is exactly this broadness or all-inclusiveness which is sometimes criticized. In the Netherlands, for example, the broad definition of stalking and its possible infringement on the principle of legal certainty was heavily debated in

parliament before the new law was introduced.<sup>16</sup> Broad concepts may evoke uncertainty of meaning and may – paradoxically – even lead to very strict interpretations in case law.<sup>17</sup> Some broad statutory elements such as ‘regular and persistent harassment’ or ‘with the intention to intimidate’, may not be inclusive enough, at least not in the minds of law enforcement officials. They may interpret these terms very strictly, only allowing the most serious cases to be prosecuted.

Next to the similarities, there are also points on which the Member States diverge:

*a) A (new) provision in the Criminal Code or an Act*

The Member States that have criminalized stalking can be subdivided into three categories: 1) the Member States that introduced a new provision in their Criminal Code, 2) the Member States that amended an existing criminal provision, and 3) the Member States that introduced a dedicated Act against stalking. Usually, these legislative differences are inspired by long-standing legal traditions. As appears from the Appendix, most Member States have opted for the inclusion of a new provision in their Criminal Codes. Only the UK and Ireland have created a specific Act which includes stalking behaviour. Denmark, which had already criminalized stalking-like behaviour back in 1933, has made several changes to the existing provision, mainly increasing the maximum penalty.

The advantage of a dedicated Act over a new provision in the Criminal Code is that these Acts often bring along some form of framework regulation. This means that not only the criminalization of stalking is regulated, but also that other important aspects, such as the protection of the victim or the implementation of the law in practice, have been addressed in one and the same document. Of course, in other countries these other aspects may have been sufficiently regulated as well, albeit in a separate regulation.<sup>18</sup> Both options bring different advantages and disadvantages, depending also on the wider national legislative context and culture.

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<sup>16</sup> See, for instance, the remarks of Member of Parliament Halsema (Parliamentary Documents, *Handelingen II* 1998/99, no. 97, p. 5668).

<sup>17</sup> *European Commission* (fn. 8), p. 67.

<sup>18</sup> In Germany, for example, the possibility for stalking victims to obtain civil protection orders is regulated in the ‘Gewaltschutzgesetz’ (Protection from Violence Act).



### *b) The maximum and minimum penalty*

Where the range of sanctions is concerned, there is a lot of variance amongst the Member States. The statutory maximum penalty ranges from three months (Malta) to ten years imprisonment (Poland). In itself it is not surprising that the maximum penalties differ, since national legal systems tend to differ with regard to the maximum penalty for all sorts of crimes, regardless of the specifics of stalking. In order to establish a suitable maximum penalty for stalking, the entire national legal system has to be taken into account: What are the maximum penalties for other offences and where does stalking fit in? To recommend across the board that stalking should always carry a particular maximum penalty is therefore difficult and would have the undesirable consequence that in certain jurisdictions it would carry a higher penalty than offences that are generally considered equally or more worthy of punishment. However, what is relevant from a transnational EU perspective is that a rather low maximum penalty can cause problems when the extradition of a suspected or convicted stalker is requested.<sup>19</sup> Usually, extradition schemes require what is called an ‘aggravated double criminality’.<sup>20</sup> The offence not only has to be criminalized in the requested and the requesting country, but the maximum penalty in *both countries needs to be at least one year imprisonment*. Malta and Member States that currently consider drafting anti-stalking legislation are for that reason advised to create a provision that carries a maximum penalty of at least one year imprisonment.

### *c) Negative consequences for the victim*

Member States’ legal definitions of stalking reflect different positions on whether evidence regarding the negative consequences of the stalking for the victim needs to be proven in court. In Germany, for instance, it needs to be proven that the behaviour has ‘seriously infringed on the lifestyle of the victim’. Similar requirements can be found in Ireland (‘seriously interferes with the other’s peace and privacy or causes alarm, distress or harm’) and Poland (‘raises in him a reasonable fear or significantly violates his privacy’). In Malta, the UK and Hungary, the situation is somewhat different. There stalking is comprised of two primary offences, both

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<sup>19</sup> See S. van der Aa, International (cyber)stalking: Impediments to investigation and prosecution, in: R. Letschert & J. van Dijk (eds.), *The new faces of victimhood: Globalization, transnational crimes, and victim rights*, Springer 2010, pp 191-213.

<sup>20</sup> V.H. Glerum & N. Rozemond, Overlevering en uitlevering, in: Sliedregt, Sjöcrona & Orije (eds.), *Handboek internationaal strafrecht*, Deventer: Kluwer, p. 196.

involving a course of conduct. In each of these countries, the first offence does not have negative consequences as a qualifying element for the crime of stalking. Only the second offence – carrying a higher maximum penalty – requires proof of the negative impact on the victim’s life. The Dutch, Czech, Italian, Belgian, Austrian, Luxemburg, and Danish anti-stalking provisions do not require the victim to have experienced fear, distress or any other negative consequence as a result of the stalking. The advantage of this latter approach is that it alleviates the burden of proof for the (public) prosecutor: he or she does not have to collect evidence on the impact of the stalking on the victim. Especially where the mental effects are concerned, this requirement poses certain challenges. What is, for example, an appropriate level of fear and how can this be assessed adequately? And how can be prevented that an exceptionally equable victim is treated differently from a victim of a more nervous nature? An important factor in this respect is the fact that in the United States – the pioneer when it comes to the criminalization of stalking – more and more states are adopting anti-stalking legislation in which the victim is no longer supposed to actually have suffered a certain level of fear – e.g., fear of bodily injury or death – but where it suffices if a *reasonable person* would suffer emotional stress, because of the harassment.<sup>21</sup> A number of US courts have held that this emotional distress no longer needs to be proven by independent expert testimony.<sup>22</sup>

*d) A (limitative) list of stalking tactics*

A different approach can be seen in the Member States’ choice to either include or exclude a list of possible stalking tactics in the criminal definition. Some Member States have dismissed the idea of providing such a list as clarification of the open and multi-interpretable term ‘stalking’ or ‘harassment’. They just used a national equivalent for the term ‘stalking’ and left it up to the courts to interpret what behaviour falls under the scope of the article. This approach is used in Belgium, Italy, Luxemburg, Malta, the Netherlands, Poland and the UK.

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<sup>21</sup> It is important that in the interpretation of a reasonable person-standard the gender based inequalities are adequately taken into consideration which can underlie much of the stalking behaviors and the response to it, particularly when the victim is female and the stalker is a male ex-partner. As research on intimate partner violence has revealed, this is a domain fraught with ambiguities where experts often disagree. Cf. *R. Römken*, Ambiguous responsibilities. Law and conflicting expert testimony on the abused woman who shot her sleeping husband, in: E. Mertz (ed.), *The Role of Law in Social Science*, Hampshire (USA): Ashgate 2008, pp. 355-391.

<sup>22</sup> *National Center for Victims of Crime*, *The Model Stalking Code revisited: Responding to the new realities of stalking*, Washington DC: National Center for Victims of Crime, 2007, p. 48.

<sup>22</sup> *National Center for Victims of Crime*, *The Model Stalking Code revisited: Responding to the new realities of stalking*, Washington DC: National Center for Victims of Crime, 2007, p. 48.

Other legislators thought it more expedient to provide the legal authorities with some guidance by spelling out certain behaviours that are typical of the crime of stalking. In those countries, the way in which the crime is clarified varies from a very basic description<sup>23</sup> to a systematic enumeration of all the possible behaviours that could amount to stalking.<sup>24</sup> In principle, providing something of a handle for the criminal justice actors to rely on it can be very useful to prevent or diminish problems with the *lex certa* principle – the principle that prescribes that the scope and definition of a criminal offence has to be sufficiently predictable for citizens so that they are informed about the potential consequences and can adjust their behaviour. However, legislators should be cautious not to include limitative or exhaustive lists of stalking tactics since stalkers are notorious for their creativity and they may be able to find ways to easily get round the criminal offence once a limitative list of acts is incorporated in the legal provision.<sup>25</sup> This is particularly relevant in light of ongoing technological developments which facilitate new and sophisticated forms of stalking via internet and through the use of GPS systems.<sup>26</sup>

*e) The term 'stalking' or a national term*

The Member States furthermore diverge in the use of specific (national) terms or a generic term (e.g., 'harassment') to designate the behaviour. With the exception of Poland, none of the thirteen Member States has used the term 'stalking', even though the public at large seems more familiar with that term.<sup>27</sup> A possible disadvantage of using nationally specific linguistic expressions is that it may cause confusion, for example, when citizens do not realize that the national term actually covers stalking behaviour and, as a result, might refrain from going to the police. The use of a national or a more generic term could also hinder a joint and proper understanding of the concept of stalking among the various legal or helping professionals themselves.<sup>28</sup> A stalking victimization survey at Victim Support the Netherlands, for instance,

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<sup>23</sup> See, for example, the Hungarian definition of stalking.

<sup>24</sup> See, for example, the Austrian definition of stalking.

<sup>25</sup> This was, for example, exactly the reason why the Dutch legislator decided not to include a list of stalking tactics (see the Parliamentary Documents *Kamerstukken II* 1997/98, 25 768, no. A, p. 4).

<sup>26</sup> C. Southworth, J. Finn, S. Dawson, C. Fraser & S. Tucker, *Intimate partner violence, technology and stalking, Violence Against Women* (13) 2007, pp. 842-856.

<sup>27</sup> De Fazio, *European Journal on Criminal Policy and Research* 2009, pp. 229-242.

<sup>28</sup> *Modena Group on Stalking* (fn. 10), p. 57.

revealed that the volunteers had interpreted the Dutch equivalent of stalking (*belaging*) as a mild and non-punitive form of harassment (such as having a snowball thrown at you).<sup>29</sup>

However, the indiscriminate adoption of the English word ‘stalking’ may generate disadvantages that are the exact opposite from the ones mentioned above. Stalking could, for instance, be seen as something that is more serious and less inclusive than harassment. Certain deviant behaviour may then fall under the radar of the general public or the police as well. Also it seems not the preferred choice of most countries to adopt foreign words or expressions in its national legislation. Regardless of the terms chosen, possible ambiguities as to its meaning can be addressed effectively by having the introduction of new anti-stalking legislation accompanied by a publicity campaign and a solid training of law practitioners.

*f) Prosecution on the basis of a complaint of the victim or prosecution ex officio*

Another difference between the Member States’ legislation is the manner in which the crime of stalking can be prosecuted. In some Member States the complaint of the victim is a statutory requirement for prosecution. This means that if there is no official complaint or if the complaint has been withdrawn within the statutory limits, the public prosecutor is barred from prosecution. Belgium, Luxemburg, Hungary, Poland and the Netherlands have adopted this approach. In Germany, stalking is also a complaint offence, but an exception has been made for cases in which the public prosecutor considers that there is a special public interest in prosecution. In the context of post-separation stalking, for example, the prosecutor can decide that the victim cannot be expected to ask for prosecution. In addition, if the stalker ‘places the victim or a person close to the victim in danger of death or serious injury’, the offence has to be prosecuted *ex officio* as well. In Italy, there is also a combination of prosecution on the complaint of the victim and prosecution *ex officio*, and in Denmark they have a system which can be considered a derivative of the complaint procedure. Danish victims first have to request the police to issue a formal warning to the (alleged) offender and only after the offender has acted in violation of this warning, he or she can be prosecuted. The aforementioned procedures contrast with the systems in which prosecution is exclusively *ex officio*, as is the case in Austria and the UK.<sup>30</sup> In Austria, up until January 2008, stalking

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<sup>29</sup> See: *Van der Aa* (fn. 4), p. 109.

<sup>30</sup> On the Czech Republic, Ireland and Malta no information could be found on whether or not stalking was a complaint offence. Possibly, in those Member States, this is not a requirement either.

perpetrated by means of (tele)communication and/or through third parties could only be prosecuted after a complaint of the victim. Nowadays, all forms of stalking can be prosecuted *ex officio*, even if this goes against the victim's wishes.

Each system has its pros and cons. The complaint requirement can form a barrier to prosecution. Some victims withdraw their complaints due to pressure from the suspect or out of fear of revenge, or the prosecution is hindered because of failure to comply with the formalities attached to the complaint procedure. In the Netherlands, for example, the public prosecutor was sometimes barred, because the case file did not contain an explicit complaint by the victim.<sup>31</sup> On the other hand, there may also be victims who welcome to have decisive influence on prosecution that a complaint procedure brings along. They want to stop the stalking but have, for instance, a genuine fear or lack of faith in the effectiveness to follow the criminal legal procedure through.<sup>32</sup> Another reason why they do not wish to lodge a complaint is that they do not want to stigmatize the stalker or they dread having to reveal private matters in court. These victims resort to the police in search for other solutions instead of a trial, such as police protection or an official warning to the stalker.

#### *g) Intent of the stalker*

A final aspect in which the Member States' legislation on stalking differs is the required level of intent or *mens rea* on the part of the perpetrator. Although the levels of intent vary per jurisdiction, the following degrees can roughly be distinguished:

- *Intentionally or purposely*: the stalker has a clear foresight of the consequences of his/her actions, and desires those consequences to occur.
- *Knowingly*: the stalker knows, or should know, that the results of his/her actions are reasonably certain to occur.
- *Recklessly*: the stalker foresees that particular consequences may occur and proceeds with the given conduct, not caring whether those consequences actually occur or not.

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<sup>31</sup> Van der Aa (fn. 4), p. 98.

<sup>32</sup> S. van der Aa & A. Groenen, Identifying the needs of stalking victims and the responsiveness of the criminal justice system: A qualitative study in Belgium and the Netherlands, *Victims and Offenders* (6) 2011, pp. 19-37.

- *Negligently*: the stalker did not actually foresee that the particular consequences would flow from his/her actions, but a reasonable person, in the same circumstances, would have foreseen those consequences.

Judging from the wording of the stalking provisions, it would appear that the Member States have indeed opted for different levels of intent, ranging from criminal negligence (UK, Malta, Ireland), via knowledge (Belgium, Luxemburg), to intent (Austria, Hungary, Italy, the Netherlands).<sup>33</sup> Depending on whether objectified, subjective or hybrid elements are allowed when establishing a certain level of *mens rea*, this could imply that in certain Member States the intent on the part of the perpetrator is more difficult to establish than in others.<sup>34</sup>

Another distinction that can have an impact on the burden of proof is the one between *basic* intent and *specific* intent.<sup>35</sup> A basic intent crime requires nothing more than that the crime is intentionally or recklessly committed. A specific intent crime requires (in addition to basic intent) that the offender intended certain negative consequences of his actions. Specific intent statutes may be more difficult to prosecute, given that the prosecution has to prove that the stalker intended the consequences of his actions.<sup>36</sup> Besides the additional burden to the public prosecutor, there is also the danger that it exempts a certain type of stalker from criminal prosecution. Erotomanics or love infatuated stalkers, for instance, generally claim they do not wish to harm the targets of their stalking behaviour, but wish to court them instead.

### III. The importance of protection

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<sup>33</sup> In the stalking definitions of the Czech Republic, Denmark and Germany no element of intent could be detected. Probably, criminal intent in these countries is regulated elsewhere (e.g., in a general clause). In Poland, only the stalking described in Article 190a (2) ('pretending to be another person') requires a certain level of intent on the part of the stalker.

<sup>34</sup> With a subjective test of *mens rea*, the court must be satisfied that the accused actually had the requisite mental element present in his mind at the time of the crime. With an objective test, the requisite *mens rea* is inferred on the basis of the assumption that a reasonable person in the same circumstances would have foreseen the consequences (*P. Shears & G. Stephenson* (eds.), *James' Introduction to English law*. 13th edition, London: Butterworths 1996, p. 158). A hybrid test (both subjective and objective elements) could also be admissible for some or all of the levels of intent. The burden of proof will generally be lower when an objective or a hybrid test suffices instead of a subjective test.

<sup>35</sup> See *D.S. Clark & T. Ansay* (eds.) *Introduction to the law of the United States*. Second edition, The Hague: Kluwer Law International 2002, p. 143.

<sup>36</sup> *Tjaden*, *European Journal on Criminal Policy and Research* 2009, pp. 261-278.

From a human rights based perspective the protection of victims of stalking is essential to fully realize their needs and to comply with emerging international human rights based standards.<sup>37</sup> This has been a guiding principle while drafting the Council of Europe *Convention on preventing and combating violence against women and domestic violence* (2011) (we will address this in more detail below). When choosing a criminal legal trajectory it is equally important to recognize that victims of stalking show an additional need for protection against recidivism compared to victims of other, non-repetitive crimes. Research findings indicate that one of the victim's primary concerns in seeking legal intervention is protection for themselves and their children.<sup>38</sup> Due to the prevalent offender's obsession with the victim, often directly related to the fact that ex-partners who refuse to accept a separation are the most common category among stalkers, the chances of these victims being victimized for a second, third or even tenth time by the same offender are much higher than the chances for the average crime victim. As long as the stalking incidents keep recurring, victims remain under a constant threat, something which is not conducive to their recovery. One of the structural problems of stalking for victims is the ongoing fear that is installed since many victims are never sure whether and when the stalker might resume his/her behaviour.

Merely making stalking liable to punishment is therefore both from a legal and psycho-social perspective not enough. Victims should also have access to (additional) protection as well as support services. Dedicated support services for victims of stalking are virtually absent in EU Member States.<sup>39</sup> Although the protection of victims can be provided in various ways, e.g. via the use of electronic safety systems which allow victims to alarm the police at an earlier stage to enable arrest,<sup>40</sup> this section focuses on legal measures, notably (temporary) civil and criminal protection orders. Next to the criminalization of stalking, this type of protection orders is often applied for to prevent repeat victimization. A caveat is in place though since the different protection order schemes in the EU Member States have never been the subject

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<sup>37</sup> Cf. *European Commission* (fn. 8), pp. 125-127 and pp. 190-210

<sup>38</sup> See *H. Johnson, N. Ollus & S. Nevala*, *Violence against women: An international perspective*, New York: Springer 2008; *J. Stubbs*, *Domestic violence and women's safety: Feminist challenges to restorative justice*, Legal Studies Research Paper No 08/16, <http://ssrn.com/abstract=1084680> (last accessed 30 March 2012). Also: *R. Römken*, *Protecting Prosecution. The powers of criminal law to protect victims of stalking*, *Violence Against Women*, (2) 2006, pp. 160-187.

<sup>39</sup> *European Commission* (fn. 8), pp. 69-70, and Annex 1, table 7

<sup>40</sup> *L. Balogh, J. van Haaf & R. Römken*, *Tot hier en niet verder. Tilburg: IVA, 2008*. Also: *R. Römken*, *Empowering technology. Protection of victims of intimate partner violence and stalking*. Paper presented at the Annual Conference of the American Society of Criminology. San Francisco: November, 2010.

of in-depth comparative study. As of late, certain research projects have touched upon the issue in a preliminary fashion and have scratched the surface of the various protection regimes in the EU.<sup>41</sup> An additional problem is that sometimes the data contain irregularities and contradict one another.

Despite these limitations, the available data at this point indicate that when it comes to criminal protection orders, practically each Member State has some form of protection in place,<sup>42</sup> but the criminal protection orders come in many shapes and forms and the level of protection provided by them varies accordingly. In some Member States, the criminal justice system, for example, does not provide protection *before* there is a final judgment (e.g., Luxemburg, Bulgaria, Czech Republic). In these countries only the criminal courts can only impose protection orders in cases that resulted in a conviction. In other countries only pre-trial protection orders can be issued which are valid *until* the final judgment (e.g., Latvia, Italy). Of course, having both pre-trial and post-trial orders available is to be preferred.<sup>43</sup> Another factor that can seriously hamper adequate victim protection is the restriction of criminal protection orders to a limited range of victims only. In Cyprus and possibly also Greece, for example, they are available to victims of domestic violence and/or human trafficking, but not to others. Victims who are stalked by people other than their (former) partners cannot benefit from the orders.

For victims of stalking, one obstacle is probably even more problematic than all the aforementioned barriers to obtaining a criminal protection order and that is the fact that

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<sup>41</sup> For example, the *Modena Group on Stalking* (fn. 10); *European Commission* (fn. 8), pp. 63-64; *M.E.I. Brienen & E.H. Hoegen*, *Victims of crime in 22 European criminal justice systems* (diss.). Nijmegen: Wolf Legal Publishers 2000; *S. van der Aa, R. van Merriënboer, A. Pemberton, J. Lázaro, C. Rasquete, C. Amaral, F. Marques & M. Pita*, *Project Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union*, Lisbon: APAV 2009. Furthermore, in 2009, within the context of the preparatory works for the European Protection Order, the Member States were asked to fill out a questionnaire on their native protection order regimes (Note from the General Secretariat to the Working Party on Cooperation in Criminal Matters on the European Protection Order (Answers by delegations in reply to the questionnaire), Council Document No 5002/10 COPEN 1 of 6 January 2010).

<sup>42</sup> Romania is the only Member State of which the studies indicate that criminal protection orders are possibly absent.

<sup>43</sup> An alternative – and possibly equally effective – option is to have a separate, administrative or quasi-criminal procedure available for the administration of protection orders. This type of order can be found in the Scandinavian countries (Denmark, Finland, and Sweden). Typically, these procedures do not necessarily require the occurrence of a crime or even a link with a criminal procedure and the orders are issued by the police or the public prosecutor. Due to space restraints, this Scandinavian model will not be further discussed here.



criminal protection orders can only be imposed when suspicions of a *crime* have arisen. Since fourteen Member States have not criminalized stalking, victims who are stalked in those jurisdictions are practically left empty-handed. Unless the stalking consists of behaviour that is criminalized elsewhere in the Criminal Code, criminal protection orders are not available to them.

Access to civil protection orders is more widely available: a large majority of EU Member States does provide access to civil injunction or civil restraining orders (except e.g., Romania, and Latvia). In comparison, American stalking victims seem better off: All US states allow individuals to seek civil protection when they are subjected to stalking by another person.<sup>44</sup> Another feature that puts stalking victims at a disadvantage is the fact that even in Member States where civil protection orders are available – again – not all stalking victims have access to them, for instance, because in some cases they are only available to victims of stalking by (ex-)partners.

#### **IV. European developments toward harmonization**

Notwithstanding the limitations, the information available does indicate that, when it comes to stalking legislation, there seems to be ample room for improvement. The following section focuses on European developments towards promoting and enhancing national anti-stalking legislation. We will first describe the US approach to see how US Congress has played an active role in trying to direct legislative efforts and reduce the differences between the different state based anti-stalking provisions. We will return to the European developments and briefly discuss whether and how a human rights based framework might be relevant to enhance developments towards harmonization.

##### *1. Harmonization in the United States*

In the United States, stalking legislation is in principle regulated on a state level. Concerned that the states would enact flawed and unenforceable statutes and realizing the possible multi-jurisdictional nature of stalking, the US Congress has however played an active role, and felt

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<sup>44</sup> Tjaden, *European Journal on Criminal Policy and Research* 2009, pp. 261-278.

the need to harmonize state laws and procedures within its territory.<sup>45</sup> It did so with the help of different approaches.

In 1993, after most states had already enacted anti-stalking legislation, the National Institute of Justice developed a model stalking Code to provide States with a template that was expected to withstand the anticipated constitutional challenges. This code was accompanied by a series of regional training seminars on issues related to the implementation of the model Code.<sup>46</sup> As a result, many states amended their state statutes to bring them in line with the recommendations of the model Code. From this point of view, the model Code was a resounding success. Still there remain significant differences between the various state laws. States' legislations differ, for example, with respect to the specific acts that are prohibited, in the requisite level of *mens rea* of the perpetrator, and in whether a threat is required.<sup>47</sup>

These differences would not matter as long as the stalking remains within the jurisdiction of one state only. But given that there are cases that cross borders, state law needed to be supplemented by federal law. For that reason, a federal interstate stalking law was enacted in 1996 which prohibits individuals from travelling across a state line with the intent to injure or harass another person.<sup>48</sup> Measures in the field of awareness raising and research received attention from US Congress as well. They commissioned several large-scale community studies on stalking<sup>49</sup> and January was launched as National Stalking Awareness Month.

All in all, when it comes to stalking, in the US on a federal level a great deal has been done to promote proper stalking legislation, increasing understanding through research, and raising awareness. The power to impose federal legislation, although under certain conditions, particularly the requirement that the behaviour takes place across State borders, is in this

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<sup>45</sup> Tjaden, *European Journal on Criminal Policy and Research* 2009, pp. 261-278.

<sup>46</sup> *National Criminal Justice Association*, Project to Develop a Model stalking code for States (Washington D.C.: U.S. Department of Justice, National Institute of Justice, 1993).

<sup>47</sup> See *U.S. Department of Justice*, Strengthening Antistalking Statutes (OVC Legal Series Bulletin nr.1, 2002); Tjaden, *European Journal on Criminal Policy and Research* 2009, pp. 261-278.

<sup>48</sup> 18 U.S.C. § 2261(A). This provision was later on amended a couple of times to include cyberstalking and stalking by means of a GPS (see, *National Center for Victims of Crime*, The Model Stalking Code Revisited: Responding to the New Realities of Stalking, Washington, D.C.: National Center for Victims of Crime 2007, p. 11).

<sup>49</sup> E.g., P. Tjaden & N. Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, Washington, D.C.: U.S. Department of Justice, National Institute of Justice 1998.

respect crucial and the developments of national policy is to a certain extent inherent to the American federal system.

## 2. *Current initiatives in Europe*

As of lately, more and more initiatives have surfaced in order to place stalking firmly on the European agenda. On a transnational European level the political and legislative context is very different from the federal level in the US. Without addressing the differences in depth in this paper, it is important to point out that unlike the US, the European Union is not a federal system. Furthermore, in the area of criminal law the legislative competence of the European Commission is very limited. Member States are to a large extent autonomous when it comes to their national crime legislation and only under very strict conditions, approximation of binding criminal legislation on some cross-border criminal issues is possible.<sup>50</sup> This imposes limitations on the EU competence in the domain of legislating stalking. Before looking at the options of the EU to stimulate the approximation of national legislation with respect to stalking, the initiatives that are currently being undertaken on the European level are discussed below.

### *a) Council of Europe Convention*

The first initiative that deserves mentioning is the Council of Europe Convention on preventing and combating violence against women and domestic violence, which was opened for signature on 11 May 2011. So far, nineteen countries have signed the Convention and Turkey was the first Member state of the CoE to ratify the Convention (December 2011).<sup>51</sup> After the Inter American Convention on the prevention, punishment and eradication of violence against women,<sup>52</sup> the CoE Convention is the first European regional human rights instrument to specifically address violence against women as a form of gender based violence. The European Convention is much more detailed than the Inter American Convention in its call on States to address violence against women. From an international law perspective it is

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<sup>50</sup> See art 83 of the Lisbon Treaty, Area on Freedom, Security and Justice. Art 83, paragraph 2 lists as areas of EU competence for approximation of substantive criminal law: terrorism, trafficking of human beings, sexual exploitation of women and children, illicit drugs trafficking, illicit arms trafficking, corruption, counterfeiting of means of payment, computer crime and organised crime. This list must be considered exhaustive. See: *European Commission* (fn. 8), pp. 143-144.

<sup>51</sup> This was the status quo on May 8 2012. **\*\* TO CHECK BEFORE PUBLICATION**

<sup>52</sup> Inter American Convention on the prevention, punishment and eradication of violence against women ("Belem do Para", 9 June 1994).

innovative in its explicit recognition of violence against women as a human rights violation and as a form of discrimination. It calls upon States to develop a fully integrated response to prevent, protect and prosecute violence against women. It is the first international treaty to contain a definition of gender, recognising that the social roles assigned to women and men can contribute to the occurrence and acceptance of violence, notably against women.<sup>53</sup> Against that backdrop, the Convention specifically addresses stalking as well. Article 34 of the Convention calls upon States for criminalization of stalking and reads as follows:

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalized.

The explanatory report to the Convention explains that the ‘threatening behaviour may consist of repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed’, but other types of behaviour are also mentioned (e.g., vandalizing the property of another person, targeting a person’s pet, setting up false identities or spreading untruthful information online).<sup>54</sup> So although the Convention itself does not contain a list of stalking tactics, the explanatory report does. Although the explanatory report is not binding law, some issues deserve critical examination. Judging by the wording of the explanatory report, this list is not exhaustive, so it does not seriously limit the ambit of the provision. What potentially could, however, limit the interpretative scope of this article is the requirement that ‘any act of such threatening conduct needs to be carried out intentionally and with the intention of instilling in the victim a sense of fear’. In other words, the stalking provision is a ‘specific intent’ crime: In addition to intentionally committing prohibited acts, the stalker also intended the negative consequences of the actions. This not only places an extra evidentiary burden on the public prosecution service, but it could exempt the so-called love infatuated stalker from criminal prosecution. After all, this type of stalker usually claims that s/he does not intend the object of affection to experience fear, but only tries to persuade this person to enter into an intimate relationship with him or her. Yet, despite the absence of malignant intentions, these stalkers can still constitute a profound intrusion into the life of victims and can seriously violate the victim’s

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<sup>53</sup> See: [www.coe.int/conventionviolence](http://www.coe.int/conventionviolence).

<sup>54</sup> See explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CM (2011) 49 final) at: [www.coe.int/conventionviolence](http://www.coe.int/conventionviolence).

privacy. This relates to another aspect problem with regard to the Convention's call for criminalization of stalking: The explanatory memorandum could be interpreted as if the fear of the victim needs to be established in court. The problems that may arise out of such a requirement – What level of fear is required; what happens to an exceptionally equable victim; how can the level of fear be effectively measured and proven? – have already been touched upon in section 2.3. A final point is that Article 78 paragraph 3 allows signatory states to reserve the right to provide for non-criminal sanctions instead of criminal sanctions. The provision of civil or administrative protection orders could be such an option. Although this exception is understandable from a strategic point of view – states may be more willing to sign the Convention – it does not offer states a strong incentive to criminalize stalking.

#### *b) Developments in the European Union*

Despite the limited competence which constrains the development of transnational EU-legislation on stalking, several political and legislative efforts reflect the growing concern for stalking victims within the EU. From a wider policy perspective the European Commission announced in the context of its 2010-2015 policy plans on gender equality, that it will adopt '(a)n EU-wide strategy on combating violence against women (...) using all appropriate instruments, including criminal law, within the limits of the EU's powers, supported by a Europe-wide awareness-raising campaign on violence against women.'<sup>55</sup> This echoes earlier plans to address the issue of violence against women in the context of a comprehensive programme to address *inter alia* rights of vulnerable groups in the EU (Stockholm programme).<sup>56</sup> These plans however have not materialized yet. On 5 April 2011, the European Parliament adopted a non-legislative resolution on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI). According to the Members of Parliament '*[s]talking should also be considered as a form of violence against women and be dealt with by means of a standard legal framework in all Member States*'.<sup>57</sup> However promising the text sounds, this effort is also a response to an earlier failed attempt to submit a

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<sup>55</sup> European Commission, Communication on a 2010-2015 Strategy for equality between women and men. 21 September 2010, p.7. See:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0491:EN:NOT>.

<sup>56</sup> *Delivering an area of freedom, security and justice for Europe's citizens*

*Action Plan Implementing the Stockholm Programme* COM (2010), 171 (see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>). The communication announces: 'Communication on a strategy to combat violence against women, domestic violence and female genital mutilation, to be followed up by an EU action plan'.

<sup>57</sup> See: <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1148523&t=e&l=en>.

written declaration to the European Parliament, calling upon all 27 Member States to recognize stalking as a crime and take more appropriate measures to enforce the law, support victims, raise awareness and conduct research.<sup>58</sup> Unfortunately, that written declaration lapsed due to insufficient support of the required number of MP's signatures.<sup>59</sup> It is a hopeful sign though that the European Parliament – after the lapse of the written declaration – has again taken up the issue of stalking. However, the statement itself is of a noncommittal nature. Member States can easily claim that they have a standard legal framework at their disposal for stalking cases, even though no specific arrangements have been made.

So far, the only concrete legislative initiative dedicated to *inter alia* stalking is the EU Directive on a European protection order. The European protection order (EPO) ensures that nationally based criminal protection orders apply in other member States across the European Union. The executing state has to adopt a measure that would be available under its national law in a similar case and which corresponds, to the highest degree possible, to the protection measure ordered in the issuing state (Art. 9(1) and (2) EPO).<sup>60</sup> Before this Directive, there was no legal basis in the European Union to enable a Member State to recognize a criminal protection order granted in another Member State. As a result, the victim who moved to another Member State would have to start new proceedings as if the previous decision had never been adopted. The problem is that the EPO has a very limited applicability – only stalking victims who move to another Member State and who remain to be in danger can benefit from the EPO – and it also does not change the fact that there are large discrepancies in the levels of protection offered in the various Member States.<sup>61</sup>

### 3. Towards harmonization across Europe

As described in the previous paragraph, there have been various initiatives to induce states to adopt anti-stalking legislation or to otherwise improve the situation for stalking victims. These initiatives, although laudable, may not be sufficient for the following reasons:

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<sup>58</sup> E. Lynne, R. Angelilli, T. Fajon & R. Romeva i Rueda, Written declaration pursuant to Rule 123 of the Rules of Procedure on the fight against stalking, 20 September 2010, (2010)0072.

<sup>59</sup> On 20 December 2010, only 139 MEP's had signed the declaration.

<sup>60</sup> The text of the Directive can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0002:0018:EN:PDF>.

<sup>61</sup> It is for that reason, that a harmonizing instrument would probably better fit the situation in this stage (see: S. van der Aa & J. Ouwerkerk, The European protection order: No time to waste or a waste of time? European Journal of Crime, Criminal Law and Criminal Justice (19) 2011, pp. 267-287).

- The EPO will only be applicable to a very limited number of cases without changing the current status quo in stalking or protection order legislation in the Member States.
- The written declaration on stalking has lapsed and the ensuing resolution by the European Parliament does not really commit Member States to make significant changes to their legislation.
- The Council of Europe Convention, which, by combining criminalization and protection in one binding instrument, is by far the most promising initiative but its becoming effective depends on the signing and ratification of the Convention by the states, so that can still take a while. The Convention furthermore departs from a concept of stalking which requires specific intent of the perpetrator and fear in the victim. This limits its scope and might exclude certain stalkers. Finally, paragraph 3 of article 78 allows the signatory states to make reservations to Article 34 and to opt for non-criminal sanctions instead.

This leads to the question of which role the European Union can play in establishing a more far-reaching approximation of national laws. An incentive in the form of EU regulation could enhance the situation. Given the limited legal competence for harmonization of national legislation on the basis of binding legislation, it makes sense to look at possible alternatives for legal measures.

In the Feasibility Study it was concluded that the open method of coordination (OMC) could offer a relevant alternative.<sup>62</sup> This was first adopted in the conclusions of the Lisbon Summit in March 2000.<sup>63</sup> The OMC is an intergovernmental method which consists of the drafting of common guidelines that are to be translated into national policy, combined with periodic monitoring and evaluation processes. It provides a framework for cooperation between the Member States in order to direct national policies toward common intergovernmental objectives. Peer reviews are organized and indicators and benchmarks are given as means of comparing best practices. The Commission may initiate an OMC in areas which fall within the competence of the Member States, such as stalking and protection order legislation. It is based on:

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<sup>62</sup> *European Commission* (fn. 8), pp. 149-151.

<sup>63</sup> *Lisbon European Council*, 'Lisbon Extraordinary European Council, 23 and 24 March 2000, Presidency Conclusions', Bulletin of the European Union, No 3.

- Jointly identifying and defining objectives to be achieved (adopted by the Council)
- Jointly establishing measuring instruments (statistics, indicators, guidelines); and
- Benchmarking, i.e. comparing the Member States' performance and exchange of best practices (monitored by the Commission).<sup>64</sup>

Applying the open method of coordination in the field of stalking would not only send out a strong message to Member States that the criminalization of stalking and the protection of (stalking) victims is of paramount importance, but it would also provide the Member States with a template on which they can base their national legislation. In this sense it could resemble the US Draft Code, albeit that even better implementation mechanisms are provided for by means of periodic monitoring and peer reviews.

## **V. Conclusion**

The biggest omission in anti-stalking legislation in the EU is the fact that the majority of Member States have not criminalized the conduct. Specifically criminalizing stalking behaviour seems crucial, given that generic legal provisions are inefficient in combating stalking and do not cover stalking behaviour in its entirety. If those Member States would consider enacting anti-stalking legislation in the future, it is useful to learn from earlier experiences. The explorative comparison of stalking provisions presented here reveals, for instance, that using broad terminology is probably necessary, but that it may be in the interest of equal implementation in legal praxis to provide legal subjects with some guidance by means of including a (non exhaustive!) list of stalking tactics. Another factor to keep in mind is that a maximum penalty of less than one year may bring along extradition difficulties.

Where sometimes the best option automatically surfaces, other choices are less straightforward. The choice between a national term and 'stalking' or between a new provision in the Criminal Code and a dedicated Act are good examples. Often it is a matter of legal tradition which option is chosen. Problems that may arise out of these choices can, however, easily be solved, for instance by having the introduction of new legislation

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<sup>64</sup> *European Commission* (fn. 8), pp. 149-150.



accompanied by a publicity campaign and police training or by regulating protection elsewhere.

More difficult is the choice between including negative consequences for the victim (fear) as a constitutive element of the stalking provision or not, between prosecution *ex officio* and a complaint offence, and between the level of *mens rea* on the part of the stalker. Here fundamental differences of opinion on the reasons for criminalizing stalking, on the legitimacy of prosecution in these cases, and on the criminal liability of the offender play a role. Some laws stand out for the great importance given to the right to privacy, whereas other countries, with their emphasis on anxiety of the victim, take the right to live without fear as a justification for criminalization. Privacy also plays an important role in the choice between prosecution on the complaint of the victim and prosecution *ex officio*, but then in the sense that victims should (or should not) have the right to guard their private affairs from public interference. Member States will have to form an opinion on these issues and draft their legislation accordingly.

The general picture that emerged from the comparison was that there is not only a huge variation in criminal anti-stalking legislation across the EU, but that victim protection in certain Member States leaves much to be desired as well. Both from a human rights and from a victim rights perspective, emphasizing the need to go beyond prosecution and offer preventive, supportive and protective provisions to victims, and in light of the growing body of international binding obligations to offer adequate victim protection,<sup>65</sup> this situation no longer seems tenable. Not only the criminalization of stalking, but the combination of criminalization with protection is crucial. A first thing then, is to have all Member States implement civil and criminal, pre- and post-trial protection orders in addition to dedicated anti-stalking legislation.

In the current political climate – heavily influenced by the economic crisis – chances are small that Member States would be at the forefront when it comes to spontaneously adopting new, possibly costly procedures to meet the needs of victims. An incentive on an EU level might help. Since the initiatives that are currently undertaken at the European level are limited for various reasons, and considering that there is no legal basis yet for drafting binding EU-

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<sup>65</sup> E.g. the EU Framework Decision on the standing of victims in criminal proceedings (15 March 2001).

legislation on this topic, a non-binding intergovernmental alternative – the Open Method of Coordination – has been proposed instead. Based on the US policy, where the drafting of a model code helped inspire many states to amend anti-stalking legislation, the idea is to draft common guidelines on the basis of the open method of coordination. This would not only send a strong message in favour of criminalization, but it would also provide the Member States with a template to base their national legislation on, and combine it with the fairly strong implementation mechanisms of periodic monitoring and peer reviews.

## Appendix

Country	Term used to define stalking	Year of coming into force	Legal definition of stalking
Austria <sup>1</sup>	‘Beharrliche Verfolgung’	2006	§107a of the Criminal Code: ‘(1) He who unlawfully insistently persecutes a person shall be punished with imprisonment of up to one year. (2) A person insistently persecutes if he, in a suitable way, with the intention of seriously affecting his way of life, during a longer period of time 1. seeks his physical proximity 2. uses telecommunication or other means of communication or third parties to get into contact with him 3. orders goods or services for him by using his personal data 4. prompts third parties to contact him by using his personal data.’
Belgium <sup>1</sup>	‘Belaging’	1998	Article 442bis of the Criminal Code: ‘He, who harassed a person, while he knew or should have known that due to his behaviour he would seriously disturb this person’s peace, will be punished with a term of imprisonment of fifteen days to two years and with a fine ranging from 50 euro to 300 euro or with one or those punishments. The behaviour described in this article can only be prosecuted following a complaint by the person claiming to be harassed.’
The Czech Republic <sup>1</sup>	‘Nebezpečné pronásledování’	2010	§354 of the Criminal Code: ‘He who pursues another for a long time by a) threatening him or a person close to him with harm to health or any other harm b) seeking his proximity or following him; c) persistently contacting him by electronic means, in a written form or otherwise; d) restricting him in his usual way of life; or by e) abusing his personal information in order to obtain personal or other contacts; and such conduct may invoke reasonable fear in the person pursued regarding his life or

			health, or the life or health of persons close to him.’
Denmark <sup>2</sup>	‘Forfølgelse’	1933	§265 of the Criminal Code: ‘Any person who violates the peace of some other person by intruding on him, pursuing him with letters or inconveniencing him in any other similar way, despite warnings by the police, shall be liable to a fine or to imprisonment for a term not exceeding 2 years. A warning under this provision shall be valid for 5 years.’
Germany <sup>3</sup>	‘Nachstellung’	2007	<p>§238 of the Criminal Code: ‘Whosoever unlawfully stalks another person by</p> <ol style="list-style-type: none"> <li>1) seeking his proximity</li> <li>2) trying to establish contact with him by means of telecommunications or other means of telecommunication or through third persons</li> <li>3) abusing his personal data for the purpose of ordering goods or services for him or causing third persons to make contact with him</li> <li>4) threatening him or a person close to him with loss of life or limb, damage to health, or deprivation of freedom, or</li> <li>5) committing similar acts</li> </ol> <p>and thereby seriously infringes his lifestyle shall be liable to imprisonment of not more than three years or a fine.</p> <p>(2)The penalty shall be three months to five years if the offender places the victim, a relative of or another person close to the victim in danger of death or serious injury</p> <p>(3) If the offender causes the death of the victim, a relative of or another person close to the victim the penalty shall be imprisonment from one to ten years.</p> <p>(4) Cases under subsection (1) above may only be prosecuted upon request unless the prosecuting</p>

			authority considers proprio motu that prosecution is required because of special public interest.’
Hungary <sup>1</sup>	‘Zaklatás’	2008	§176/A of the Criminal Code: ‘(1) Any person who with the intention to intimidate another person, or to disturb the privacy or the everyday life of another person, engages in the regular or persistent harassment of another person, by regularly seeking contact with a person against his/her will, either in person or by means of telecommunication, even if no serious crime has been committed, is guilty of an offence, punished by one year imprisonment, community work or a fine. (2) He who, for the purpose of intimidation, threatens to commit a punishable violent act against a person or a relative of this person, thereby putting that person in imminent fear of his/her life or health, or the life or health of a relative of this person is guilty of an offence, punished by two years imprisonment, community work or a fine. (3) He who harasses (a) a former spouse or registered partner, (b) a person under his care, custody, supervision or medical care, as mentioned in (1) shall be punished by two years’ imprisonment, community work or a fine, or, as guilty of the criminal offence mentioned in (2), with three years’ imprisonment.’
Ireland	‘Harassment’	1997	Non-fatal Offences against the Person Act: Section 10: ‘Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her shall be guilty of an offence. For the purposes of this section a person harasses another where (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other and (b) his or her acts

			are such that a reasonable person would realize that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other. A person guilty of an offence under this section shall be liable (a) on summary conviction to a fine not exceeding £ 1,500 or to imprisonment for a term not exceeding 12 months or to both, or (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.'
Italy <sup>4</sup>	'Atti persecutori'	2009	Article 612bis of the Criminal Code: 'If it is not a more serious crime, he who repeatedly harasses or threatens another person in order to cause a persistent anxiety or fear or a serious concern for his/her safety or for the safety of another person linked to the victim by an affective bond, or to oblige such person to change his/her own life habits, is punished with imprisonment of six months to four years. The punishment is increased if the offender is an ex-partner of the victim. The punishment is increased with up to a half if the victim is a minor, a pregnant woman, or a person with disabilities as described in article 3 law n. 104 of 1992, or if the act is committed with weapons or by a distorted person. The crime is punishable on the complaint of the victim. The authority proceeds <i>ex officio</i> if the act is committed against a minor or a person with disabilities (...) as well as when the act is connected with another crime for which <i>ex officio</i> action is foreseen.'
Luxemburg <sup>1</sup>	'Harcèlement obsessionnel'	2009	Article 442-2 of the Criminal Code: 'Anyone who repeatedly harassed a person while he knew or should have known that by such conduct he would seriously affect the tranquillity of that person, shall be punished with imprisonment of fifteen days to two years and a fine of 251 to 3000 euro, or one of these penalties. The

			<p>offence in this article shall be prosecuted on the complaint of the victim, his legal representative, or his assigns.</p>
Malta <sup>2</sup>	'Fastidju'	2005	<p>Article 251A of the Criminal Code: 'A person who pursues a course of conduct which amounts to harassment of another person, and which he knows or ought to know amounts to harassment of such other person, shall be guilty of an offence under this article. For the purpose of this article, the person whose course of conduct is in question ought to know that it amounts to harassment of another person if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person. A person guilty of an offence under this article shall be liable to the punishment of imprisonment for a term of one to three months or to a fine of not less than two thousand and three hundred and twenty-nine euro and thirty-seven cents and not more than four thousand and six hundred and fifty-eight euro and seventy-five cents, or to both such fine and imprisonment. Provided that the punishment shall be increased by one degree where the offence is committed against any person mentioned in article 222 (1).'</p> <p>Article 251B of the Criminal Code: 'A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendents, brothers or sisters or any person mentioned in this article 221(1) shall be guilty of an offence if he knows or ought to know that this course of conduct will cause the other so to fear on each of those occasions, and shall be liable to the punishment of imprisonment for a term from three to six months or to a fine of not less than four thousand and six hundred and</p>

			fifty-eight euro and seventy-five cents and not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents, or to both such fine and imprisonment.’ Article 251C of the Criminal Code: ‘in articles 251A and 251B references to harassing a person include alarming the person or causing the person distress.’
The Netherlands <sup>1</sup>	‘Belaging’	2000	Article 285b of the Criminal Code: ‘He who unlawfully, systematically, intentionally intrudes upon another person’s privacy with the aim of forcing that person to do something, to refrain from doing something, to tolerate something or to instil fear in that person, is liable, as guilty of stalking, to a prison term with a maximum of three years or a fine of the fourth category. Prosecution can only occur on the complaint of the person against whom the crime was committed.
Poland	‘Stalking’	2011	Article 190a of the Criminal Code: ‘(1) He who by the persistent harassment of another person or a person’s near ones raises in him a reasonable fear or significantly violates his privacy shall be liable to an imprisonment of up to 3 years. (2) He who, pretending to be another person, uses his image or other personal data in order to cause material or personal damage, shall be subjected to the same penalty. (3) If the act specified in § 1 or 2 results in a suicide attempt by the victim, the perpetrator is liable to an imprisonment of one to 10 years. (4) Prosecution of the crime specified in § 1 or 2 occurs at the request of the victim.
The United Kingdom	‘Harassment’ and ‘putting people in fear of violence’	1997	Protection from Harassment Act: Section 1: ‘A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. For the purposes of this section, the person whose course of



		<p>conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'</p> <p>Section 2: 'A person who pursues a course of conduct in breach of section 1 is guilty of an offence. A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.'</p> <p>Section 4: 'A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that this course of conduct will cause the other so to fear on each of those occasions. For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion. A person guilty of an offence under this section is liable on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.'</p> <p>Section 7: 'References to harassing a person include alarming the person or causing the person distress.'</p>
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<sup>1</sup> This legal definition was translated by the author (with the help of a native speaker).

<sup>2</sup> This translation was copied from *De Fazio*, European Journal on Criminal Policy and Research 2009, pp. 229-242.

<sup>3</sup> This official translation can be found at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGBengl\\_000P238](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P238).

<sup>4</sup>This translation combines the one from *De Fazio*, *European Journal on Criminal Policy and Research* 2009, pp. 229-242 with the one from the *European Commission* (fn. 8).