



**Protection of Abducting Mothers** in Return Proceedings:  
Intersection between Domestic Violence and Parental Child Abduction

## **German National Report**

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## I. Introduction

Many legal systems use protection measures as an effective tool not only to fight violence in their societies preventively but also retrospectively by sanctions, punishment and damages. The law often allows persons whose physical or psychological integrity is endangered to apply for an order restraining the person causing the danger from certain acts. Since 2015, two new instruments have been adopted by the EU legislator in order to try to enhance the effects of such protection measures within the European Union. On the one hand, the European Protection Measures Regulation<sup>1</sup> provides for cross-border recognition and enforcement of protection measures in civil matters. On the other hand, the European Protection Order Directive<sup>2</sup> introduces a European Protection Order, which the authorities of one Member State can issue in criminal matters and the other Member States are bound to recognise and to transform it into a protection measure under their own national law.

Both instruments have been implemented in Germany, in particular, by the Act on European Procedures for the Protection Against Violence, the *Gesetz zum Europäischen Gewaltschutzverfahren*<sup>3</sup>. The European instruments and the implementing legislation have not attracted much attention in Germany so far. During our research we did not find a single published court decision applying the new rules. Furthermore, there is not much legal literature in German on the instruments<sup>4</sup>, at least compared to other areas of EU private international law;

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<sup>1</sup> Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L181/4.

<sup>2</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, [2011] OJ L338/2.

<sup>3</sup> Introduced by Art 1 of the *Gesetz zur Umsetzung der Richtlinie 2011/99/EU über die Europäische Schutzanordnung und zur Durchführung der Verordnung (EU) Nr. 606/2013 über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen* of 5 December 2014, BGBl. 2014 I 1964

<sup>4</sup> See e.g. *Brand*, Europäische Schutzanordnung kommt, Deutsche Richterzeitung (DRiZ) 2011, 389; *Kohler/Pintens*, Entwicklungen im europäischen Familien- und Erbrecht 2011–2012, Zeitschrift für das gesamte Familienrecht (FamRZ) 2012, 1425, 1429 et seq.; *Kohler/Pintens*, Entwicklungen im europäischen Personen- und Familienrecht, FamRZ 2013, 1437, 1439; *Mansel/Thorn/R. Wagner*, Europäisches Kollisionsrecht 2011: Gegenläufige Entwicklungen, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2012, 1, 8; *Mansel/Thorn/R. Wagner*, Europäisches Kollisionsrecht 2012: Voranschreiten des Kodifikationsprozesses – Flickenteppich des Einheitsrechts, IPRax 2013 1, 10; *Mansel/Thorn/R. Wagner*, Europäisches Kollisionsrecht 2013: Atempause im status quo, IPRax 2014, 1, 2; *Mansel/Thorn/R. Wagner*, Europäisches Kollisionsrecht 2014: Jahr des Umbruchs, IPRax 2015, 1, 11; *Mohr*, Die europäischen Schutzmaßnahmen – Anerkennung und Vollstreckung von einstweiligen Verfügungen zum Schutz vor Gewalt, Interdisziplinäre Zeitschrift für Familienrecht (iFamZ) 2014, 221; *Pietsch*, Die EU-Verordnung über die gegenseitige Anerkennung von Schutzmaßnahmen, Neue Zeitschrift für Familienrecht (NZFam) 2014, 726; *Dutta*, Grenzüberschreitender Gewaltschutz in der Europäischen Union, FamRZ 2015, 85; *Geimer*, Grenzüberschreitender Gewaltschutz in der Europäischen Union – Eine Facette der Europäisierung des internationalen Verfahrensrechts, in Festschrift für Dagmar Coester-Waltjen, 2015, p. 375; *Hess*, Grenzüberschreitende Gewaltschutzanordnungen im Europäischen Justizraum, in Festschrift für Dagmar Coester-Waltjen, 2015, p. 453; *Kemper*, Internationaler Gewaltschutz im Wandel, Familien und Recht (FuR) 2015, 218; *Schneider*, Verfahren nach dem neuen EU-Gewaltschutzverfahrensgesetz, FamRB 2015, 112; *Erbarth*, in Münchener Kommentar zum FamFG, 2019, Verordnung (EU) Nr. 606/2013; *Hausmann*, Internationales und Europäisches Familienrecht, 2018, R. Sonstige

the pertinent textbooks and commentaries dealing with protection measures under German domestic law (see infra section II) often only refer to the European instruments and the implementing legislation without further exploring them.<sup>5</sup>

On 3rd and 4th of June 2019 our local workshops took place at the Ludwig Maximilians University in Munich in order to obtain first-hand information from practitioners on the intersection between domestic violence and international parental child abduction within the European Union. We discussed the protection of abducting mothers who have been involved in return proceedings under the 1980 Hague Abduction Convention<sup>6</sup> and the Brussels IIa Regulation<sup>7</sup>, in circumstances where the child abduction had been motivated by acts of domestic violence from the left-behind father, in order to examine the usefulness of the Protection Measures Regulation and the European Protection Order Directive in the context of such return proceedings. Each of the workshops started with a presentation on the European Protection Measures Regulation and the European Protection Order Directive in general and in the context of return proceedings under the Brussels IIbis Regulation and the 1980 Hague Convention. In the discussion which followed the presentation many unanswered questions were raised and deficits of the European rules detected and we will analyse these in this report. The workshops were attended by representatives of the German Central Authority, specialized family judges and lawyers in the area of cross-border child abduction and child disputes as well as academics and representatives of NGOs. The revised version of the Brussels IIbis Regulation<sup>8</sup> could not be considered in the local workshop as it was adopted shortly after the workshops took place.

## II. Protection measures in German domestic law – a brief overview

Under German law, protection against violence is regulated by the *Gewaltschutzgesetz* (GewSchG). Protection measures are treated as civil matters. The competent court for ordering protection measures is the *Amtsgericht als Familiengericht*, the family court of first instance.<sup>9</sup> In 2018, 48,352 protection measure cases were decided throughout Germany at first instance.<sup>10</sup> The decisions of the *Amtsgericht* can be challenged by appeal (*Beschwerde*).<sup>11</sup> The competent appellate court is the *Oberlandesgericht* (Higher Regional Court).<sup>12</sup> The decision of the

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Familiensachen note 55-137; Binder, in Rauscher, EuZPR-EuIPR Kommentar, 2015, Eu-SchutzMVO; Duden, in Münchener Kommentar zum BGB, 2019, § 1 GewSchG note 54.

<sup>5</sup> *Cirullies/Cirullies*, Schutz bei Gewalt und Nachstellung, 2019; *Kemper*, in Saenger, Zivilprozessordnung, 2019, § 108 note 4; *Gottwald*, in Münchener Kommentar zur ZPO, 2016, § 328 note 28; *Rauscher*, in Münchener Kommentar zur ZPO, Einleitung note 498; *Grandke*, in Scholz/Kleffmann/Doering-Striening, Praxishandbuch Familienrecht, 2019, Teil D Ehwohnung, Haushaltsgegenstände und Gewaltschutz note 110a..

<sup>6</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 1343 UNTS 89.

<sup>7</sup> Council Regulation (EC) No. 2201/2003 of 27 November 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, [2003] OJ L338/1.

<sup>8</sup> Council Regulation (EU) No. 1111/2019 of 15 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L 178/1.

<sup>9</sup> §§ 23a Abs. 1 S. 1 Nr. 1, 23b GVG (Gerichtsverfassungsgesetz), 111 Nr. 6, 210 FamFG (Familienverfahrensgesetz); Duden, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 6; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 76, 110.

<sup>10</sup> Statistisches Bundesamt, Rechtspflege. Familiengerichte. 2018, Fachserie 10 Reihe 2.2, published on 06.09.2019 (access available at: [https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/familiengerichte-2100220187004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/familiengerichte-2100220187004.pdf?__blob=publicationFile)).

<sup>11</sup> Duden, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 41; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 120.

<sup>12</sup> *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 120.

*Oberlandesgericht* can be reversed by the *Bundesgerichtshof* (Federal Court of Justice), but only if the appeal was admitted by the *Oberlandesgericht*.<sup>13</sup>

The *Gewaltschutzgesetz* is not restricted to domestic violence.<sup>14</sup> Even though the prevention of domestic violence was an important reason for enacting the Act, a (family) relationship between the offender and the violated person is not required.<sup>15</sup> Therefore, protection measures can be ordered against (former) spouses, registered partners and cohabitants but also against colleagues, neighbours or even complete strangers.<sup>16</sup> If children are the victims of violence, protection measures can be ordered under the *Gewaltschutzgesetz* or under § 1666 *Bürgerliches Gesetzbuch – BGB* (Civil Code).<sup>17</sup> Under § 1666 BGB – a central provision of German child law – the court can order child protection measures if the child’s well-being is at risk. The basis for a claim depends on the legal relationship between the child and the offender.<sup>18</sup> If the offender is a parent, guardian or carer with custody rights, the measures are covered exclusively by § 1666 BGB.<sup>19</sup> In relation to third parties, protection measures can be ordered under the *Gewaltschutzgesetz* and under § 1666 BGB.<sup>20</sup> The difference is that measures under the *Gewaltschutzgesetz* are only ordered upon the request of the victim<sup>21</sup> while a proceeding under the *Bürgerliches Gesetzbuch* are commenced ex officio.<sup>22</sup>

If a person intentionally violates the body, health or freedom of another person unlawfully, the court will take the necessary measures to avert further violations at the request of the injured person.<sup>23</sup> The same applies to cases in which violence has not been used yet, but where a person has threatened to violate the body, health or freedom of another person.<sup>24</sup> The Act lists the most common measures that can be ordered.<sup>25</sup> However, the list is not exhaustive.<sup>26</sup> In order to protect the victim, the court may order that the offender must not enter the victim’s home, § 1 (1) 2 No. 1 GewSchG. It can also prohibit the offender from coming within a certain radius of the injured person’s home, No. 2, and from going to certain places that the injured person regularly visits (e.g. a workplace, kindergarten, home of the victim's partner)<sup>27</sup>, No. 3. These may also be publicly accessible places such as sports facilities or, for example, the victim’s favourite pub.<sup>28</sup> In addition, a protection measure can impose a prohibition against contacting

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<sup>13</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 41; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 121.

<sup>14</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 1; *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>15</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 1; *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>16</sup> *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>17</sup> *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>18</sup> *Cirullies/Cirullies*, Schutz bei Gewalt und Nachstellung, 2. Aufl. 2019, note 319; *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>19</sup> Explicitly stated in § 3 (1) GewSchG. *Cirullies/Cirullies*, Schutz bei Gewalt und Nachstellung, 2. Aufl. 2019, note 319; *Götz*, in: Henrich, Familienrecht, 6. Aufl. 2015, § 1 GewSchG note 2.

<sup>20</sup> *Cirullies/Cirullies*, Schutz bei Gewalt und Nachstellung, 2. Aufl. 2019, note 319.

<sup>21</sup> *Reinken*, in: Beck’scher Online-Kommentar, § 1 GewSchG note 30.

<sup>22</sup> *Veit*, in: Beck’scher Online-Kommentar, § 1666 note 125.

<sup>23</sup> § 1 (1) 1 Gewaltschutzgesetz.

<sup>24</sup> § 1 (2) No. 1 Gewaltschutzgesetz.

<sup>25</sup> § 1 (1) 2 Gewaltschutzgesetz.

<sup>26</sup> *Reinken*, in: Beck’scher Online-Kommentar, § 1 GewSchG note 20.

<sup>27</sup> *Reinken*, in: Beck’scher Online-Kommentar, § 1 GewSchG note 24; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 56.

<sup>28</sup> *Reinken*, in: Beck’scher Online-Kommentar, § 1 GewSchG note 24; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 56.

the victim in any form including the traditional method via telephone and fax and the use of modern means of communication such as mobile phone, internet or e-mail.<sup>29</sup> Finally, the court can order that the offender must not arrange an encounter with the victim, No. 5. As mentioned above, these are only examples of measures that the court can adopt; the list is not exhaustive. The adopted protection measures shall be limited in duration according to the Act.<sup>30</sup> The duration depends on the individual case as well as the number, duration and seriousness of the violations.<sup>31</sup> Only under special circumstances can the court impose a measure without a time limit.<sup>32</sup> However, the measure can be extended after its expiry if there is a risk of further violations, e.g. where a previous court order was infringed.<sup>33</sup> An extension of the measures which are time limited can be ordered more than once.<sup>34</sup>

In addition to the general protection measures, the court may order the allocation of an apartment to the victim if the person living with the victim has injured their body, health or freedom or if this person has threatened the victim with such an injury.<sup>35</sup> Such an allocation is again only a provisional regulation, i.e. limited in time.<sup>36</sup>

### III. Jurisdiction and the applicable law for protection measures

#### 1. Jurisdiction for protection measures

Unlike other EU instruments in the area of private international law, the Protection Measures Regulation does not regulate either the international jurisdiction or the law applicable to protection measures.<sup>37</sup> The earlier Commission Proposal for the Regulation<sup>38</sup> contained a provision defining the jurisdiction of the Member States. It stated that the authorities of the Member State where the person's physical and/or psychological integrity or liberty is at risk shall have jurisdiction.<sup>39</sup> As this provision was not implemented in the Regulation, there is a need for clarification as to which instrument is applicable to determine the international jurisdiction for protection measures. This is an essential question for practice, and was discussed extensively in our workshops. Can the jurisdiction for protection measures be based

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<sup>29</sup> *Reinken*, in: Beck'scher Online-Kommentar, § 1 GewSchG note 25; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 57.

<sup>30</sup> § 1 (1) 2 Gewaltschutzgesetz.

<sup>31</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 33; *Reinken*, in: Beck'scher Online-Kommentar, § 1 GewSchG note 29; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 66.

<sup>32</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 33; *Reinken*, in: Beck'scher Online-Kommentar, § 1 GewSchG note 29; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 65.

<sup>33</sup> According to *Schulte-Bunert* the measure can also be expired if the court order was not infringed, *Schulte-Bunert* in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 67. However, *Duden* sees this as a requirement for the expiry, *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 33.

<sup>34</sup> *Reinken*, in: Beck'scher Online-Kommentar, § 1 GewSchG note 29; *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 1 GewSchG note 33; *Schulte-Bunert* in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 67.

<sup>35</sup> *Duden*, in: Münchener Kommentar zum BGB, 8. Aufl. 2019, § 2 GewSchG note 1.; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 2 GewSchG note 2.

<sup>36</sup> § 2(2) Gewaltschutzgesetz.

<sup>37</sup> *Dutta*, FamRZ 2015, 85.

<sup>38</sup> Proposal of the Commission for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, COM (2011) 276 final.

<sup>39</sup> See Article 3 of the Proposal of the Commission for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, COM (2011) 276 final.

on the Brussels Ibis Regulation (if connected to matrimonial or child matters) or on the Brussels Ibis Regulation (in case of general protection measures), or is national procedural law applicable?<sup>40</sup>

a) Brussels Ibis Regulation

If the protection measure concerns a child, an application of the Brussels Ibis Regulation can be considered. According to Article 1(1)(b) Brussels Ibis Regulation, this instrument applies in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. Measures to protect a child from his or her violent parents fall within the scope of the Regulation as such a measure restricts parental responsibility. Under German law, all measures based on §§ 1666, 1666a Bürgerliches Gesetzbuch (Civil Code (Bürgerliches Gesetzbuch)) are covered by the Regulation.<sup>41</sup>

If the best interest of a child is endangered by persons other than the parents, a protection measure against such third parties does not fall under the Brussels Ibis Regulation as it does not affect parental responsibility. Under German substantive and procedural law, these measures are regulated by the *Gewaltschutzgesetz*.

In the case that domestic violence is “only” perpetrated against the mother and not the child, in a domestic case without an international element the mother can request a protection measure against her partner under the *Gewaltschutzgesetz*. Even if only the mother is exposed to violence, “violence against the mother is a form of violence against the child. Children who witness domestic violence and have to experience and watch their father [...] hitting and abusing her [their mother] are always victims of psychological violence.”<sup>42</sup> Furthermore, “[t]his can cause children to develop massive problems and behavioural disorders, including psychosomatic symptoms and psychological problems such as low self-esteem, restlessness, sleep disorders, difficulties at school, anxiety, aggression, and even suicidal thoughts.”<sup>43</sup> In addition, “[g]rowing up in a context of domestic violence can also have an impact on the children’s attitude to violence and to their own violent behaviour.”<sup>44</sup> Thus, it is recognised in Germany that in such cases the State can also order a child protection measure based on § 1666 BGB.<sup>45</sup> The child protection measure based on § 1666 BGB falls unambiguously under the Brussels Ibis Regulation. However, the question is whether the protection measure under the *Gewaltschutzgesetz* – the protection measure for the mother – would fall within the scope of the Brussels Ibis Regulation as well. The protection measures are aimed at protecting the mother but at the same time the measures protect the child as the violence against the mother stops and by extension the psychological violence against the child stops; therefore the child benefits from the protection measure as well. It could be argued that it is therefore also a child protection measure encompassed by the Brussels Ibis Regulation. Nonetheless, protection measures for a mother do not fall within the scope of the Brussels Ibis Regulation as they have no impact upon parental responsibility.

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<sup>40</sup> Dutta, JPIL 2016, 169, 171.

<sup>41</sup> Dutta, FamRZ 2015, 85, 90.

<sup>42</sup> Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, OJ C 325/15, 30.12.2006, p.60, note 2.2.4.

<sup>43</sup> Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, OJ C 325/15, 30.12.2006, p.60, note 2.3.4.

<sup>44</sup> Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, OJ C 325/15, 30.12.2006, p.60, 2.3.6.

<sup>45</sup> Cf. the cases in *Olzen*, Münchener Kommentar zum BGB, 2017, § 1666 note 115.

Therefore, a distinction must be made between protection measures ordered by the State to protect the child (e.g. measures based on § 1666 BGB) covered by the Brussels Ibis Regulation and measures that are directed at the mother, with the child benefiting only indirectly falling outside the scope of the Brussels Ibis Regulation (e.g. measures based on the *Gewaltschutzgesetz*).

If domestic violence is linked to divorce proceedings, it could be argued that protection measures against the violent spouse fall within the scope of Article 1(1)(a) Brussels Ibis Regulation. The *Borrás* report on the European Convention, which is the official report on the predecessor of the Brussels II and Brussels Ibis Regulation states: “The Convention is confined to proceedings relating to the marriage bond as such, i.e. annulment, divorce and legal separation.”<sup>46</sup> This is not the case for protection measures because a decision regarding protection measures does not affect the marriage. Hence, the Brussels Ibis Regulation should not be applicable *ratione materiae*. The picture is, however, considerably blurred by the *Borrás* report itself. The report asserts at para. 59 – a statement which is rather difficult to understand<sup>47</sup> – that provisional measures – as most protection measures – taken under Article 12 of the Convention, whose wording<sup>48</sup> more or less mirrors Article 20(1) Brussels Ibis Regulation, can lie outside the scope of the Convention<sup>49</sup>. The position of the *Borrás* report was also endorsed by the European Commission when drafting the Brussels II Regulation and its Article 12 (now Article 20(1) of the Brussels Ibis Regulation)<sup>50</sup>. Furthermore, the ECJ in *Purrucker I* has

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<sup>46</sup> *Borrás* Report para. 22.

<sup>47</sup> See also the qualification in *Wermuth v. Wermuth* [2003] 1 FLR 1029, para. 20 (Thorpe LJ), that the relevant passage of the report is “dense and by no means easy to understand even after repeated reading”. One of the leading commentaries in Germany of the Regulation characterises this part of the Report to be a “rather enigmatic interpretation” (“einigermaßen rätselhafte Interpretation”), see *Rauscher* in Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht*, 2010, Article 20 Brussels Ibis Regulation para. 4.

<sup>48</sup> Article 12 of the Convention says: “In urgent cases, the provisions of this Convention shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Convention, the court of another Member State has jurisdiction as to the substance of the matter”.

<sup>49</sup> Para. 59 of the *Borrás* Reports reads: “As to the content of the provision, it should be noted that although provisional and protective measures may be adopted in connection with proceedings within the scope of the Convention and are applicable only in urgent cases, they relate to both persons and to property and therefore touch on matters not covered by the Convention, in the case of actions provided for in national rules. The differences with respect to the Brussels Convention are significant, as in the Brussels Convention the measures to which Article 24(a) refers are restricted to matters within the scope of the Convention: those in (b) on the other hand, have extraterritorial effects. The measures to be adopted are very broad since they can affect both persons and assets in the State in which they are adopted, something which is very necessary in matrimonial disputes. The Convention says nothing about the type of measures or about their connection with the matrimonial proceedings. These measures, accordingly, affect even matters that do not come within the scope of the Convention. This is a rule which enshrines national law jurisdiction, thereby derogating from the rules laid down in the first part of the Convention.”

<sup>50</sup> The Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, COM(1999) 220 final, p. 17, states: “As to the content of the provision, it should be noted that although provisional and protective measures may be adopted in connection with proceedings within the scope of the Regulation and are applicable only in urgent cases, they relate to both persons and to property and therefore touch on matters not covered by the Regulation, in the case of actions provided for in national rules. The measures to be adopted are very broad since they can affect both persons and assets in the State in which they are adopted, something which is very necessary in matrimonial disputes. The Regulation says nothing about the type of measures or about their connection with the matrimonial proceedings. These measures, accordingly, affect even matters that do not come within the scope of the Regulation. This is a rule which enshrines national law jurisdiction, thereby derogating from the rules laid down in the first part of the Regulation. The provision makes it clear that such measures may be adopted in one State even though the court of another State has jurisdiction to hear the case. The measures will, of course, cease to apply once the court having jurisdiction gives a judgment on the basis of one of the grounds of jurisdiction set

explicitly – albeit in an obiter dictum – approved the wide interpretation of Article 20(1) of the Brussels Ibis Regulation<sup>51</sup>. The reason for such a broad understanding of Article 20 lies in the fact that provisional divorce proceedings are not known and therefore Article 20 must refer to provisional proceedings within the divorce context but outside the scope of the Regulation.

To sum up, the Brussels Ibis Regulation applies only to protection measures directed at the child against his or her violent parent. In such cases, predominantly the Member State where the child is habitually resident is competent under Article 8 Brussels Ibis Regulation to issue protection orders. If one takes the *Borrás* report seriously, provisional protection measures in the context of divorce proceedings could be subject to the jurisdictional rules of the Brussels Ibis Regulation, in particular Article 3.

#### b) Brussels Ibis Regulation

For all other protection measures, jurisdiction could be based on the Brussels Ibis Regulation<sup>52,53</sup>. The Brussels Ibis Regulation is confined to jurisdiction and judgments in “civil and commercial matters”, Article 1(1) Brussels Ibis Regulation. The term “civil matters” is not defined in the Regulation. The demarcation of protection measures as a civil matter is not clear, as some Member States define protection measures as civil matters<sup>54</sup> and others as criminal matters.<sup>55</sup> However, the term of the Brussels Ibis Regulation must be interpreted autonomously.<sup>56</sup> The nature of the court is of no relevance as Article 1(1) Brussels Ibis Regulation states. Protection measures could be qualified as torts and thus fall within the scope of the Brussels Ibis Regulation.<sup>57</sup> “Tort, quasi-tort and delict cover all actions which seek to establish liability of a defendant and which are not related to a contract within the meaning of (1).”<sup>58</sup> Liability for bodily and physical violence qualifies as torts.<sup>59</sup> Liability covers not only an action for damages but also injunctions.<sup>60</sup> As protection measures are aimed at preventing further actions of domestic violence in the future, it can be qualified as tort.<sup>61</sup> Thus, the Brussels Ibis Regulation has to be applied for protection measures, i.e. the perpetrator can either be sued in the courts of the Member State he or she is domiciled, Article 4(1), or pursuant to Article 7(2) in the courts for the place where the harmful event may occur. The second alternative “where the harmful event may occur” is specifically designed to cover preventive actions.<sup>62</sup>

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out in the Regulation and that judgment is recognised (or enforced) under the Regulation. Other measures relating to matters excluded from the scope of the Regulation will continue to apply until appropriate judgments are given by a court with jurisdiction for, for example, marriage contracts”

<sup>51</sup> ECJ Case C-256/09 (Purrucker I) [2010] ECR I-7349, para. 86: “As was stated both in the explanatory memorandum in the Commission’s 1999 proposal which led to the adoption of Regulation No 1347/2000 and in the *Borrás* report, the provisional measures covered by Article 20 of Regulation No 2201/2003 relate both to persons and assets and encompass, consequently, matters outwith the scope of that regulation”.

<sup>52</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L351/1.

<sup>53</sup> In favour of applying the Brussels Ibis Regulation: *Duden*, in Münchener Kommentar zum BGB, 2019, § 1 GewSchG note 52; *Hau*, in Prütting/Helms, FamFG, 2018, § 105 Rn. 13.

<sup>54</sup> E.g. Germany.

<sup>55</sup> E.g. Spain.

<sup>56</sup> Magnus/Mankowski/Rogerson, Brussels Ibis Regulation, 2016, Article 1 note 13.

<sup>57</sup> See Article 7 Brussels Ibis Regulation.

<sup>58</sup> Magnus/Mankowski, Brussels Ibis Regulation, 2016, Article 7 note 238.

<sup>59</sup> Magnus/Mankowski, Brussels Ibis Regulation, 2016, Article 7 note 248.

<sup>60</sup> Magnus/Mankowski, Brussels Ibis Regulation, 2016, Article 7, note 240.

<sup>61</sup> De Götzen comes to the same conclusion, see *De Götzen*, Protection Orders Across Europe: First Remarks on Regulation No. 606/2012, in Boele-Woelki/ Dethloff/ Gephart (eds), Family law and culture in Europe, 2014, p. 277, 279.

<sup>62</sup> Magnus/Mankowski, Brussels Ibis Regulation, 2016, Article 7 note 395.



This will predominantly be – though not necessarily – the place where the harmful event has happened previously.<sup>63</sup>

c) Domestic jurisdictional rules of the Member States

As either Brussels Ibis Regulation or Brussels Ibis Regulation is applicable, there is no room to apply the internal jurisdictional rules of the Member States.<sup>64</sup>

## 2. Applicable Law

Uncertainty remains about the substantive law applicable to protection measures as the conflict of laws is not regulated by either the Regulation or the Directive. During the discussions in our workshops, the following instruments came into consideration to determine the governing law: the 1996 Hague Child Protection Convention<sup>65</sup>, the Rome III Regulation<sup>66</sup>, the Rome II Regulation<sup>67</sup> or internal conflict rules of the Member States.<sup>68</sup> Moreover, it could be argued that the court adapting protection measures has to apply the *lex fori* because of the procedural nature of protection orders. The workshop participants considered that the uncertainty regarding the pertinent conflict rules was one of the main deficiencies of the European rules.

a) Hague Child Protection Convention

If the protection measures fall within the scope of the Brussels Ibis Regulation (as seen above), the Hague Child Protection Convention is applicable for determining the applicable law.<sup>69</sup> It is controversial whether Article 15(1) Hague Child Protection Convention applies even where the jurisdiction is based on the Brussels Ibis Regulation and not on the Convention.<sup>70</sup> The majority view is that Article 15 Hague Child Protection Convention is applicable in all cases, i.e. regardless of which instrument the jurisdiction of the court is based on, the court applies the *lex fori*.<sup>71</sup> With regard to all other protection measures – which are not at the same time child protection measures – the Hague Child Protection Convention is not applicable.

b) The Rome III Regulation

The application of the Rome III Regulation in cases where the domestic violence is connected to divorce matters has to be rejected. The Rome III Regulation determines the law applicable to divorce and legal separation. Domestic violence might be the reason for the divorce and it can be relevant for the divorce decision. Nonetheless, the ordering of protection measures does not affect the marriage bond and therefore the Rome III Regulation cannot be used to determine the applicable law.

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<sup>63</sup> Magnus/Mankowski, Brussels Ibis Regulation, 2016, Article 7 note 396.

<sup>64</sup> Different view: *Cirullies/Cirullies*, Schutz bei Gewalt und Nachstellung, 2019, note 108; *Schulte-Bunert*, in: Beck-Online.GROSSKOMMENTAR, § 1 GewSchG note 75. According to the authors the international jurisdiction is based on § 105 FamFG as other instruments are not applicable.

<sup>65</sup> Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

<sup>66</sup> Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343, p. 10.

<sup>67</sup> Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

<sup>68</sup> See also *Dutta*, JPIL 2016, 169, 171 et seq.

<sup>69</sup> *Hausmann*, Internationales und Europäisches Familienrecht, 2018, F. Kindschaftssachen note 614.

<sup>70</sup> *Hausmann*, Internationales und Europäisches Familienrecht, 2018, F. Kindschaftssachen note 615.

<sup>71</sup> *Hausmann*, Internationales und Europäisches Familienrecht, 2018, F. Kindschaftssachen note 616.

### c) The Rome II Regulation

The Rome II Regulation can instead be applied to protection measures.<sup>72</sup> Pursuant to Article 1, the Regulation applies to non-contractual obligations in civil and commercial matters. Non-contractual obligations are defined in Article 2 and this covers *inter alia* torts. As seen above, violence is qualified as a tortious act and thus falls within the scope of the Rome II Regulation. As no more specific conflict rule of the Rome II Regulation is applicable, Article 4 determines the applicable law. According to Article 4(1) Rome II Regulation, the law of the place of the torts should govern all aspects of tortious liability.<sup>73</sup> However, where the tortfeasor and victim both have their habitual residence in the same country at the time when the damage occurred, the law of that country shall apply, para. (2). Finally, where the tort is more closely connected with another country, the law of that country shall apply, para. (3).

As it follows from Article 2(2), (3) and Article 15(d), the damage need not have occurred yet.<sup>74</sup> It is sufficient that a tortious obligation or damage is threatened. Therefore, Article 4 also covers the case where an injunction against the threatened damage is sought.<sup>75</sup> In this case, the law applicable is the law of the country in which the damage is likely to occur or may occur.

When determining the applicable law under the Rome II Regulation the crucial question is where is the violence that requires a protection order likely to occur. In terms of protection measures with a prohibition on entering the place where the protected person resides, works or regularly visits or stays, the threat can be specific to that place. In cases where the protection measure forbids the abuser from contacting the protected person, e.g. by telephone or electronically, it is more difficult to determine where the damage may occur. The protected person can be contacted anywhere and thus the threat is to be located at the place where the person is currently present. The following case helps to illustrate this: A woman who is a victim of stalking, lives in Germany but has a holiday/weekend home in Austria that she frequents at the weekends. When she is in Germany, she will be threatened there, as it is likely that the offender will call her or email her. But when she is in Austria, the damage (calling, texting, ...) is likely to occur there. So, in this case, it is difficult to determine beforehand where the damage will occur. It could be argued that in these cases –where more than one law is applicable – the law of the country with the closest connection shall apply, Article 4(3). The alternative would be to separate the protection measure into a protection measure prohibiting the offender from contacting the victim in Germany, applying German law, and a protection measure prohibiting the offender from contacting the victim in Austria, applying Austrian law. The same difficulty arises for protection measures prohibiting the offender from approaching the victim closer than a prescribed distance.

### d) Lex fori

It is questionable if either of them is convincing and useful. Instead, it could be considered whether exceptionally the court having jurisdiction is simply always applying the *lex fori*. There is a close link between the forum and applicable law in protection measures which could justify applying the *lex fori*. Further, to apply foreign law in violence protection proceedings is not expedient as it would take too long to obtain the relevant information on foreign law. For

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<sup>72</sup> In favour of applying the Rome II Regulation, *Duden*, in Münchener Kommentar zum BGB, 2019, § 1 GewSchG note 53.

<sup>73</sup> *Magnus*, in Magnus/Mankowski (eds), ECPIIL. Rome II Regulation, 2019, Article 4 note 2.

<sup>74</sup> *Magnus*, in Magnus/Mankowski (eds), ECPIIL. Rome II Regulation, 2019, Article 4 note 17.

<sup>75</sup> *Magnus*, in Magnus/Mankowski (eds), ECPIIL. Rome II Regulation, 2019, Article 4 note 17.

example, in Germany procedural law would often require a legal opinion by an expert on the foreign law. In addition, as in some countries the violence protection law is regulated by criminal law, the *lex fori* will be applied in these countries anyway.

Looking at the Protection Measures Regulation and the Protection Order Directive, it could be argued that both instruments proceed on the assumption that the *lex fori* is applicable as they both define protection measures as decisions ordered by the issuing Member State “in accordance with its national law”, see Article 3 No. 1 of the Regulation and Article 2(2) of the Directive. This could mean that the Regulation and Directive assume that the courts of the Member States apply their own national law and thus the *lex fori*. On the other hand, it can be argued that the meaning “in accordance with national law” includes the provisions of private international law as well.<sup>76</sup> It is more convincing to assume that the Regulation and the Directive adopted this wording in order to make clear that courts apply their national law for protection measures without the need for private international law. Otherwise, Article 3 No. 1 of the Regulation and Article 2(2) of the Directive would be without any content, as it is clear that the courts shall not order a protection measure where it would be against their law. Therefore, it appears to be more convincing to apply the *lex fori*.

#### IV. Deficits of the Protection Measures Regulation und the Protection Order Directive

##### 1. Limit to a period of 12 months

Pursuant to Article 4(4) of the Protection Measures Regulation, the effects of recognition under this Regulation are limited to a period of 12 months, starting from the date of the issuing of the certificate.<sup>77</sup> This time limit applies irrespectively of whether the protection measure itself (be it provisional, time-limited or indefinite in nature) has a longer duration. If the protected person wishes to enforce the measure beyond the expiry date, she or he can either apply for a new certificate in the Member State of origin<sup>78</sup> or rely on other EU instruments<sup>79</sup> or apply for a new protection measure in the Member State addressed<sup>80</sup>, see also Recital 16 of the Regulation. The Commission Proposal did not contain a time limit.<sup>81</sup> The question that arises is whether the adoption of the time limit in the Regulation was useful.

It can be argued that the protection measures themselves are generally time-limited and thus a second time limit regarding the duration of the enforcement is not necessary. For example, German law explicitly states that the measures should be adopted with a time limit, § 1(1)2 of the *Gewaltschutzgesetz*, usually up to 6 months. In addition, the time limit under the Regulation is a fixed limit and is not responsive to the individual case as it should be for protection measures generally.

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<sup>76</sup> In this direction *Dutta*, FamRZ 2015, 85, 87.

<sup>77</sup> Stated also in Recital 15 of the Regulation.

<sup>78</sup> *Mohr*, iFamZ 2014, 221, 224; *Dutta*, JPIL 2016, 169, 177.

<sup>79</sup> E.g. the Brussels Ibis Regulation, see *Dutta*, FamRZ 2015, 85, 88 and 90; *Geimer*, in Festschrift Coester-Waltjen, 2015 p. 375, 379 footnote 21.

<sup>80</sup> *Dutta*, JPIL 2016, 169, 177.

<sup>81</sup> Proposal of the Commission for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, COM (2011) 276 final.; *Geimer*, in Festschrift Coester-Waltjen, 2015 p. 375, 379.

Nonetheless, the time limit under the Regulation can be supported and this was also the prevailing opinion in the workshops. As circumstances can change very quickly, protection measures should only be adopted with a time limit. As this cannot be guaranteed at the EU level, the Regulation provides a mechanism to make sure a protection measure is time limited. It is at least possible that a protection measure issued by another Member State is indefinite and thus would have to be recognised as unlimited if no time limit at the level of recognition existed. As a time limit is essential, and as it cannot be guaranteed at the level of issuing the national protection measure, it has to be guaranteed at the level of recognition.

## 2. No provisions regarding *lis pendens*

The Regulation and the Directive are lacking provisions on *lis pendens*. In other EU-Regulations provisions regarding *lis pendens* have been adopted.<sup>82</sup> Whether such provision would be necessary was discussed in our workshops. Without provisions regarding *lis pendens*, two courts in different Member States can decide upon the case leading to irreconcilable protection measures. As protection measures are restricted territorially, it is possible that there are different protection measures in place in different States. What happens when the protection measure of another Member State is recognised according to the Regulation and the Directive? Under the Regulation, potential conflicts are solved by Article 13 of the Regulation which states that the recognition can be refused to the extent that such recognition is irreconcilable with a judgment given or recognised in the Member State addressed.

On the contrary, under the Directive the recognition cannot be refused and thus it remains unclear as to which protection measure will prevail – the protection measure ordered by the Member State itself or the protection measure ordered by another Member State that is being recognised in that Member State. As domestic violence is a field where the circumstances change quickly, the best solution might be to enforce the protection measure issued most recently because the court would be able to consider all of the circumstances.

## 3. Relationship with the Brussels Ibis Regulation

According to Article 2(3) of the Regulation, the Regulation shall not apply to protection measures falling within the scope of the Brussels Ibis Regulation. As already mentioned above, the Brussels Ibis Regulation is applicable to protection measures concerning the attribution, exercise, delegation, restriction or termination of parental responsibility, Article 1(1)(b) of the Brussels Ibis Regulation.<sup>83</sup> These child protection measures fall exclusively under the Brussels Ibis Regulation and thus, the cross-border enforcement of these child protection measures is governed by Articles 21 et seq of the Brussels Ibis Regulation.<sup>84</sup> The cross-border enforcement under the Brussels Ibis Regulation is to some extent more advantageous than under the Protection Measures Regulation. However, some provisions are less advantageous.<sup>85</sup> Under Brussels Ibis, an exequatur proceeding is still required for the enforcement of a decision, see Articles 40 et seq Brussels Ibis, while this requirement has been abolished under the Protection Measures Regulation.<sup>86</sup> This makes the enforcement under the Protection Measures Regulation

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<sup>82</sup> See e.g. Article 19(1) and (2) Brussels Ibis Regulation; Article 29 Brussels Ibis Regulation.

<sup>83</sup> Dutta, JPIL 2016, 169, 180.

<sup>84</sup> Dutta, JPIL 2016, 169, 180.

<sup>85</sup> Dutta, JPIL 2016, 169, 180.

<sup>86</sup> Dutta, JPIL 2016, 169, 180.

easier and faster – at least in theory. However, the enforcement based on the Brussels IIbis Regulation has no time limit.<sup>87</sup>

As a result of those differences, it would have been a better solution to open both instruments and to give the protected person the choice.<sup>88</sup> This would, contrary to the fears of the legislator, cf. Recital 11 of the Protection Measures Regulation, not impede the proper functioning of the Brussels IIbis Regulation.<sup>89</sup>

## V. Problems with the Directive and the Regulation in the German context

When applying the Protection Measures Regulation and the Protection Order Directive in Germany, some uncertainties arise and these were highlighted during the discussions in our workshops.

### 1. Is the breach of foreign protection measures a criminal offense?

In purely domestic cases, the breach of protection measures ordered by a German court applying German law is a criminal offense pursuant to § 4 of the *Gewaltschutzgesetz*. This, of course, strengthens the effectiveness of protection orders considerably. It is not clear whether a breach of protection measures ordered by another Member State and recognised in Germany under the Regulation is a criminal offense under German criminal law as well. The law requires explicitly in § 4 *Gewaltschutzgesetz* “the breach of measures ordered under § 1 of the Act”. Therefore, it is unclear whether the provision can be applied also to foreign protection measures recognised under the Regulation. In the event of a breach of a measure ordered by a German court following the recognition of a European Protection Order based on the Directive, a specific provision was implemented stating that such a breach is a criminal offence (§ 24 of the implementing Act on European Procedures for the Protection against violence, the *Gesetz zum Europäischen Gewaltschutzverfahren*). However, the lack of such a provision means that a breach against a foreign protection measures recognised under the Regulation is not a criminal offense. It does not fall under § 4 *Gewaltschutzgesetz* as it is not a protection measure based on § 1. It also does not fall under § 24 *Gesetz zum Europäischen Gewaltschutzverfahren* as it is not a protection measure ordered by the German court following the recognition of a European Protection Order. Regarding the principle *nulla poena sine lege* (no penalty without a law) codified in the German constitution, the breach cannot be penalised under criminal law without a provision. There is no reason for the different handling and thus the result is unsatisfactory. The German legislator should adopt a provision which recognises the breach of a foreign protection measure as a criminal offense in Germany.

### 2. Implementation of the Directive in German national law

In its *Gesetz zum Europäischen Gewaltschutzverfahren*, Germany implemented the Directive only regarding incoming protection measures – i.e. the recognition of protection orders issued in other Member States and the adoption of national measures but not regarding outgoing protection measures – i.e. the issuing of a German protection order.<sup>90</sup> The reason for this is that the protection measures based on the *Gewaltschutzgesetz* are ordered in civil matters and not in criminal matters. The Directive, on the contrary, only applies to protection measures adopted

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<sup>87</sup> Dutta, JPIL 2016, 169, 180.

<sup>88</sup> Dutta, JPIL 2016, 169, 181.

<sup>89</sup> Dutta, JPIL 2016, 169, 181.

<sup>90</sup> BT-Drs. 18/2955, 23 et seq.

in criminal matters.<sup>91</sup> Nevertheless, German criminal law provides that in certain situations there is the possibility of ordering a measure that prohibits contacting or approaching the victim.<sup>92</sup> The question is whether these measures fall within the scope of the Directive; if so, then the Directive was not implemented sufficiently. The German legislator was aware of the criminal measures mentioned but concluded that they did not fall under the Directive.<sup>93</sup> Recital 9 of the Directive states that “[..]a Member State is not obliged to issue a European Protection Order on the basis of a criminal measure which does not serve specifically to protect a person, but primarily serves other aims, for example the social rehabilitation of the offender”. This is the case here.<sup>94</sup> The measures ordered under German criminal law are primarily aimed at the social rehabilitation of the offender.<sup>95</sup> Only the measures ordered under the *Gewaltschutzgesetz* primarily serve the purpose of protecting a person. As they are ordered as protective measures in civil matters, they fall within the scope of the Regulation.

Thus, the criminal measures do not fall within the scope of the Directive and therefore it was not necessary to implement the provisions regarding the issuing of a German protection order.

## VI. Application of the Regulation and the Directive in child abducting cases

In this section, it will be examined whether and how the Protection Measures Regulation and the Protection Order Directive might play a role in return proceedings under the Hague Child Convention. This was one of the main topics discussed in the workshops.

The instruments could be used in order to protect a parent being exposed to violence in a child abduction case. The following scenario shall illustrate this: the mother<sup>96</sup> flees from her country of origin with her child to another State within the EU because she has been a victim of domestic violence. The father files an application under the Hague Convention in order to obtain the return of the child and thus the child has to be sent back. The question is whether the mother can ask the court in the Member State of refuge to order protection measures against her violent partner, the father of the child. If the answer is yes, then the Member State of origin would have to enforce the protection measures under the Regulation or the Directive. Therefore, she would be protected when returning with her child.

### 1. Jurisdiction

The question that arises is whether the courts in the Member State of refuge have international jurisdiction to adopt protection measures against the violent parent, which could then be enforced under the Regulation or the Directive in the Member State of origin.

As the protection measure for the mother against her partner does not affect the parental responsibility (see above III.1.a)), jurisdiction cannot be based on the Brussels IIbis Regulation.

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<sup>91</sup> Recital 10 of the Protection Order Directive.

<sup>92</sup> § 56c (2) and § 68 b (1) StGB (Criminal Code); BT-Drs. 18/2955, 23; *Geimer*, in Festschrift Coester-Waltjen, 2015 p. 375, 386 et seq.

<sup>93</sup> BT-Drs. 18/2955, p. 23.

<sup>94</sup> BT-Drs. 18/2955, p. 23.

<sup>95</sup> BT-Drs. 18/2955, p. 23.

<sup>96</sup> Statistics show that mothers are in the majority of cases the taking person, see *Lowe/Stephens*, A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction –Global report, 3 note 10 (available at <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>)

Therefore, the Brussels Ibis Regulation is applicable (cf. III.1.). Pursuant to Article 4(1) Brussels Ibis Regulation, the courts of the Member State where the remaining parent is domiciled have jurisdiction. This is generally the State that the woman has fled from – the Member State of origin.

The jurisdiction could only be based on Article 7(2). Under Article 7(2) Brussels Ibis Regulation, the court of a Member State has jurisdiction in matters relating to tort, delict or quasi-delict where the harmful event occurred. As seen above, protection measures can qualify as tort and thus fall under this provision. It must be determined where the harmful event – the violence – may occur. The threat can be localized in the Member State of origin as this was the reason the woman left the country with her child. However, it could also be the case that she is exposed to the threat of violence in the Member State of refuge as well. Often the woman will not be exposed to violence in that State as this is the reason she went there. She is especially safe when the father does not know where she is – in this case there is no threat in the Member State of refuge. However, the moment he knows where she is – which is the case at the time he files an application under the Hague Child Abduction Convention – it is conceivable that he could threaten to follow her and assault her. This is especially within the EU, with its freedom of movement, as there is a potential danger that he will follow the mother when he knows where she is – especially as his child is there as well. In this case the place where the harmful event may occur is in the Member State of refuge as well.

So, in the following scenario the courts of the Member State of refuge, which are also competent for the return proceedings under the Hague Child Abduction Convention, would have jurisdiction: the parents used to live together in Germany, but their families are from Poland. Because of domestic violence, the woman flees with her child to her parents in Poland. In this case, it is not inconceivable that the partner will follow her as he also knows where her parents live and will therefore threaten or assault her in the Member State of refuge.

Another conceivable scenario would be where, after the woman has fled, the father keeps contacting her via telephone, mail or social media and threatens that he will find and assault her.

However, even if the courts of the Member State of refuge are vested with jurisdiction for a protection order, the court competent for the return proceedings might not have (local or subject matter) jurisdiction for protection measures according to national procedural law.<sup>97</sup> Thus, the woman would need to address another court in that Member State.

## 2. De lege ferenda: Should the courts of the Member State of refuge also be able to issue protection measures?

As the court of refuge will not always have jurisdiction, it should be explored whether a special jurisdiction for protection measures would be useful. Should the court of refuge be able to order protection measures in favour of the mother against the father in cases of domestic violence?

### a) Pros and Cons

According to the experts participating in our local workshop, violence is brought forward in nearly every return proceedings with the hope that the court will refuse the return of the child under Article 13(b) of the Hague Child Abduction Convention. It would not be convincing to order protection measures in each return proceedings in which violence was brought up as a

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<sup>97</sup> Dutta, JPIL 2016, 169, 182.

defence. This would mean a reversal of the burden of proof established by Article 13 Hague Convention. Further, it would contradict the purpose of the Convention – a fast return of the child without any conditions. In addition, the return court is not closely connected to the relationship at issue and therefore not best placed to decide on potential protection measures. In cases where there is no threat in the Member State of refuge, but violence has happened in the Member State of origin, it would be very difficult for the court of refuge to hear evidence and make an appropriate decision. The court has only six weeks to decide whether the child must be returned under the Brussels IIbis Regulation, and this is not enough time to adopt protection measures as well. Finally, the left-behind parent is usually not present in the return proceeding and thus protection measures against him or her might be ordered without a hearing.

Furthermore, even if it is not convincing to order protection measures in each return proceedings in which violence was brought up, it could be appropriate to order such measures in cases where violence can actually be proven – even though the number of such cases will be limited as usually there is not enough evidence. It is similar to Article 13(b) of the Hague Child Abduction Convention where violence needs to be proven as well in order to refuse the return. Currently, the return of the child is often ordered under conditions in the form of undertakings or safe harbour orders. Undertakings have become a fairly common way for some courts to try to secure the safety of the child and also, at times, the safety of the mother.<sup>98</sup> The problem with undertakings is that they are not recognized in all jurisdictions as they are not mentioned in the Hague Convention and thus are not enforceable.<sup>99</sup> If the undertakings are violated, there is no remedy for the violation.<sup>100</sup> The other possibility is a safe harbour order which is a parallel order from the court in the child's habitual residence in order to make sure the undertakings are enforced.<sup>101</sup> The courts make the return of the child contingent on a safe harbour order of the court of origin.<sup>102</sup> However, the mechanism is inefficient for ensuring the enforceability of a court's order as it requires two court proceedings to obtain an enforceable order.<sup>103</sup> The option of ordering protection measures is similar to employing undertakings and safe harbour orders in that they all impose conditions on the return. The advantage of the ability to order protection measures would be that they are directly enforceable under the Regulation or Directive.

b) Necessity to request a protection measure

However, it should be borne in mind that protection measures cannot be ordered *ex officio* but rather require an application by the endangered person. The question, therefore, is whether the woman will request a protection measure if such a measure would mean that she cannot rely on Article 13(b) of the Hague Abduction Convention anymore and therefore the return of the child will be ordered.

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<sup>98</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 676; from a German perspective: *Dutta/Scherpe*, FamRZ 2006, 901, 907 et seq.

<sup>99</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 678; *Dutta/Scherpe*, FamRZ 2006, 901, 907 et seq. .

<sup>100</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 678.

<sup>101</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 678; *Dutta/Scherpe*, FamRZ 2006, 901, 908.

<sup>102</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 678.

<sup>103</sup> *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 679.



If the mother was previously physically harmed by her partner and there is a risk that this will happen again after her return with the children, the return of the children can be refused pursuant to Article 13(b) of the Hague Abduction Convention. Even if the father “only” harmed the mother and never physically harmed the children, witnessing such conduct can affect and endanger the welfare of the children.<sup>104</sup> Thus, domestic violence against the mother can establish a grave risk for the child within the meaning of Article 13(b) and the return can be refused.<sup>105</sup>

If the mother requests a protection order that would be recognised under the Regulation or the Directive in the Member State of refuge, she would be protected in the country of refuge and thus there is no grave risk for the children anymore and Article 13(b) of the Hague Abduction Convention would not be applicable. Thus, in this case it would not be in the interest of the mother to request a protection measure. The question is whether the court in the Member State of refuge could order protection measures in favour of the mother without her request anyway. As protection measures are only ordered on request of the person who is a victim of violence and as there is no request, the answer is no. Nonetheless, the court could argue that in this case where the mother can request protection measures and thus, is able to protect the children from physical or psychological harm, Article 13(b) of the Hague Abduction Convention will not be applied. This interpretation is likely as Article 13(b) has to be construed narrowly.<sup>106</sup>

Even if the domestic violence against the mother is not seen as constituting psychological harm to the child in a particular case, domestic violence can play a role in Article 13(b) of the Hague Abduction Convention nevertheless: If the mother was the one predominantly taking care of the child, the separation of the child and the mother - especially in the case of young children - can pose a risk to the child’s psychological health and the return can be refused based on Article 13(b).<sup>107</sup> But generally speaking the mother has the duty to return with her child in order to avoid any risk to the well-being of the child.<sup>108</sup> However, the abducting parent is not obliged to return with the child if it is unreasonable for her to do so.<sup>109</sup> This is the case when it is foreseeable that the father will use domestic violence against the mother and there are no effective protection measures.<sup>110</sup> Therefore, again, if the court of refuge could order protection measures and it was guaranteed that they would be recognized and enforced under the Regulation or the Directive in the Member State of origin, Article 13(b) of the Hague Abduction Convention would not be applicable.

To conclude: if the court was competent to order protection measures in cases of domestic violence against the mother, the mother could not rely on Article 13(b) of the Hague Abduction Convention anymore. However, it would strengthen the purpose of the Convention to return the children to the country of origin.

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<sup>104</sup> Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, OJ C 325/15, 30.12.2006, p.60, Note 2.2.7; see also II.1.a.

<sup>105</sup> According to *Weiner*, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review 2000, Vol. 69, 593, 704 too few courts have actually recognized that witnessing domestic violence is a type of grave risk.

<sup>106</sup> *Botthof*, Münchener Kommentar zum FamFG, 2019, HKÜ, Article 13 note 18.

<sup>107</sup> *Botthof*, Münchener Kommentar zum FamFG, 2019, HKÜ, Article 13 note 24.

<sup>108</sup> *Botthof*, Münchener Kommentar zum FamFG, 2019, HKÜ, Article 13 note 24.

<sup>109</sup> *Botthof*, Münchener Kommentar zum FamFG, 2019, HKÜ, Article 13 note 24.

<sup>110</sup> *Botthof*, Münchener Kommentar zum FamFG, 2019, HKÜ, Article 13 note 24.

c) With regard to the new Brussels IIbis Recast

The new Brussels IIbis Recast Regulation – which could not be discussed in our workshop – provides the possibility for the courts in the Member State of refuge to order provisional child protection measures that are enforced in the Member State of origin, Article 27 (5) Brussels IIbis Recast Regulation. It could be argued that ordering protection measures for the mother is similar to ordering child protection measures and should be implemented as well. On the other hand, the possibility of ordering child protection measures may mean that it is not necessary to order protection measures for the mother as well. As domestic violence against the mother usually causes psychological harm to the children (as seen above), the court of refuge can order child protection measure in cases of domestic violence as e.g. that the father is not allowed to enter the family house (like § 1666 Abs. 3 Nr. 3 *BGB*). Even if the measure is ordered to protect the children and not the mother, she would be protected indirectly as well and thus benefit indirectly from that protection measure.

As in most cases of domestic violence it is not only the mother who is the victim but also the children who witness the violence, it is sufficient if the court orders child protection measures.

## VII. Conclusion

The outcome of the local desk research has shown that most of the concerns expressed by the participants of the two workshops are well founded and that the European Protection Measures Regulation and the European Protection Order Directive contain deficiencies that impede their positive effect in fighting violence against women in cross-border cases – be it in general or within the child abduction context.