

# Best Practice Guide

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



PREPARED UNDER THE AUSPICES OF THE POAM PROJECT

by

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## TABLE OF CONTENTS

### 1. INTRODUCTION

- 1.1. Methodology
- 1.2. Objectives
- 1.3. Scope

### 2. PROTECTION OF ABDUCTING MOTHERS IN RETURN PROCEEDINGS

- 2.1. Importance of the topic
  - 2.1.1. High proportion of mothers as abductors
  - 2.1.2. Vulnerabilities of abducting mothers in cases involving domestic violence
  - 2.1.3. Gap: safety of abducting mothers upon return
- 2.2. The grave risk of harm defence and allegations of domestic violence
- 2.3. Policy considerations

### 3. PROTECTIVE MEASURES IN THE CONTEXT OF RETURN PROCEEDINGS

- 3.1. The nature and type of protective measures
- 3.2. Protective measures vs 'soft-landing' measures

### 4. PROTECTIVE MEASURES WITHIN THE EU

- 4.1. Mutual recognition of protection measures in the EU: Overview of Regulation 606/2013 and Directive 2011/99
  - 4.1.1. Directive 2011/99
  - 4.1.2. Regulation 606/2013
- 4.2. National approaches to protection measures
  - 4.2.1. Civil vs criminal protection orders
  - 4.2.2. Substantive similarities
  - 4.2.3. Protection order procedures
  - 4.2.4. Procedural variances
- 4.3. Regulation 606/2013 and Directive 2011/99 in the specific context of international parental child abduction
  - 4.3.1. Reasons related to the key characteristics of criminal protection orders
    - a) The requirement of a link with criminal proceedings
    - b) The complexity and length of criminal order proceedings
  - 4.3.2. Reasons related to aspects of the mutual recognition procedure under the Directive
    - a) The recognition of the protection measure is not automatic
    - b) The length of the recognition proceedings
    - c) The behaviour underlying the protection measure must be recognised as a criminal offence in both Member States
    - d) Extensive grounds for non-recognition
    - e) Limited scope of the Directive

- f) Assessment of the duration of the victim’s stay and the need for protection
- 4.3.3. (Relative) weakness of the civil protection orders and the Regulation
  - a) Victim as the applicant
  - b) Effectiveness of civil protection orders
  - c) Sanctions for violations of civil protection orders
  - d) Time limit on the effects of recognition
  - e) Characterisation
  - f) Jurisdiction
  - g) Applicable law

#### 4.4. Recommendations

## 5. IN PRACTICE: STEP BY STEP GUIDE

- 5.1. Application of Article 13(1)(b) in cases involving allegations of domestic violence
  - 5.1.1. General points
  - 5.1.2. The court’s approach to grave risk of harm
  - 5.1.3. Assessing the grave risk of harm where allegations of domestic violence have been made/investigating the merits of allegations of domestic violence in the context of the grave risk of harm exception to return
    - 5.1.3.1. Evidence
    - 5.1.3.2. Burden and standard of proof
    - 5.1.3.3. Factors to consider
      - a) The level of harm
      - b) The type of harm
      - c) The impact on the abducting mother’s mental health
- 5.2. Protective measures as civil law measures: Regulation 606/2013
  - 5.2.1. Outgoing protection measures
    - 5.2.1.1. Jurisdiction, cross-border circulation and applicable law
      - a) Protective measures for the abducting mother as indirect protective measures for the child – issued by the Hague Convention return court in the return proceedings
      - b) Protective measures for the abducting mother as self-standing measures – issued in proceedings that are separate from the Hague Convention return proceedings
    - 5.2.1.2. Practical considerations
  - 5.2.2. Incoming protection measures
    - 5.2.2.1. Adjustment of factual elements

## 6. CONCLUSION

### INDEX OF CASES CITED

### GLOSSARY

# BEST PRACTICE GUIDE ON THE PROTECTION OF ABDUCTING MOTHERS IN RETURN PROCEEDINGS

## 1. INTRODUCTION

### 1.1. Methodology

This Guide was prepared under the auspices of the research project ‘Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction’ (POAM)<sup>1</sup>, funded by the European Commission from the European Union’s Rights, Equality and Citizenship Programme. The Guide presents the findings of the POAM project, collated from the project local workshops<sup>2</sup> and project reports<sup>3</sup> prepared by the University of Aberdeen (United Kingdom – Scotland), the University of Osijek (Croatia), the University of Milan-Bicocca (Italy) and the Ludwig-Maximilian University of Munich (Germany) (‘the Project Partners’) and the National Points of Contact for Spain, Slovenia and Serbia (‘the National Points of Contact’), and refined through a process of consultations with relevant specialists, including experts from the European Commission and the Hague Conference on Private International Law (hereafter ‘the Hague Conference’).<sup>4</sup>

The Guide was developed taking into consideration the Hague Conference ‘Guide to Good Practice under the HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part VI – Article 13(1)(b)’ (hereafter ‘the HCCH Guide’).<sup>5</sup> The HCCH Guide addresses the application of Article 13(1)(b) of the 1980 Hague Abduction Convention<sup>6</sup> and provides guidance to judges and Central Authorities on the approach to, and analysis of, the Article 13(1)(b) ‘grave risk of harm’ exception. The HCCH Guide’s objective is to promote, on an international scale, the correct and consistent application of the Article 13(1)(b) grave risk exception in accordance with the 1980 Hague Convention. There are aspects of the HCCH Guide that are relevant to the issue of protection measures for abducting mothers and, indeed, the protection of children in cases involving domestic violence. The present Guide is intended to complement the HCCH Guide through the provision of in-depth guidance on these specific issues. Among other pertinent matters, the present Guide analyses the utility of Regulation 606/2013<sup>7</sup> and Directive 2011/99<sup>8</sup> in the context of parental child abductions

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<sup>1</sup> See <https://research.abdn.ac.uk/poam/>.

<sup>2</sup> See <https://research.abdn.ac.uk/poam/events/>.

<sup>3</sup> See <https://research.abdn.ac.uk/poam/resources/reports/>.

<sup>4</sup> These consultations culminated in the Project Workshop (‘POAM Experts’ Workshop’), which was originally scheduled to take place at the University of Milano-Bicocca, Italy on 27 March 2020, to be hosted by Professor Costanza Honorati, but had to be rescheduled at a short notice due to the COVID-19 pandemic. The Workshop was then held as a virtual event on 19 June 2020.

<sup>5</sup> Hague Conference on Private International Law, ‘Guide to Good Practice under the HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part VI – Article 13(1)(b)’, 2020 (hereafter ‘HCCH Guide’), available at <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>.

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

<sup>7</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.

<sup>8</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

motivated by acts of domestic violence, taking into account the EU child abduction regime of Regulation 2201/2003 ('the Brussels IIa Regulation').<sup>9</sup>

## 1.2. Objectives

The Guide is intended to assist child abduction professionals, including judges, legal practitioners, NGO representatives, Central Authorities and other public authorities involved in child abduction cases where allegations of domestic violence by the left-behind father have been made by the abducting mother in return proceedings.

In particular, the Guide seeks to achieve the following objectives:

- To evaluate the difficult issues of protection of abducting mothers in child abduction cases committed against the background of domestic violence, and to enhance the protection of such abducting mothers in return proceedings.
- To contribute towards the awareness and implementation of Regulation 606/2013 and Directive 2011/99.
- To contribute towards the objectives of the Hague Conference on Private International Law set out in the Conclusions and Recommendations of the 7<sup>th</sup> Meeting of the Special Commission to review the practical operation of the 1980 and 1996 Hague Conventions,<sup>10</sup> and its recognition of the value of evidence-based research (paragraph 81).<sup>11</sup>

## 1.3. Scope

The Council of Europe Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention')<sup>12</sup> contains a wide definition of domestic violence, stating that it includes 'acts of physical, sexual, psychological and economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'.<sup>13</sup> Regulation 606/2013 does not introduce an autonomous definition of violence, and refers to behaviour that endangers a victim's life, physical or psychological integrity, personal liberty, security or sexual integrity, and aspires to offer protection from acts such as 'physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion'.<sup>14</sup>

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<sup>9</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.

<sup>10</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>11</sup> Paragraph 81 states: 'The Special Commission recognises the value of evidence-based research to strengthen existing knowledge on the effects of wrongful removal or retention of children internationally. In particular, it would be desirable to have further research addressing: (1) the short-term and long-term outcomes for children and relevant family members, including taking and left-behind parents; and (2) the impact and effectiveness of protective measures, other judicial and legal processes, support services and / or arrangements to apply post-return.' Available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>.

<sup>12</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11/05/2011.

<sup>13</sup> Istanbul Convention, Art. 3(b).

<sup>14</sup> Regulation, Recital 6.

This Guide adopts the Hague Conference terminology,<sup>15</sup> which corresponds with Regulation 606/2013, Recital 6, and uses the term ‘domestic violence’ to denote a range of abusive behaviours within the family, including physical (including sexual) and psychological abuse.<sup>16</sup> The specific category of domestic violence victims that this project is concerned with is abducting mothers who have been involved in return proceedings under the 1980 Hague Abduction Convention and the Brussels IIa Regulation, in circumstances where the child abduction had been motivated by acts of domestic violence in the form of physical or psychological abuse from the left-behind father who, following the abduction, filed an application for the return of the child to the State of the child’s habitual residence.

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<sup>15</sup> See HCCH Guide, Glossary.

<sup>16</sup> Recital 6 of Regulation 606/2013 states that the Regulation is intended to apply to ‘protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion’.

## 2. PROTECTION OF ABDUCTING MOTHERS IN RETURN PROCEEDINGS

### 2.1. Importance of the topic

#### 2.1.1. High proportion of mothers as abductors

Statistical information on the operation of the 1980 Hague Abduction Convention shows that 73% of parental child abductions are committed by mothers.<sup>17</sup> Alarming, many of these mothers are fleeing domestic violence.<sup>18</sup> Although there are no comprehensive statistics on how many 1980 Convention cases involve allegations or findings of domestic violence, empirical research has confirmed that this phenomenon frequently plays a role in parental child abduction cases, and it is alleged that it may be present in a large number of child abductions committed by mothers.<sup>19</sup> This suggests that many of the returning abducting mothers may potentially be at risk of revictimisation at the hands of their violent ex-partners.

#### 2.1.2. Vulnerabilities of abducting mothers in cases involving domestic violence

Returning mothers in child abductions committed against the background of domestic violence are subject to particular vulnerabilities, including the risk of revictimisation upon their return to the State of habitual residence, the lack of financial and emotional support in the State of habitual residence plus probable financial dependence on the left-behind father on the return, sometimes the lack of credibility as a respondent in return proceedings due to the failure to report the incidents of domestic violence in the State of habitual residence prior to the abduction, and the exposure to 'intimidatory litigation', whereby the left-behind father abusively uses the return proceedings as a means of further harassment, rather than from a genuine desire to secure the return of the child. Such 'intimidatory litigation' adds greatly to the anxiety suffered by the abducting mother, who, as a survivor of an abusive relationship, is likely to be overwhelmed already with the repercussions of that relationship.

#### 2.1.3. Gap: safety of the abducting mothers upon return

Nowadays it is widely understood that 'domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their well-being.'<sup>20</sup> Yet, neither the 1980 Convention nor the Brussels IIa Regulation have explicit regard to the safety of the abducting mother upon

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<sup>17</sup> N. Lowe and V. 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, Part I – Regional (revised) (September 2017); Part II – Global Report (September 2017), Part III – National Reports (July 2018)'.

<sup>18</sup> Case study example: when mothers flee from domestic abuse, it is useful to consider two distinctly different circumstances. The first is a foreign mother returning to her home country having fled from the abuse, but also from a country where the language is problematic, family/support network is scant, or even immigration difficulties are present: there is a higher degree of disenfranchisement. The second is a mother who, with a good command of English and familial connections in England flees for example from Ireland to England.

<sup>19</sup> M. Freeman, 'The Outcomes for Children Returned Following an Abduction' (2003) The Reunite Research Unit. The study conducted by the International Child Abduction Centre, Reunite, revealed that domestic violence and/or child abuse were raised as the main concern relating to return in 67% of the representative sample of mother abductor cases. See also S. De Silva, 'The International Parental Child Abduction Service of the International Social Service Australian Branch' (2006) 11 *The Judges' Newsletter* 61; Permanent Bureau of the Hague Conference, 'Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper' (May 2011), available at <https://assets.hcch.net/upload/wop/abduct2011pd09e.pdf>; and M. Župan, M. Drvenčić and T. Kruger, 'Cross-Border Removal and Retention of a Child – Croatian Practice and European Expectation' (2020) 34 *International Journal of Family Law and Policy* 60.

<sup>20</sup> B. Hale, 'Taking Flight—Domestic Violence and Child Abduction' (2017) 70 *Current Legal Problems* 7.

the return. Although the Hague Conference has recognised that, '[i]n some situations, the grave risk to the child may also be based on potential harm to the taking parent by the left-behind parent',<sup>21</sup> and that 'the protection of the child may also sometimes require steps to be taken to protect an accompanying parent',<sup>22</sup> a gap remains as to the enforceability of protective measures intended to safeguard the abducting mother upon the return, with inconsistent practices in place resulting in varying levels of protection across jurisdictions. It is the intention of the Guide to address this gap.

## 2.2. The grave risk of harm defence and allegations of domestic violence

The 'grave risk of harm' exception to return, embodied in Article 13(1)(b) of the 1980 Convention,<sup>23</sup> is particularly pertinent to abductions committed against the background of domestic violence.<sup>24</sup> Indeed, it is often raised by abducting mothers opposing the return, based either on the allegations involving the child as the 'direct victim', or as an 'indirect victim', where the child is exposed to the effects of domestic violence directed towards the mother.<sup>25</sup> Among such effects are impaired parenting capacities of the mother, resulting from the impact of the violence on her physical and/or psychological health.<sup>26</sup> The 'grave risk of harm' defence may also be raised where the abducting mother is unable to return with the child due to fear of the child's father; the subsequent separation from the primary carer mother may be argued to create a grave risk for the child.<sup>27</sup>

It has, therefore, been recognised that the circumstances of the abducting mother and the child may be intertwined to the extent that domestic violence perpetrated solely against the mother may justify the finding that the return would expose the child to a grave risk of 'psychological harm or other intolerable situation', pursuant to Article 13(1)(b).<sup>28</sup>

In cases involving allegations of domestic violence, the 'grave risk of harm' defence is often invoked, and in some cases successfully made out, in conjunction with the 'child's objections' defence under Article 13(2) of the Convention.<sup>29</sup>

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<sup>21</sup> HCCH Guide, para. 57.

<sup>22</sup> Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Meeting of the Special Commission (2006), para. 1.1.12, available at [https://assets.hcch.net/upload/concl28sc5\\_e.pdf](https://assets.hcch.net/upload/concl28sc5_e.pdf).

<sup>23</sup> Article 13(1)(b) states: 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that ... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

<sup>24</sup> See HCCH Guide, paras. 57–59.

<sup>25</sup> Permanent Bureau of the Hague Conference, 'Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper' (May 2011), available at <https://assets.hcch.net/upload/wop/abduct2011pd09e.pdf>, para. 11.

<sup>26</sup> HCCH Guide, para. 57.

<sup>27</sup> *Ibid*, para. 9.

<sup>28</sup> E.g. *In the Matter of E (Children)* [2011] UKSC 27 (hereafter '*Re E*'); and *In the Matter of S (a Child)* [2012] UKSC 12 (hereafter '*Re S*'). See also HCCH Guide, para. 58.

<sup>29</sup> See POAM Project Report – United Kingdom, p. 85 and POAM Project Report – Italy, p. 3, available at <https://research.abdn.ac.uk/poam/resources/reports/>. Article 13(2) states: 'The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.' C. Honorati, 'Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della convenzione dell'Aja del 1980' (2020) 4 *Rivista di diritto internazionale privato e processuale* 822–24 suggests that courts find it easier and more secure to argue on the opposition of the child or on other available defences, rather than on grave risk of harm caused by domestic violence, especially because of the difficulties related to the burden of proof and the role of protective measures that this ground brings with it.



### 2.3. Policy considerations

The underlying philosophy of the 1980 Hague Convention is that international child abduction is harmful to children and should, therefore, be discouraged.<sup>30</sup> The Convention also seeks to prevent the abducting parent from establishing ‘artificial jurisdictional links’ with the requested State with the intention of obtaining an advantage in custody proceedings, and thus benefitting from his/her own wrongdoing.<sup>31</sup> Accordingly, the Convention sets out a legal mechanism designed to ensure the prompt return of a wrongfully removed or retained child to the country of his or her habitual residence. In line with this policy, there are only a limited number of exceptions available to the abducting parent, whilst these exceptions are to be interpreted in a narrow fashion.<sup>32</sup>

As the Convention return policy and the objective of protecting abducting mothers in return proceedings may seem potentially contradictory, it should be emphasised that it is not the intention of this Guide to undermine the return policy of the Convention. Rather, the Guide seeks to ensure that, where appropriate,<sup>33</sup> return can be ordered whilst the abducting mother returning with the child is being protected by means of all available legal avenues, as appropriate in the particular circumstances of the case.

Although the effectiveness of protection measures in the context of domestic violence has been subject to debate, there is strong evidence that protection orders are useful tools in tackling domestic violence.<sup>34</sup> Indeed, even though protection orders are sometimes breached, and satisfactory follow-up measures by relevant authorities may be lacking, in many cases protection orders do halt the undesirable contact, or at least help improve the overall physical, psychological and emotional well-being of the victim as, even if the contact does not stop completely, the overall frequency and intensity of violence tends to decrease.<sup>35</sup> Moreover, protection orders are said to psychologically empower the victim, whilst sending a clear message to the offender that domestic violence is a public concern, and will not be tolerated.<sup>36</sup> However, given the concerns over the effectiveness of protective measures, this Guide recommends that the courts be extremely cautious in accepting protection measures in return proceedings in cases where there is a risk of severe future violence. In essence, the employment of protective measures in such cases should be an exception.<sup>37</sup>

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<sup>30</sup> E. Pérez-Vera, ‘Explanatory Report on the 1980 Hague Child Abduction Convention’, paras. 16–26 (hereafter ‘Explanatory Report’), available at <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, para. 34.

<sup>33</sup> See section 5, ‘In Practice: Step by Step Guide’, below.

<sup>34</sup> S. van der Aa, et al., ‘Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States’ (hereafter ‘POEMs Project Final Report’), p. 102, available at <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf>.

<sup>35</sup> *Ibid.*, p. 238.

<sup>36</sup> *Ibid.*, p. 252.

<sup>37</sup> See section 4.4, ‘Recommendations’, below.

### 3. PROTECTIVE MEASURES IN THE CONTEXT OF RETURN PROCEEDINGS

#### 3.1. The nature and type of protective measures

The Brussels IIa Regulation<sup>38</sup> and its Recast (Brussels IIb)<sup>39</sup> prohibit a non-return order on the basis of Article 13(1)(b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the child's protection upon his/her return. The appropriate protective measures and their effectiveness will differ from case to case, and from jurisdiction to jurisdiction.<sup>40</sup> Therefore, when assessing whether or not protective measures have been taken in the State of habitual residence, and whether they will adequately safeguard the protection of the child upon his or her return, courts may find it helpful to utilise the assistance of the Central Authority of the State of habitual residence<sup>41</sup> and/or the international cooperation arrangements between Hague network judges.<sup>42</sup>

Protective measures in, or related to, return proceedings may be divided into three categories: 1) measures issued by the court seised with the return application ('the Hague Convention return court'); 2) protection orders issued by competent courts in the State of refuge, in proceedings that are separate from the Hague Convention return proceedings (usually on application by the abducting mother); and 3) measures issued by a competent court in the State of habitual residence (See *Figure 1* below). This Guide is concerned with the first two types of protective measures (i.e. 1) and 2)).

##### 1) *Protective measures issued by the Hague Convention return court in the return proceedings*

This category of protective measures involves measures that are ordered by the Hague Convention return court in the State of refuge, and which need to be *recognised* in the State of habitual residence.

In some jurisdictions, courts also endorse and accept undertakings from the left-behind parent as one, or the only, form of protection. Undertakings have, historically, been described as 'promises offered or in certain circumstances imposed upon an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child'.<sup>43</sup> In recent precedents, the serious problem of the effectiveness of undertakings was reiterated, echoing the UK Supreme Court case of *Re E*, when Lady Hale referred to concerns about the 'too ready' acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting State. Schuz highlights that the unenforceability of undertakings is particularly acute in cases involving domestic violence,

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<sup>38</sup> Art. 11(4).

<sup>39</sup> Council Regulation (EU) 2019/1111 of 25 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), Art. 27(3).

<sup>40</sup> *Re E*, para. 36.

<sup>41</sup> European Commission, 'Practice Guide for the Application of the Brussels IIa Regulation', p. 55 (hereafter 'EC Practice Guide'), available at <https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed>.

<sup>42</sup> *Re E*, para. 36.

<sup>43</sup> P. Beaumont and P. McElevay, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), p. 30. See also K. Trimmings, *Child Abduction within the European Union* (Hart Publishing, 2013) pp. 155–61.

and spouses who ‘will not balk at violating their undertakings’.<sup>44</sup> In essence, the efficacy of undertakings may vary amongst jurisdictions that employ them within their domestic laws. Within cross-border proceedings, voluntary undertakings can be largely ineffective as a means of protection, and therefore the issue of enforceability must be addressed to the court’s satisfaction that measures originating from voluntary undertakings have legal effect, i.e. by virtue of the 1996 Hague Convention or mirror orders. Examples of undertakings include: non-molestation/non-harassment undertakings (e.g. ‘not to use violence or threats towards the mother, nor to instruct anybody else to do so’, or ‘not to communicate with the mother directly’); undertakings related to the occupation of the family home (e.g. ‘to vacate the family home and make it available for a sole occupancy by the mother and the child’); undertakings related to financial support (e.g. ‘to pay for the return tickets for the mother and the child’, or ‘to provide financial support/maintenance to the mother and the child upon their return’); and undertakings related to residence or access to the child (e.g. ‘not to seek to separate the mother from the child’, or ‘not to seek contact with the child unless awarded by the court or agreed’). As can be seen from the above examples, undertakings do not always contain protective measures as such, but may instead encompass ‘more light-touch’ practical arrangements to facilitate and implement the child’s return and enable a ‘soft landing’ of the child in the State of habitual residence (e.g. the funding of return flights and financial support upon the return).<sup>45</sup> Given the difficulties with the enforceability of undertakings, this Guide does not endorse the employment of undertakings in return proceedings involving allegations of domestic violence.

Finally, it has been suggested that, when assessing the level of protection available in the State of habitual residence, the Hague Convention return court should also consider the general features of the State of habitual residence (e.g. access to courts and other legal services; State assistance and support, including financial assistance, housing assistance, health services, women’s shelters and other means of support to victims of domestic violence; responses by police, and the criminal justice system more generally; and availability of protective measures to victims of domestic violence in the State of habitual residence, such as non-molestation injunctions).<sup>46</sup> This approach is not, however, endorsed by this Guide, as it runs contrary to the Practice Guide for the Application of the Brussels IIa Regulation, which states that ‘[i]t is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question’.<sup>47</sup>

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<sup>44</sup> R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, 2013), p. 293. See also the recent decision in *Saada v. Golan*, where the USCA (2<sup>nd</sup> Circuit), on 19 July 2019, voided the District Court order for the return of the child, stating the assumption that ‘in cases in which the district court has determined that repatriating a child will expose him or her to a grave risk of harm, *unenforceable undertakings are generally disfavoured*, particularly where the petitioning parent will comply with the undertakings and *there are no other “sufficient guarantees of performance”*’ [at p. 34a, emphasis added]. The Court of Appeal required the District Court to investigate whether alternative, more appropriate and effective protective (‘ameliorative’) measures were available, and could offer better guarantees for a safe return.

<sup>45</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para. 55. See section 3.2, ‘Protective measures vs ‘soft-landing’ measures’, below.

<sup>46</sup> J. Munby (President of the Family Division), ‘Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings’, March 2018, England and Wales, para. 2.11 (e), available at <https://www.judiciary.uk/publications/practice-guidance-case-management-and-mediation-of-international-child-abduction-proceedings/>; and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para. 51.

<sup>47</sup> EC Practice Guide, p. 55.

2) *Protective measures issued in proceedings that are separate from the Hague Convention return proceedings*

A protection order may be issued prior to the return (usually on application by the abducting mother) by a competent court in the State of refuge, in proceedings that are separate from the Hague Convention return proceedings. The abducting mother can then travel, with that protective measure, back to the State of habitual residence.

3) *Protective measures issued by a court in the State of habitual residence*

This category of protective measures covers relevant decisions made in the State of habitual residence either before or after the abduction. In particular, in some cases, there may already be decisions of courts and/or other competent authorities (as appropriate) in the State of habitual residence that can facilitate (or contribute towards facilitating) the protection of the child and/or the mother upon the return. These may include, e.g. civil and/or criminal protection orders in favour of the abducting mother or, where appropriate, (an interim) non-contact order. Alternatively, these measures can be sought from a court in the State of habitual residence, usually after the return of the child has been ordered.

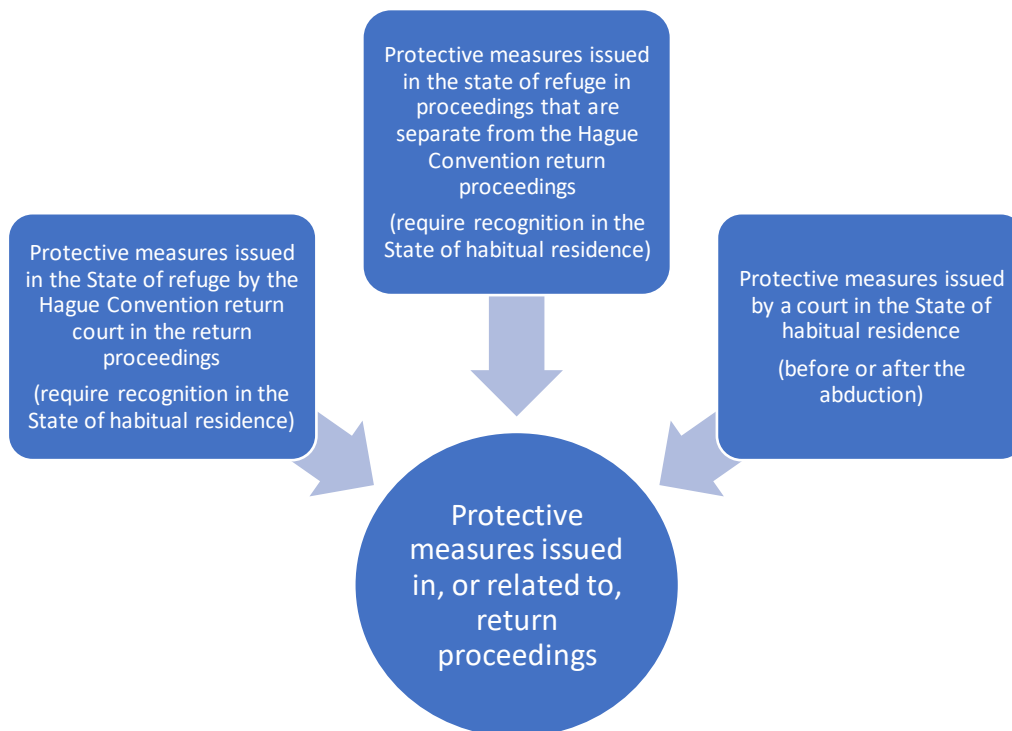


Figure 1 – Protective measures issued in or related to return proceedings

3.2. Protective measures vs ‘soft landing’ measures

The courts have, in many scenarios, endorsed, or even made, orders giving effect to ‘soft-landing’ measures within return proceedings. These measures are distinguishable from protective measures against specific and identifiable grave risks of, e.g. domestic violence. Soft landing measures may comprise, e.g. the left-behind parent purchasing return flight tickets for the mother and children to enable them to journey to the country of habitual residence; the provision of a home; financial measures, such as to pay maintenance, or for a down payment for a home, or money to obtain legal advice and to instigate proceedings relevant to the custody of the children. It is of note that soft-landing measures and protective measures may overlap. For example, measures akin to the provision of a home, or money for separate accommodation, for the mother and children share a commonality with non-occupation orders, which constitute an injunctive relief and a means of prohibiting the father from living in the same home, in order that the grave risk of harm is ameliorated. Interestingly, the HCCH Guide makes the point that the court of the State of refuge cannot make orders that are not required to mitigate an established grave risk.<sup>48</sup> However, the HCCH Guide also observes that there are additional measures that, although not directly relevant to the issue of domestic violence, are nevertheless ‘practical arrangements’ to assist in the implementation of a return order: in other words, ‘soft-landing measures’.<sup>49</sup>

Protective measures, on the other hand, are put in place with the explicit intention of addressing the grave risk of harm posed by the domestic violence established in the case. Examples may include non-molestation orders, occupation orders, restraining orders, non-harassment orders, exclusion orders, ouster orders, domestic abuse interdicts, eviction orders, prohibition of access orders, or prohibitive steps orders and other protection orders against (former) spouses, partners and cohabitants, as well as orders to protect children whose well-being is at risk.

#### **4. PROTECTIVE MEASURES WITHIN THE EU**

National approaches to protection measures vary across the Member States. Nevertheless, many shared features and common patterns in the regulation of protection measures across the EU can be identified. To facilitate cross-border movement of victims of violence, including domestic violence, the EU legislator has introduced two instruments on mutual recognition of protection orders: Directive 2011/99 on the European Protection Order, and Regulation 606/2013 on mutual recognition of protection measures in civil matters.

This part of the Guide sets out the key features of the Directive and the Regulation. It then outlines the common features and trends in the regulation of protection orders at the national level across the EU, before analysing the potential utility of the Directive and the Regulation in the child abduction context, and making appropriate recommendations.

##### **4.1. Mutual recognition of protection measures in the EU: overview of Regulation 606/2013 and Directive 2011/99**

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<sup>48</sup> HCCH Guide, p. 35.

<sup>49</sup> *Ibid.*, p. 34.

The EU legal framework for cross-border recognition of protective measures is represented by Directive 2011/99 on the European Protection Order, and Regulation 606/2013 on mutual recognition of protection measures in civil matters. These instruments provide a legal basis for EU Member States to recognise and, if needed, enforce a protection order that was granted in another Member State.<sup>50</sup> This section provides a brief overview of these two instruments.

#### 4.1.1. Directive 2011/99

The Directive is based on Article 82(1) of the TFEU on judicial cooperation in criminal matters, and aims to facilitate mutual recognition of criminal protection orders that have been issued in one Member State ('the issuing State'), and are sought to be recognised in another Member State ('the executing State').<sup>51</sup>

The Directive aims to protect a person against a criminal act, and therefore applies only if the underlying harmful conduct is criminalised.<sup>52</sup> The relevant crimes are those that may endanger the 'life, physical or psychological integrity, dignity, personal liberty or sexual integrity' of the protected person.<sup>53</sup> Therefore, a European Protection Order ('EPO') can be requested only if the protection order was issued in the context of a criminal matter,<sup>54</sup> and aims to prevent new criminal acts or reduce the consequences of previous criminal acts.<sup>55</sup> Examples include protection orders preventing any form of harassment, abduction, stalking, or other forms of indirect coercion.<sup>56</sup> For a protection measure to fall within the scope of the Directive, it is not necessary for a criminal offence to have been established by a final decision.<sup>57</sup> Interestingly, the issuing authority does not necessarily need to belong to the criminal justice system: it can be of an administrative or civil nature, too.<sup>58</sup>

The restrictions that can be placed on the person causing risk are:

- a) a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays;
- b) a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means; and
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.<sup>59</sup>

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<sup>50</sup> Ireland does not participate in the Directive (Directive 2011/99, Recital 41), and Denmark does not participate in either the Directive or the Regulation (Directive 2011/99, Recital 42 and Regulation 606/2013, Recital 41).

<sup>51</sup> Directive 2011/99, Art. 2.

<sup>52</sup> Directive 2011/99, Arts. 1 and 2(2).

<sup>53</sup> *Ibid.*

<sup>54</sup> E.g., it is not enough that the violations of the protective measure are subject to criminal act: Directive 2011/99, Art 1, an EPO can only be requested if the protection order was issued within criminal matters.

<sup>55</sup> Directive 2011/99, Recital 9.

<sup>56</sup> *Ibid.*

<sup>57</sup> Directive 2011/99, Recital 10.

<sup>58</sup> *Ibid.*

<sup>59</sup> Directive 2011/99, Art. 5.

The recognition procedure under the Directive departs from the traditional mutual recognition approach based on ‘automatic’ recognition, as it involves an additional step.<sup>60</sup> the executing Member State has to replace the original protection order with a similar measure available under its national law.<sup>61</sup> The executing State can choose whether to apply criminal, administrative or civil measures available under its national law;<sup>62</sup> however, it may refuse to recognise the protection order on one of the extensive grounds for non-recognition set out in Article 10.

The enforcement of the protection measure imposed in the issuing State and recognised in the executing State, including the penalties for the breach of the protection order, is left to the national law of the executing State.<sup>63</sup>

#### 4.1.2. Regulation 606/2013

The Regulation is based on Article 81 TFEU, and provides for the mutual recognition of civil protection measures across the EU by establishing ‘rules for a simple and rapid mechanism for the recognition of protection measures ordered in a Member State in civil matters’.<sup>64</sup> There are slight differences between the terminology used in the Regulation and the terminology used in the Directive, as the Member State that issued the protection order is referred to in the Regulation as ‘the Member State of origin’, and the other Member State is termed ‘the Member State addressed’.<sup>65</sup> For a protection measure to fall within the scope of the Regulation, the issuing authority does not necessarily need to belong to the civil justice system;<sup>66</sup> however, a protection order issued by the police would not be eligible.<sup>67</sup>

The restrictions that can be placed on the person causing risk, with a view to safeguarding the protected person’s physical or psychological integrity, are the same as under the Directive and include:

- a) a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays;
- b) a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means; and
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.<sup>68</sup>

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<sup>60</sup> See POEMs Project Final Report, p. 205.

<sup>61</sup> Directive 2011/99, Art. 9. The procedure will include these steps: 1.) an EPO is issued by the competent authority of the issuing State on request of the protected person; 2.) the EPO is presented for recognition before the competent authority of the executing State by the protected person; and 3.) the competent authority of the executing State considers whether to recognise the EPO, taking account of the possible grounds for non-recognition (Art. 10); and 4.) if the EPO has been recognised, the competent authority of the executing State adopts a similar measure available under its national law to replace the original protection order (cf. POEMs Project Final Report, p. 207).

<sup>62</sup> Directive 2011/99, Art. 9(1).

<sup>63</sup> Directive 2011/99, Art. 11(1).

<sup>64</sup> Regulation 606/2013, Art. 1.

<sup>65</sup> Regulation 606/2013, Art. 3.

<sup>66</sup> Regulation 606/2013, Recital 10.

<sup>67</sup> Regulation 606/2013, Recital 13.

<sup>68</sup> Regulation 606/2013, Art. 3(1).

The recognition of the protection measure is automatic, meaning that ‘a protection measure ordered in a Member State shall be recognised in the other Member States without any special procedure being required and shall be enforceable without a declaration of enforceability being required’.<sup>69</sup>

A protected person who wishes to invoke their protection measure in another Member State is required to produce:<sup>70</sup>

- 1) A copy of the protection measure;
- 2) A certificate issued by the Member State of origin;<sup>71</sup> and
- 3) Where necessary, a translation or transliteration of the certificate.

The protected person can bring enforcement proceedings in the Member State addressed if necessary, and the enforcement, including the sanctions and procedures relating to the breach of the protection order, are left to the law of that Member State.<sup>72</sup>

There are only limited grounds on which a court in the Member State addressed can refuse to recognise and, where applicable, enforce a protection measure issued in another Member State (upon application by the person causing the risk). These grounds include that the protection order is:

- Manifestly contrary to public policy in the Member State addressed; or
- Irreconcilable with a judgment given or recognised in the Member State addressed.<sup>73</sup>

#### 4.1.3. Problems with the implementation of Regulation 606/2013 in some Member States

The Directive belongs to the ‘European criminal cooperation’ package, and has been transposed into national legislative frameworks through implementation. The Regulation belongs to the ‘European civil cooperation’ package, and applies directly in all Member States except Denmark.<sup>74</sup> In several Member States, it is still lacking full effect. This non-compliance with the Regulation results either from an omission to notify a body responsible to issue a certificate or enforce a protection order (Ireland), or from a negative declaration to the effect

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<sup>69</sup> Protection Measures Regulation, Art. 4(1).

<sup>70</sup> Regulation 606/2013, Art. 4.

<sup>71</sup> See section 5.2.1.2, ‘Practical considerations’, below.

<sup>72</sup> Regulation 606/2013, Art. 4(5).

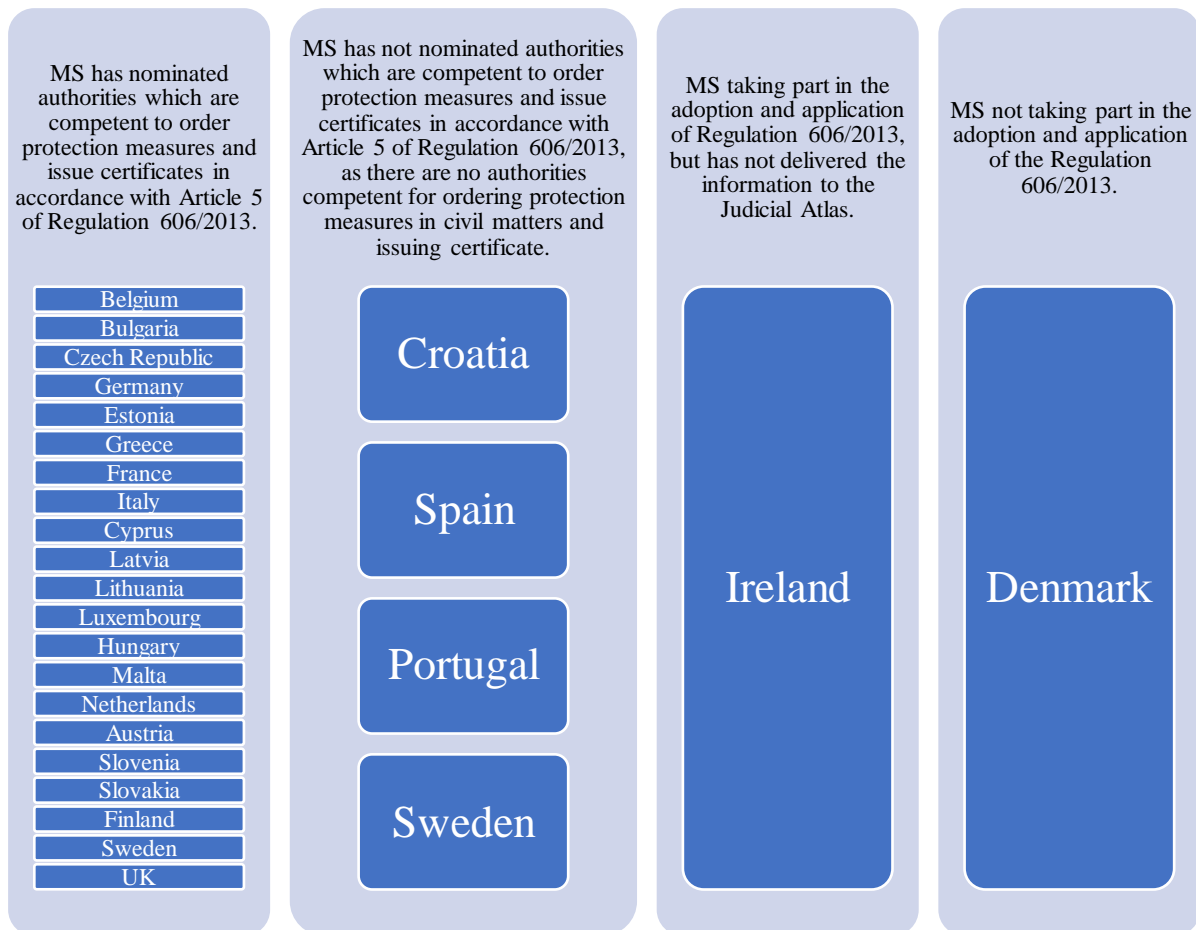
<sup>73</sup> Regulation 606/2013, Art. 13(1).

<sup>74</sup> Denmark does not participate in either the Directive or the Regulation (Directive 2011/99, Recital 42 and Regulation 606/2013, Recital 41).



that there are ‘no authorities competent for ordering protection measures in civil matters and issuing of certificates’ (Croatia, Spain,<sup>75</sup> Sweden, and Portugal).<sup>76</sup>

**Figure 2. National Information Concerning Regulation 606/2013<sup>77</sup>**



A conclusion on mandatory direct application of the Regulation can be reached in respect of the countries that have not nominated authorities to order protection measures and issue certificates. The Court of Justice of the European Union (‘CJEU’) has recently rendered a

<sup>75</sup> It is to be pointed out that the information contained in the Judicial Atlas concerning Spain does not align with the findings of the POAM project. The POAM Project Report on Spain explains that, in Spain, criminal courts can issue both criminal and civil protection measures. Whilst the former can circulate under Directive 2011/99, the latter should be able to circulate under Regulation 606/2013: ‘Protection measures for victims of domestic violence available under Spanish domestic law can have a criminal, civil and even administrative nature. Whilst civil courts can only adopt civil protection measures, Courts for violence against woman can adopt criminal and civil ones, depending on the case. As such, the so-called protection order in Spanish domestic system can only be issued by courts with criminal jurisdiction. In addition, Law 23/2014 resumes the domestic regulation of the EPO into the Criminal Procedural Law. Therefore, EPO can only be obtained in criminal courts and, obviously, on the basis of the existence of a criminal proceeding. Protection measures with civil nature adopted by criminal courts cannot be covered by the EPO. Nevertheless, those measures, as well as the ones adopted by civil courts, may benefit from the mutual recognition system established under Regulation 606/2013. In this regard, following the respective EU norms, it is important to remain attentive to the nature and purposes of the measure, not of the authority that adopts it’: POAM Project Report – Spain, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report\\_Spain.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report_Spain.pdf).

<sup>76</sup> The POEMs Project Final Report explains that ‘In Portugal POs are mainly, if not exclusively, issued in criminal proceedings. Although it is possible to apply for POs in civil proceedings, this rarely happens in practice’: POEMs Project Final Report, p. 54. This is confirmed by the author of the information on Portugal contained in the Judicial Atlas, which adds that civil protection orders can be imposed under Article 70(2) of the Civil Code.

<sup>77</sup> Source: The European e-Justice Portal, ‘European Judicial Atlas in Civil Matters, Mutual Recognition of Protection Measures in Civil Matters’, available at [https://e-justice.europa.eu/content\\_mutual\\_recognition\\_of\\_protection\\_measures\\_in\\_civil\\_matters-352-en.do](https://e-justice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-en.do).

decision in relation to a failure by a Member State to notify the European Commission of notaries as non-judicial authorities exercising judicial functions like courts.<sup>78</sup> The CJEU held that a failure of a Member State to notify the Commission of a body responsible to issue a measure was of a merely indicative value.<sup>79</sup> It is argued here that such failure cannot deprive a protected person of the right to request a certificate under the Regulation. A logical question arises: Where should the protected person seek the certificate? The Regulation clearly indicates that it does not touch upon a national system of judicial functions, but, on the contrary, relies upon them. A formal failure of notification does not affect the substantive situation that a certain body within the national system is responsible for ordering protection measures. Consequently, it is the court issuing a measure corresponding to measures prescribed by Regulation 606/2013 (and Directive 2011/99) that should issue the certificate.

## 4.2. National approaches to protection measures<sup>80</sup>

### 4.2.1. Civil vs criminal protection orders

The Regulation and the Directive were drafted on the assumption that protection orders can be procured mainly through civil and criminal law. Even though most Member States provide for both civil protection orders and criminal protection orders, not all systems fit neatly into the 'civil vs criminal protection orders' dichotomy envisaged by the EU legislator.<sup>81</sup> In particular, civil protection orders are not available in EU countries such as Croatia: instead, protection orders can be obtained in either criminal or misdemeanour proceedings;<sup>82</sup> and criminal protection orders, as such, are not available in Finland, Denmark and Sweden; instead, a distinct 'quasi-criminal' route is used whereby no link with substantive criminal proceedings is required,<sup>83</sup> although the protection order is imposed by the public prosecutor, the Chief of Police, or a district court.<sup>84</sup>

### 4.2.2. Substantive similarities

Protection orders available to victims of domestic violence may be regulated in generic law,<sup>85</sup> or in specific laws on domestic violence.<sup>86</sup> Although the terminology denoting individual types

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<sup>78</sup> Case C-658/17 *WB*, 23 May 2019, ECLI:EU:C:2019:444.

<sup>79</sup> *Ibid.*, para. 48: 'Accordingly, the Republic of Poland's failure to notify the Commission of notaries who exercise judicial functions, as provided for in the second subparagraph of Article 3(2) of Regulation No 650/2012, is of merely indicative value.'

<sup>80</sup> This overview is based on the POAM Project Reports, available at <https://research.abdn.ac.uk/poam/resources/reports/>, and the POEMs Project Final Report.

<sup>81</sup> POEMs Project Final Report, pp. 231 and 240.

<sup>82</sup> POAM Project Report – Croatia, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report\\_Croatia.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report_Croatia.pdf).

<sup>83</sup> POEMs Project Final Report, pp. 231 and 240.

<sup>84</sup> *Ibid.*, p 59.

<sup>85</sup> E.g. Criminal Code (Kazneni zakon), Official Gazette No. 125/11, as amended by the Act on Amendments to Criminal Code (Zakon o izmjenama i dopunama Kaznenog zakona), Official Gazette No. 56/15 (Croatia), see POAM Project Report – Croatia available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report\\_Croatia.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report_Croatia.pdf); Civil Code (Italy), Arts. 342-*bis* and 342-*ter*, Code of Civil Procedure (Italy), Art 737-*bis*, and Code of Criminal Procedure (Italy), Arts. 282-*bis* and 282-*ter*, see POAM Project Report – Italy, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_Italy.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_Italy.pdf); and § 1666 Bürgerliches Gesetzbuch – BGB (Civil Code) (Germany), para. 1666, see POAM Project Report – Germany, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_Germany.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_Germany.pdf).

<sup>86</sup> E.g. Domestic Violence Prevention Act (Zakon o preprečevanju nasilja v družini), Official Gazette, No. 16/08, 68/16 (Slovenia), see POAM Project Report – Slovenia, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_Slovenia.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_Slovenia.pdf); Domestic Abuse (Scotland) Act 2018, see POAM Project Report – United Kingdom, available at <https://research.abdn.ac.uk/wp->

of protection orders may differ across the Member States, all Member States make it possible to impose (in the sphere of civil and/or criminal law) the three prohibitions set out in Regulation 606/2013 and Directive 2011/99: 1) the ban on contacting the protected person; 2) the ban on entering certain areas; and 3) the ban on approaching the protected person.<sup>87</sup>

#### 4.2.3. Protection order procedures

A civil protection order can normally be applied for by a claimant in civil summary proceedings, and can often be imposed *ex parte*.<sup>88</sup> It can generally be issued as a (preliminary) injunction via interlocutory proceedings (although sometimes it is dependent on other (substantive) proceedings, e.g. divorce or proceedings on the merits of the case).<sup>89</sup> Although evidentiary requirements for civil protection orders, to some extent, differ among the Member States, the evidentiary threshold is usually not very high.<sup>90</sup> The victim merely has to demonstrate that she is in need of protection.<sup>91</sup>

In contrast, a criminal protection order is normally imposed by a criminal (investigative) court (usually on request by the police or the public prosecutor) as a pre-trial coercive measure or bail (as a means of preventing the suspect from interfering with the criminal procedure); a restraining order (as a means of preventing the suspect from harassing a specific person(s)); a condition to probation; a condition to a suspended prison sentence, or a condition to a conditional release from prison.<sup>92</sup> Some Member States allow criminal protection orders in pre- or post-trial stages only, although in most Member States they are available in both stages.<sup>93</sup> A criminal protection order is always inseparably linked to criminal proceedings (i.e. there must be a suspicion of a crime),<sup>94</sup> and may be imposed for different types of crimes, some of which are more general (e.g. assault, stalking and rape), and some more specific (e.g. intimate partner violence or domestic abuse).<sup>95</sup> It is usually required that the offender be heard first. *Ex parte* criminal protection orders are possible only in a few Member States, and only in exceptional circumstances (e.g. the suspect cannot be located in spite of serious attempts, or the case requires urgent intervention), and only to the extent that the defendant can challenge the decision in subsequent hearings.<sup>96</sup>

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[content/uploads/sites/15/2020/02/National-report\\_UK.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf); Act on Protection against Domestic Violence (Zakon o zaštiti od nasilja u obitelji), Official Gazette No. 137/2009, 14/2010, 60/2010 (Croatia) POAM Project Report – Croatia.;

<sup>87</sup> POEMs Project Final Report, p. 234.

<sup>88</sup> i.e. without hearing the left-behind father (as long as he has been summoned, and is allowed to appeal the decision, in order to guarantee procedural fairness): POEMs Project Final Report, p. 234. See also POAM Project Reports, available at <https://research.abdn.ac.uk/poam/resources/reports/>. E.g. In Italy, when the measure is granted *ex parte*, the defendant is heard within a few days for the purposes of a confirmation of the measure. POAM Project Report – Italy, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_Italy.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_Italy.pdf).

<sup>89</sup> POEMs Project Final Report, p. 59.

<sup>90</sup> Ibid., p. 242.

<sup>91</sup> Ibid., p. 242.

<sup>92</sup> Ibid., p. 59.

<sup>93</sup> Ibid., p. 231. Only in England and Wales, and the Republic of Ireland, criminal protection orders can be imposed upon the acquittal of the defendant: Ibid., p. 237. See also POAM Project Report – United Kingdom, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_UK.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf).

<sup>94</sup> POEMs Project Final Report, p. 70.

<sup>95</sup> For more details, see POAM Project Reports.

<sup>96</sup> POEMs Project Final Report, p. 71. This may be different in Cyprus, where it possibly suffices that a prosecutor swears under oath that the offence is serious, and that the victim is in need of protection (ibid., fn 49).

Unlike civil protection orders, most criminal protection orders were developed as substitutes for detention or prison and, as such, require a level of violence that will justify an arrest.<sup>97</sup> Moreover, because criminal protection orders are connected to criminal proceedings, the behaviour that will justify an arrest has to be criminalised.

#### 4.2.4. Procedural variances in national legal systems

Despite many commonalities in the regulation of protection order procedures across the Member States, there are also important procedural variances.<sup>98</sup> These concern, inter alia: 1) the range of persons who can apply for a protection order; 2) the interdependence with other proceedings; 3) the application requirements for criminal protection orders, in particular the requisite level of evidence;<sup>99</sup> 4) the possibility of *ex parte* protection orders; 5) the immediate effect of protection orders; 6) the inclusion of mutual children in protection orders; 7) the length of protection order proceedings; 8) the costs of protection of proceedings (i.e. the administrative and court fees involved); 9) the requirement of a legal representation for the victim; 10) the access of the victim to free legal representation;<sup>100</sup> 11) the statutory maximum (if any) and average duration of protection orders; 12) the range of persons who qualify for a protection order; 13) the formal requirements for the formulation of protection orders; and 13) the type of sanctions for breaches of civil protection orders.<sup>101</sup>

#### 4.3. Regulation 606/2013 and Directive 2011/99 in the specific context of international parental child abduction

When it comes to potential utility of the Regulation and the Directive in the specific context of child abduction, the Regulation clearly outclasses the Directive. This is for two sets of reasons: first, reasons pertaining to the key characteristics of criminal protection orders, and second, reasons related specifically to the mutual recognition procedure under the Directive (see below, sections 4.3.1 and 4.3.2. respectively). Nevertheless, the Regulation itself is not flawless, and section 4.3.3. addresses the relative weaknesses of this instrument. This analysis is followed by a set of recommendations, in section 4.4., that have been formulated on the basis of the information set out in the preceding sections.

#### 4.3.1. Reasons related to the key characteristics of criminal protection orders

##### **a. The requirement of a link with criminal proceedings**

Criminal protection orders are not 'autonomous' measures that could be imposed outside the context of criminal proceedings; rather, they are inseparably linked to criminal proceedings. Such proceedings would have to be initiated in the Member State of refuge as a consequence of a criminal act committed by the left-behind father. As the left-behind father usually remains in the State of habitual residence, this scenario is not very likely. Nevertheless, a situation can be envisaged whereby the left-behind father travels to the State

<sup>97</sup> Ibid., p. 242.

<sup>98</sup> As identified by the POEMs project research team in the Project Final Report.

<sup>99</sup> Ideally, a civil protection order should be available merely based on a written (statutory) declaration of the victim (ibid., p. 237).

<sup>100</sup> Ibid., p. 233.

<sup>101</sup> Ibid., pp. 233 and 234.

of refuge and assaults/stalks/threatens the abducting mother there. Criminal proceedings can then be initiated in the Member State of refuge.

Another exception can be envisaged where relevant national legislation of the State of habitual residence has extraterritorial application. For example, in Scotland, an offence of abusive behaviour towards a partner or ex-partner under the Domestic Abuse (Scotland) Act 2018 can be prosecuted in the Scottish courts, even if the course of behaviour by the perpetrator takes place outside the UK (either wholly or partly). This is as long as, at the time the course of conduct occurs, the perpetrator is a UK national or a habitual resident of Scotland.<sup>102</sup> For example, in a case involving a Scottish couple living in Spain, the mother wrongfully removes the child from Spain to Scotland following an extended period of physical and emotional abuse by the father in Spain. If the mother reported the abuse in Scotland, and criminal proceedings were initiated by the State, a protection measure could be issued by the court to protect the mother, if the father was found guilty of the offence.



*Civil protection orders: can be obtained in simple fast-track proceedings,<sup>103</sup> usually independent from proceedings on the merits of the case (although a few Member States have linked them to divorce or other substantive proceedings).<sup>104</sup>*

#### **b. The complexity and length of criminal protection order proceedings**

As criminal protection orders are issued in the course of criminal proceedings, the entire procedure is usually complex and, potentially, lengthy. It is normally required that the offender be heard first. The underlying behaviour must be criminalised, and of sufficient severity to justify an arrest, meaning that the evidential threshold is high. Consequently, if the behaviour (e.g. threatening behaviour, stalking, domestic abuse) is not criminalised, or the crime/requisite level of violence cannot be proven, or the victim does not wish to press criminal charges,<sup>105</sup> no protection will be available to the victim.<sup>106</sup>



*Civil protection orders: can normally be obtained as a (preliminary) injunction via interlocutory proceedings, usually on application by the victim.<sup>107</sup> Even though there is no uniform evidentiary standard across the Member States, the evidentiary threshold is usually not very high, with the victim having to merely demonstrate that she needs protection.<sup>108</sup> A civil protection order can often be imposed ex parte.*

### 4.3.2. Reasons related to aspects of the mutual recognition procedure under Directive 2011/99

#### **a. The recognition of the protection measure is not automatic**

Continuation of the protection measure is not automatic, but presupposes a decision by the executing Member State.<sup>109</sup> As even a mere recognition requires a decision by the executing Member State, the abducting mother will not be protected immediately upon her return to

<sup>102</sup> Domestic Abuse (Scotland) Act 2018, s. 3.

<sup>103</sup> POEMs Project Final Report, p. 242.

<sup>104</sup> See section 4.3.3, '(Relative) weaknesses of the civil protection orders and the Regulation', below.

<sup>105</sup> This is not unusual, as the victim may fear retaliation from the abuser, or not want him to have a criminal record.

<sup>106</sup> POEMs Project Final Report, p. 242.

<sup>107</sup> Ibid. See section 4.3.3, '(Relative) weaknesses of the civil protection orders and the Regulation', below.

<sup>108</sup> POEMs Project Final Report, p. 242.

<sup>109</sup> Directive 2011/99, Art. 9. In particular, the competent authority of the executing State shall (without undue delay) recognise the protection order, and take a decision adopting any measure that would be available under its national law in a similar case.

the State of habitual residence, exposing her to a risk of continued violence by the left-behind father.

Moreover, as the recognition procedure requires the executing State to replace the original protection order with a measure that would be available under its national law in a similar case,<sup>110</sup> it may well be that no such measure will be available under the national law of the executing State. In such circumstances, the executing State merely has to report to the issuing State ‘any breach of the protection measure described in the European protection order of which it is aware’.<sup>111</sup>



*Regulation 606/2013: Automatic recognition procedure. A ‘protected person’ does not need to undertake any court proceedings in the Member State addressed to secure recognition of the measure, because recognition is automatic. The only formal requirement is the presentation of a certificate issued by the Member State of origin. The protection measure is treated as if it had been ordered in the Member State addressed. The Member State addressed does not need to replace the original protection measure with a protection measure under its national law, and it is irrelevant whether the Member State addressed has a protection measure available for similar cases under its own law.*<sup>112</sup>

### **b. The length of the recognition proceedings**

In the light of the summary nature of the return proceedings under the 1980 Hague Convention, the fact that the procedure under Directive 2011/99 requires an ‘extra step’ before the protection order can be recognised raises serious concerns. The length of the recognition proceedings will also be affected by factors such as the overall effectiveness of the criminal justice system in the executing State, and the particulars of the case in question. For example, if the left-behind father was not heard in the protection order proceedings in the issuing State, he will have to be heard in the recognition proceedings.<sup>113</sup>



*Regulation 606/2013: No need to hear the defendant. Once a certificate under Article 5 has been issued, the issuing authority of the State of origin must notify the defendant of the certificate,<sup>114</sup> but, unlike under the Directive, there is no requirement of a prior hearing of the defendant.*

### **c. The behaviour underlying the protection measure must be recognised as criminal in both Member States**

Mutual recognition under Directive 2011/99 can only ensue if both the issuing and the executing Member State criminalise the behaviour underlying the protection order. Some behaviours, e.g. stalking, may be recognised as a crime in the issuing Member State, but not be criminalised in the executing Member State. Therefore, abducting mothers who are returned to a State of habitual residence that does not recognise stalking as a criminal offence may experience difficulties with having their protection orders recognised.<sup>115</sup> Another example is the criminal offence of ‘abusive behaviour towards partner or ex-partner’, created in Scotland by the Domestic Abuse (Scotland) Act 2018. The Act explicitly recognises the range of behaviours that can constitute domestic abuse, including behaviours amounting to coercive and controlling behaviour and psychological abuse, such as controlling activities, behaviour or

<sup>110</sup> Directive 2011/99, Art. 9(1).

<sup>111</sup> Directive 2011/99, Art. 11(3).

<sup>112</sup> POEMs Project Final Report, p. 210; Directive 2011/99, Art. 13(3).

<sup>113</sup> Directive 2011/99, Art. 6(4).

<sup>114</sup> Directive 2011/99, Art. 8.

<sup>115</sup> Cf. POEMs Project Final Report, p. 213.

finances, or isolating the victim from friends or family.<sup>116</sup> This very novel approach to tackling domestic violence is not yet a common occurrence in other Member States. Consequently, as such behaviours are not likely to be recognised as criminal in other Member States, a non-harassment order issued following conviction under the 2018 Act is likely to be refused recognition under the Directive.



*Regulation: N/A.*

#### **d. Extensive grounds for non-recognition**

The grounds for non-recognition of a protection order under Directive 2011/99 are much more extensive than those under the Regulation. In particular, it is open to the executing State to refuse recognition of the protection order on one (or more) grounds set out in Article 10, of which the following two are particularly relevant in the child abduction context:

- the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State;<sup>117</sup> and
- the protection measure relates to a criminal offence which, under the law of the executing State, is regarded as having been committed, wholly or for a major or essential part, within its territory.<sup>118</sup>



*Regulation 606/2013: much more limited grounds for refusal. The grounds for refusal under the Regulation are much more limited than those available under the Directive. Importantly, unlike under the Directive, it is not possible to refuse recognition of the protection measure on the ground that the law of the Member State addressed does not allow for such a measure, based on the same facts.<sup>119</sup> Also, importantly, the Member State addressed may 'under no circumstances' review the substance of the protection measure.<sup>120</sup>*

#### **e. Limited scope of Directive 2011/99**

In order for a protection order to fall within the scope of the Directive, it must be aimed at preventing new criminal acts or reducing the consequences of previous criminal acts.<sup>121</sup> This means that Member States are not under obligation to issue an EPO based on an order that primarily serves aims other than the protection of the victim (e.g. the social rehabilitation of the offender<sup>122</sup> or witness protection).<sup>123</sup> This means that many orders will not be eligible for recognition under the Directive as, in many Member States, criminal protection orders are typically imposed with different motives in mind.<sup>124</sup>



<sup>116</sup> POAM Project Report – United Kingdom, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_UK.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf). Note that the offence needs to be constituted by a course of conduct, so must be, at a minimum, two incidents: *Ibid.*, p. 111.

<sup>117</sup> Directive 2011/99, Art. 10(1)(c). Given the differences among the Member States in tackling domestic violence through criminal law legislation, this ground for non-recognition is likely to limit the level of protection of abducting mothers through criminal protection orders. See sub-section 4.3.2 (c), 'The behaviour underlying the protection measure must be recognised as a criminal offence in both Member States', above.

<sup>118</sup> Directive 2011/99, Art. 10(1)(i). See sub-section 4.3.1 (a) 'The requirement of a link with criminal proceedings' above, concerning extraterritorial application of the Domestic Abuse (Scotland) Act 2018.

<sup>119</sup> Regulation 606/2013, Art. 13(3).

<sup>120</sup> Regulation 606/2013, Art. 12.

<sup>121</sup> Regulation 606/2013, Recital 9.

<sup>122</sup> Directive 2011/99, Recital 9.

<sup>123</sup> Directive 2011/99, Recital 11.

<sup>124</sup> POEMs Project Final Report, p. 240. See e.g. POAM Project Report – Croatia, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report\\_Croatia.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/05/National-report_Croatia.pdf), p. 24.

*Regulation 606/2013: In the case of civil protection orders, it is not possible to exclude from the scope of the Regulation protection orders that would not primarily serve the objective of protecting the victim, as civil protection orders always promote the interests of the victim first.*<sup>125</sup>

#### **f. Assessment of the duration of the victim's stay and the need for protection**

The issuing Member State has considerable discretion when deciding whether to issue an EPO. In particular, Directive 2011/99 directs the issuing Member State to take account of the duration of the victim's stay in the executing Member State, when deciding whether to issue an EPO.<sup>126</sup> It is uncertain how this provision would be applied in the child abduction context, as it is unclear how long the abducting mother would need to stay in the State of habitual residence upon the return. This will depend on the outcome of the substantive proceedings on custody and contact, in the State of habitual residence.

Similarly, the issuing Member State must consider the seriousness of the victim's need for protection when deciding whether to issue an EPO.<sup>127</sup> This requirement 'brings with it a "double risk" assessment for the victim who already had the seriousness of the need for protection recognised in the issuing State'.<sup>128</sup>



*Regulation 606/2013: The duration of the victim's stay in the executing Member State is irrelevant under the Regulation, and there is no such 'double-check', as is permitted under the Regulation.*

### 4.3.3. (Relative) weaknesses of civil protection orders and the Regulation

#### **a. Victim as the applicant**

Civil protection orders are normally issued on application by the victim (or the victim's representative).<sup>129</sup> The abducting mother should, therefore, be informed of the possibility to apply for a protection order that would then be circulated under Regulation 606/2013. Nevertheless, the decision as to whether to apply for a protection order rests with the abducting mother, and should not prejudice her position in the return proceedings.

#### **b. Effectiveness of civil protection orders**

The utility of protection measures is determined by their effectiveness. In theory, criminal protection orders are more effective, as breaches of such orders carry criminal penalties. Nevertheless, although the suspect can be detained for breaching the order, this is not always the case in practice.<sup>130</sup> In contrast, breaches of civil protection orders are often not criminalised,<sup>131</sup> and civil protection orders are often criticised for lacking rigorous enforcement mechanisms. Therefore, caution is needed when determining whether a civil protection order would be appropriate in an individual child abduction case, in particular where credible

<sup>125</sup> Ibid., p. 213.

<sup>126</sup> Directive 2011/99, Art. 6(1).

<sup>127</sup> Ibid.

<sup>128</sup> POEMs Project Final Report, p. 214.

<sup>129</sup> Ibid., p. 68.

<sup>130</sup> Ibid., p. 242.

<sup>131</sup> Nevertheless, generally, there appears to be a trend towards criminalising civil protection orders (e.g. in the UK, breaches of a non-molestation order, a non-harassment order or a domestic abuse interdict have been criminalised: see POAM UK National Report). See also POEMs Project Final Report, p. 149.



allegations of severe violence have been made, and there is a future risk of violence of such severity.<sup>132</sup>

### **c. Sanctions for violations of civil protection orders**

Some Member States have criminalised civil protection orders violations, whereas others impose only civil sanctions in response to such breaches. This will lead to a problem where a civil protection order has been issued in a Member State that has criminalised breaches, and the protection order has been violated upon the abducting mother's return to a State of habitual residence that has not criminalised such breaches and has only civil sanctions available. In such situation, it is expected that an extra court procedure will be required to determine the appropriate civil sanction for the violation.<sup>133</sup>

### **d. Time limit on the effects of recognition**

The Regulation provides that '[i]rrespective of whether the protection measure has a longer duration, the effects of recognition ... shall be limited to a period of 12 months, starting from the date of the issuing of the certificate'.<sup>134</sup> This restriction, however, is not considered significant in the context of child abduction, as the protection of the abducting mother by the protection order is intended to be only temporary – until the substantive issues of custody and contact have been addressed by the courts of the State of habitual residence. In many cases, leave to remove the child from the State of habitual residence will be granted to the abducting mother by the court of the habitual residence, in the substantive proceedings following the return.

### **e. Characterisation**

The problem of characterisation, in this context, refers to determining whether the measure falls within the civil or criminal law domain. As mentioned above, Regulation 606/2013 facilitates the recognition of protection measures issued in civil law matters, whereas Directive 2011/99 applies to protection measures issued in criminal law matters. Neither the Regulation nor the Directive define what gives a protection measure a criminal or a civil character; nevertheless, it is clear that the instruments are not intended to overlap. The Directive is intended to apply only if the harmful conduct is criminalised,<sup>135</sup> i.e. only if the measure is taken to protect against acts that are criminal per se, and it is not sufficient that violations of the protection order are subject to criminal sanctions. Therefore, protection measures against harmful but not criminal conduct do not fall within the scope of the Directive.

The civil, administrative or criminal nature of the authority ordering a protection measure is not determinative for assessing the civil character of the measure,<sup>136</sup> although a protection order issued by the police would not qualify.<sup>137</sup> The Regulation does not leave the interpretation of the term 'civil matters' to national law, but instead provides that the notion should be interpreted autonomously, in accordance with the principles of Union law.<sup>138</sup> This

<sup>132</sup> POEMs Project Final Report, p. 242.

<sup>133</sup> See *ibid.*, pp. 241 and 224.

<sup>134</sup> Regulation 606/2013, Art. 4(4).

<sup>135</sup> Directive 2011/99, Art. 1.

<sup>136</sup> Regulation 606/2013, Recital 10; Directive 2011/99, Recital 10.

<sup>137</sup> Regulation 606/2013, Recital 6.

<sup>138</sup> Regulation 606/2013, Recital 10.

means that the term is to be defined by the CJEU; however, there is no CJEU case-law on this point in the specific context of Regulation 606/2013 yet.

Against this background, one may ask whether it is left to the issuing Member State to decide which of the two instruments applies to its protection measures. In other words, does the issuing of a certificate under the Regulation, rather than of an EPO under the Directive, bind the other Member States? The answer seems to be ‘yes’, as, based on the principle of mutual recognition, protection measures ordered in civil matters ‘should’ be recognised in the Member State addressed as protection measures in civil matters, in accordance with the Regulation,<sup>139</sup> and the necessary adjustments the Member State addressed is allowed to make in the protection measure (e.g. change of address of the protected person) may not affect the ‘civil nature’ of the measure.<sup>140</sup>

#### **f. Jurisdiction**

Unlike other private international law instruments, Regulation 606/2013 does not contain rules on international jurisdiction.<sup>141</sup> Interestingly, the European Commission’s proposal for the Regulation<sup>142</sup> contained a jurisdictional rule; however, this rule was not included in the final version of the instrument. The proposed rule was as follows: ‘The authorities of the Member State where the person’s physical and/or psychological integrity or liberty is at risk shall have jurisdiction’.<sup>143</sup> Had this rule been adopted, how would have it applied in a child abduction scenario? Would the State of abduction have had jurisdiction to issue a protection measure if the left-behind abuser father was still in the State of habitual residence, as would normally be the case? In some cases, the left-behind father may travel to the State of refuge, posing a danger to the abducting mother, or may threaten her with abusive phone calls or correspondence whilst he remains in the State of habitual residence. In both situations, the abducting mother’s ‘physical and/or psychological integrity or liberty’ would be at risk, and the authorities of the State of refuge would have jurisdiction to issue a protection measure.

Does the failure to include a jurisdictional rule for issuing protection measures in the final version of the Regulation mean that jurisdiction is to be governed by other EU instruments or national law? There is no clear answer to this question, as the intention of the legislator on this point is uncertain. Nevertheless, although the jurisdictional basis is unclear, the Regulation seems to accept the possibility that the person causing the risk may reside in a Member State other than the Member State where the protection order was issued. In particular, Articles 8 and 11, which deal with the obligation to notify the person causing the risk of the issuing of the certificate, and of the adjustment of the protection measure, both refer to a situation ‘where the person causing the risk resides in a Member State other than the Member State of origin or in a third country’.

Alternative pathways to determine jurisdiction for issuing a protection order, for circulation under the Regulation in a child abduction case, are set out in section 5.2.1.1 (‘In Practice: Step by Step Guide’) below.

#### **g. Applicable law**

<sup>139</sup> Regulation 606/2013, Recital 14.

<sup>140</sup> Regulation 606/2013, Recital 20.

<sup>141</sup> The same is true of the Directive.

<sup>142</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>143</sup> *Ibid.*, Art. 3.

The Regulation contains no rules on applicable law either.<sup>144</sup> This raises the question whether the law governing protection measures should be determined by the *lex fori* (because of the procedural nature of these measures), by the 1996 Hague Convention (as a matter connected to parental responsibility), by 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') (in the case of general protection measures), or by national conflict rules.<sup>145</sup>

Nevertheless, Article 3(1) of the Regulation<sup>146</sup> seems to suggest that the *lex fori* is applicable. This provision defines protection measures as decisions ordered by the issuing Member State 'in accordance with its national law.' Although, technically, the reference to 'national law' may be interpreted as including relevant provisions of private international law, it is more convincing to assume that the EU legislator adopted this wording precisely with the opposite intention, i.e. in order to make it clear that courts should apply their national law for protection measures without having regard to private international law rules. Otherwise, Article 3(1) would be without any content, as it is clear that the courts should not order a protection measure where it would be against their national law. Therefore, the most convincing interpretation is that the *lex fori* should be applied.

#### 4.4. Recommendations

Based on the above analysis, this Guide makes the following recommendations:

- 1) In the light of concerns over the effectiveness of protective measures, the employment of civil protection orders with a view to making a return order should not be considered in cases where it has been established that there is a future risk of severe violence.
- 2) Given the advantages of civil protection orders over criminal protection orders, and the strengths of the Regulation over the Directive, civil protection orders should be employed in return proceedings. Accordingly, where a type of a protection does not fit neatly into the civil–criminal dichotomy, such protection orders should preferably be circulated under the Regulation rather than under the Directive. This recommendation is supported by the fact that protection measures against harmful, but not criminal, conduct do not fall within the scope of the Directive; accordingly, the Directive should be applied only in circumstances where the harmful conduct is criminalised.<sup>147</sup>
- 3) In the protection order proceedings, the issuing Member State should apply the *lex fori*.
- 4) In the absence of a jurisdictional rule in the Regulation, in the protection order proceedings, the issuing Member State should determine its jurisdiction to issue the protection order in accordance with one of the 'pathways' set out in section 5.2.1.1 ('In Practice: Step by Step Guide') below.

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<sup>144</sup> The same is true of the Directive.

<sup>145</sup> See A. Dutta, 'Cross-Border Protection Measures in the European Union' (2016) 12 *Journal of Private International Law* 169, 171–172.

<sup>146</sup> The same is true of the Directive: see Art. 2(2).

<sup>147</sup> Directive 2011/99, Art. 1.

- 5) The abducting mother should be informed of the possibility to apply for a protection order that would then be circulated under Regulation 606/2013. Nevertheless, the decision as to whether to apply for a protection order rests with the abducting mother, and should not prejudice her position in the return proceedings.

## 5. IN PRACTICE: STEP BY STEP GUIDE

### 5.1. Application of Article 13(1)(b) in cases involving allegations of domestic violence

#### 5.1.1. General points

Although domestic violence against the abducting mother may present an Article 13(1)(b) defence, '[e]vidence of the existence of a situation of domestic violence, in and of itself, is ... not sufficient to establish the existence of a grave risk to the child'.<sup>148</sup> The key question is whether the effect of domestic violence on the child upon his/her return to the State of habitual residence will meet the high threshold of the Article 13(1)(b) exception.<sup>149</sup> This assessment can only reliably be carried out if a prior evaluation of the merits of the allegations of domestic violence has been undertaken by the court in the return proceedings (see section 5.1.2., 'The court's approach to grave risk of harm', below). As Article 13(1)(b) is forward-looking, the court must focus on evaluating the future (as opposed to the past) risks.<sup>150</sup>

The appraisal of the Article 13(1)(b) defence is a general process,<sup>151</sup> meaning, inter alia, that the court *must* take into account all relevant matters, including all available protective measures.<sup>152</sup> Therefore, also where the evaluation of the merits of the allegations of domestic violence has led the court to the conclusion that the effects of domestic violence on the child upon his/her return to the State of habitual residence meet the high standard of the 'grave risk of harm' exception (see section 5.1.2, 'The court's approach to grave risk of harm', below), the court must consider 'the availability, adequacy and effectiveness' of protective measures.<sup>153</sup>

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<sup>148</sup> HCCH Guide, para. 58.

<sup>149</sup> Ibid.

<sup>150</sup> *Re E*, para. 35. See also *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para. 48, and HCCH Guide, p. 27. See also POAM Project Report – United Kingdom, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_UK.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf), p. 95.

<sup>151</sup> *Re S*, para. 22; and *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para. 40.

<sup>152</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, paras. 40–41.

<sup>153</sup> HCCH Guide, para. 59; C. Honorati, 'Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della convenzione dell'Aja del 1980' (2020) 4 *Rivista di diritto internazionale privato e processuale* 816, 820.

## Key question

- Will the effect of domestic violence on the child upon his/her return to the State of habitual residence meet the threshold of the Article 13(1)(b) exception?

## Evaluation of the allegations of DV

- A level of evaluation of the allegations of domestic violence must be undertaken by the court in the return proceedings.

## Protective measures

- The court must consider the availability, adequacy and effectiveness of protective measures to dispel the grave risk of harm to the child.

Figure 2: Application of Article 13(1)(b) in cases involving allegations of domestic violence – General points

In the sections below, this Guide advocates for a ‘thorough, limited and expeditious’<sup>154</sup> investigation of the merits of the allegations of domestic violence (see section 5.1.2, ‘The court’s approach to grave risk of harm’), and provides guidance on how such investigation should be approached, including matters such as evidence, burden of proof and the factors to consider (see section 5.1.3, ‘Assessing the grave risk of harm where allegations of domestic violence have been made’).

### 5.1.2. The court’s approach to protective measures in grave risk of harm cases

Two distinct approaches to cases where factual allegations of domestic violence have been made under the ‘grave risk of harm’ defence have been identified:<sup>155</sup> (1) ‘the assessment of allegations approach’, where the asserted facts relevant to the disputed allegations of domestic violence are tested by the court, considering all available documentary evidence and, at times, oral accounts (Figure 4); and (2) ‘the protective measures approach’,<sup>156</sup> where the court assumes the allegations of domestic violence to be true and, without any assessment of the veracity of the claims, decides whether there are adequate protective measures to ameliorate the grave risk (Figure 5). The latter approach focuses on assessing the adequacy of protective measures as a substitute for investigating the disputed facts.

<sup>154</sup> *X v. Latvia* (Application no.27853/09) Grand Chamber [2013] (hereafter ‘*X v. Latvia*’).

<sup>155</sup> See also HCCH Guide. Previous drafts of the HCCH Guide approached the matter as follows: the initial draft Guide set out and endorsed two alternative approaches – Approach 1 (assumption that the asserted grave risk of harm exists and going straight to considering protective measures) and Approach 2 (investigating whether the facts asserted are of sufficient detail and substance, before proceeding to considering protective measures) – see Hague Conference on Private International Law, ‘Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’, Preliminary Document No. 3 (June 2017), paras. 114–121. The revised draft Guide proposed only Approach 2: see Hague Conference on Private International Law, ‘Draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention’, Preliminary Document No. 4 (February 2019). For further discussion, see O. Momoh, ‘The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting *X v. Latvia* and the Principle of “Effective Examination”’ (2019) 15 *Journal of Private International Law* 626, 651. See also POAM Project Report – United Kingdom, available at [https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report\\_UK.pdf](https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf), pp. 87–95. The report further notes that, ‘[a]dditionally, isolated incidences of alternative approaches have been recorded, although these remain largely non-theorized and conceptually underdeveloped’ (Ibid., p. 87).

<sup>156</sup> See, e.g. *Re E*.

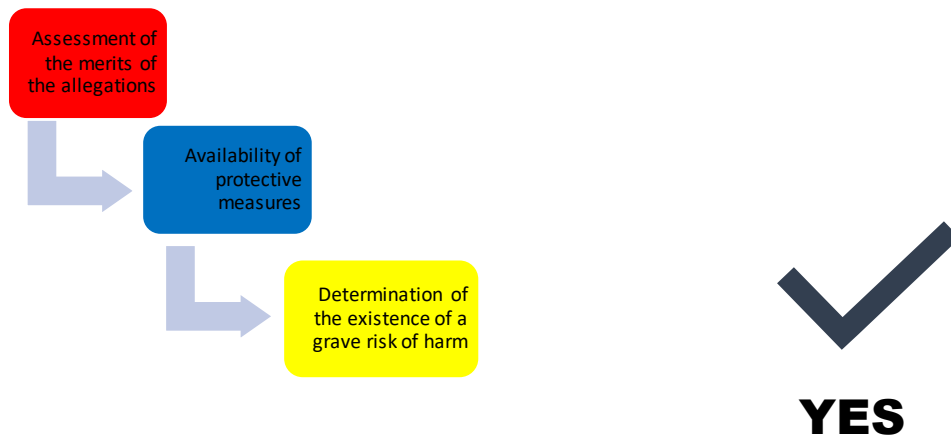


Figure 3: Assessment of allegations approach (i.e. investigating, first, the merits of the allegations)

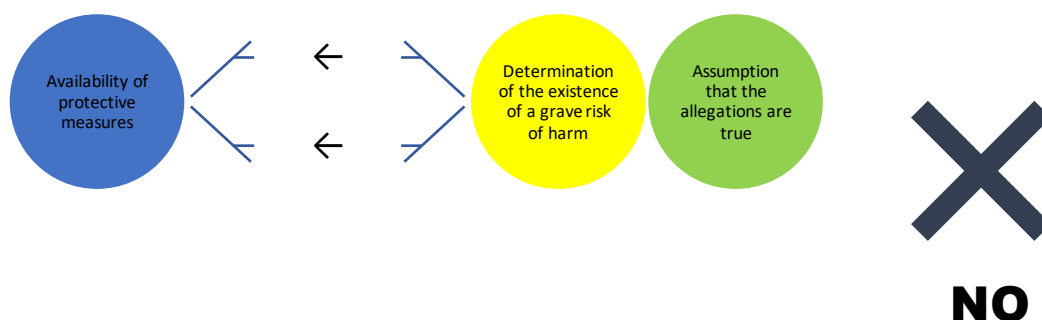


Figure 4: Protective measures approach (i.e. assuming the allegations are true, and considering protective measures first)

This Guide endorses the assessment of allegations approach over the protective measures approach. Importantly, the assessment of allegations approach seems also to correspond with the relevant proposal in the HCCH Guide.<sup>157</sup> The assessment of allegations approach is considered more appropriate as, without determining whether domestic violence is present, it is difficult to see how ‘grave risk’ could reliably be assessed, and effective protective measures determined. The protective measures approach seems to be illogical – as if ‘putting the cart before the horse’ – as it ‘involves the consideration of protective measures to mitigate risk before that risk has been established and assessed’.<sup>158</sup>

<sup>157</sup> HCCH Guide, p. 31.

<sup>158</sup> A. Barnett, ‘Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction – a perspective from England and Wales’, p. 18, in *Eight Letters Submitted to the United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law about a Draft Guide for Article 13(1)(b) and Related Draft Documents that were circulated for comment prior to the October 2017 meeting of the Seventh Special Commission on the 1980 Hague Child Abduction Convention at The Hague*, available at <https://law.ucdavis.edu/faculty/bruch/files/Letters-re-Hague-Convention.pdf>.

Admittedly, the assessment of allegations approach may raise concerns over the length of the return proceedings. Speed, however, should not take priority over the proper assessment of risk, and consideration of the safety of the child and the abducting mother, especially when there is an alleged case of domestic violence which is at least *prima facie* credible. Indeed, the emphasis on speed may encourage courts to minimise or ignore allegations of domestic violence rather than determining them, thus leaving an unassessed risk of harm.

This is, however, not to suggest that the summary nature of return proceedings should be undermined in cases involving allegations of domestic violence. Rather, the assessment of the allegations should be carried out within the boundaries of the return proceedings, through a process of ‘thorough, limited and expeditious’ examination (‘effective examination’).<sup>159</sup> Accordingly, a ‘thorough, limited and expeditious’ examination of disputed allegations of domestic violence should be carried out by the court in return proceedings *before* it proceeds to determining the availability of protective measures. This is important not only for the sake of the child and the abducting mother, but also of the left-behind father who, in the interests of fairness and justice, deserves a degree of adjudication on allegations that may well be exaggerated or, even worse, false.<sup>160</sup> Indeed, the left-behind father may be seriously prejudiced by the stigma attached to measures made against him, either by way of undertakings or injunctions or such as non-molestation orders, occupation orders, or orders that there be no interim contact between him and the child.

### 5.1.3. Assessing the grave risk of harm where allegations of domestic violence have been made

#### 5.1.3.1. Evidence

As domestic violence, by its very nature, usually occurs behind closed doors, supporting or corroborative documentary evidence can be scarce. Indeed, the absence of police or other authority intervention is not untypical of a disempowered victim of domestic violence, demonstrated by psychological conditions such as battered women syndrome. Notwithstanding this, there are cases where the alleged victim is equipped with documentary evidence, usually relating to previous proceedings in the State of habitual residence, seeking protection from domestic violence. Such evidence may take the form of police and/or medical reports, previous non-molestation orders, ouster orders, non-harassment orders, child arrangements orders, or even criminal proceedings relating to specific acts of violence.

Nevertheless, in the context of return proceedings, obtaining such documentary evidence in a cross-border setting, even with the support of Central Authorities, may prove challenging, and at times unsuccessful, within the strict timescales afforded to Hague Convention cases. These dilemmas may tempt the court to avoid undertaking an evaluation of the merits of the allegations of domestic violence, and to simply proceed to considering protective measures (see section 5.1.2, ‘The court’s approach to grave risk of harm’, above, on the ‘Protective

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<sup>159</sup> *X v. Latvia*. For further analysis as to how to strike this difficult balance, see section 5.1.3, ‘Assessing the grave risk of harm where allegations of domestic violence have been made’, below.

<sup>160</sup> O. Momoh, ‘The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting *X v. Latvia* and the Principle of “Effective Examination”’ (2019) 15 *Journal of Private International Law* 626, 651.

measures approach'). This resultant circumstance must be discouraged. Relying on the European Court of Human Rights (Grand Chamber) guidance in the case of *X v. Latvia*, the court should consider the disputed allegations of domestic violence, with the examination leading to a ruling on 'specific reasons [for the decision] in light of the circumstances of the case'.<sup>161</sup> This presupposes that, where available, the court will seek to obtain relevant documentary evidence from the State of habitual residence.

However, where documentary evidence is unavailable (either because it does not exist, or cannot be obtained from the State of habitual residence in a timely manner) the court should hear limited oral evidence to determine the merits of the disputed allegations of domestic violence. Such hearings are sometimes referred to as finding-of-fact or fact-finding hearings. The terminology does appear to carry with it the suggestion of a detailed, highly litigious and contested hearing of great length. This, however, is not what is envisaged here. Indeed, as e.g. English case law demonstrates,<sup>162</sup> it is possible to undertake a limited finding-of-fact hearing to determine disputed allegations of domestic violence, well within the confines of the summary nature of return proceedings.

Further, there are cases where expert psychological or psychiatric evidence is required to address the question of psychological abuse of the mother, and the impact thereof on the child. The diagrams below set out 'the evidence roadmap', separately for documentary evidence (Figure 6), oral evidence (Figure 7) and on navigating the evidence types (Figure 8).

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<sup>161</sup> *X v. Latvia*, para. 107. However, bearing in mind the scope and object of return proceedings, the court should take care to avoid pursuing full proceedings on domestic violence. The likelihood of future coercive and violent behaviour should suffice to meet the requirement under Article 13(1)(b), and to examine the availability of protection measures. See C. Honorati, 'Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della convenzione dell'Aja del 1980' (2020) 4 *Rivista di diritto internazionale privato e processuale* 815.

<sup>162</sup> E.g. *Klentzeris v. Klentzeris* [2007] EWCA Civ 533, where the court explicitly highlighted the requirement in Art. 11(3) of the Brussels IIa Regulation for child abduction cases to be dealt with within six weeks. Thorpe L.J. held that this extended to appeal hearings and, as such, recommended that applications for permission to appeal should be made directly to the trial judge, and that the normal 21-day period for lodging a notice of appeal should be restricted.



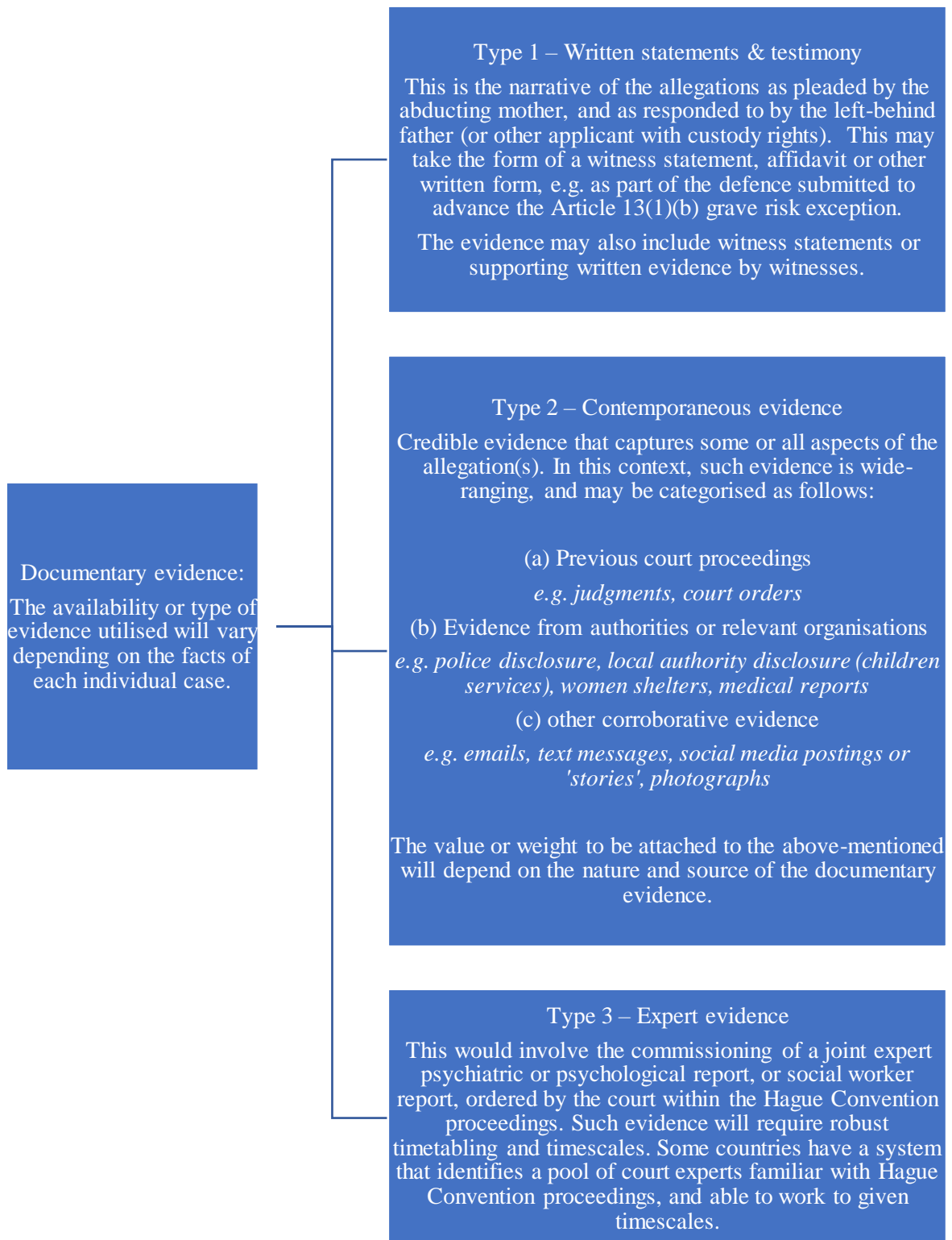


Figure 5 – Evidence roadmap

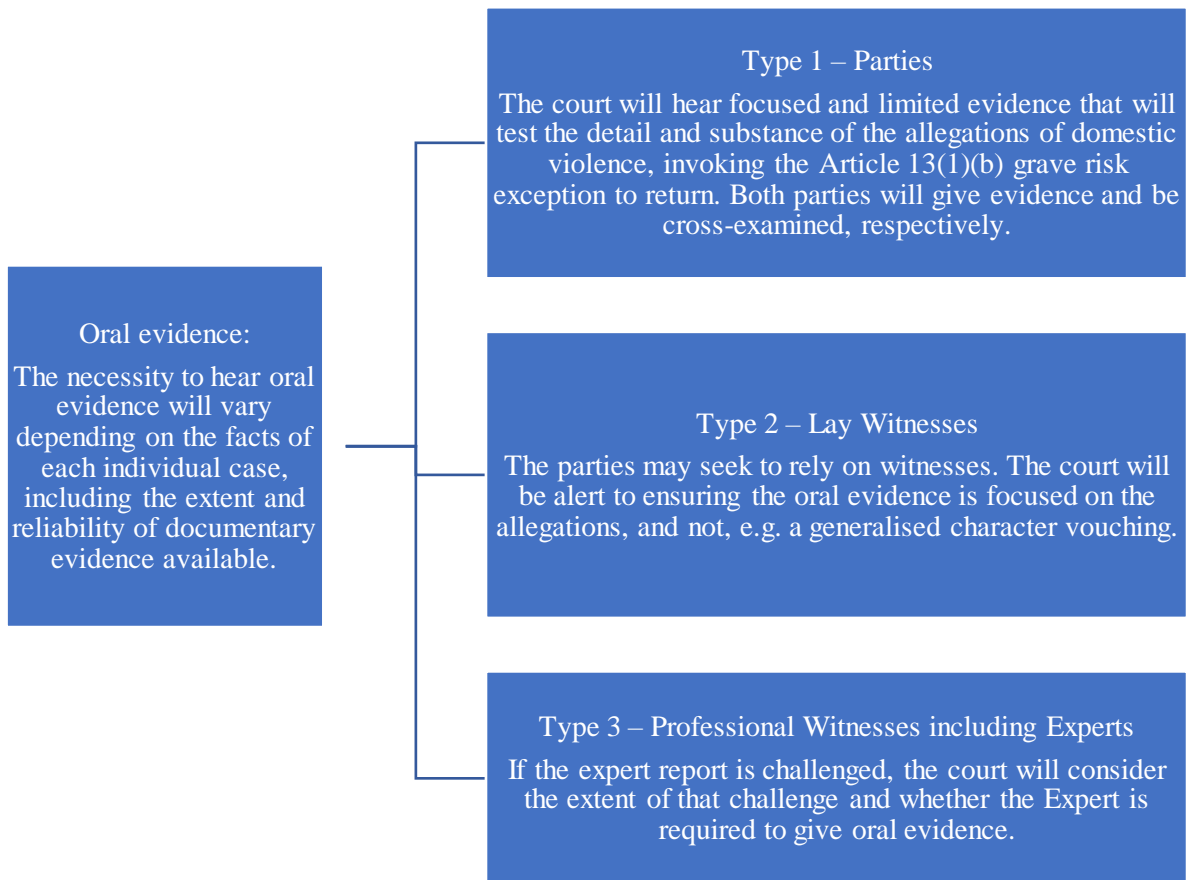


Figure 6 – Oral evidence

## Navigating the Evidence Types

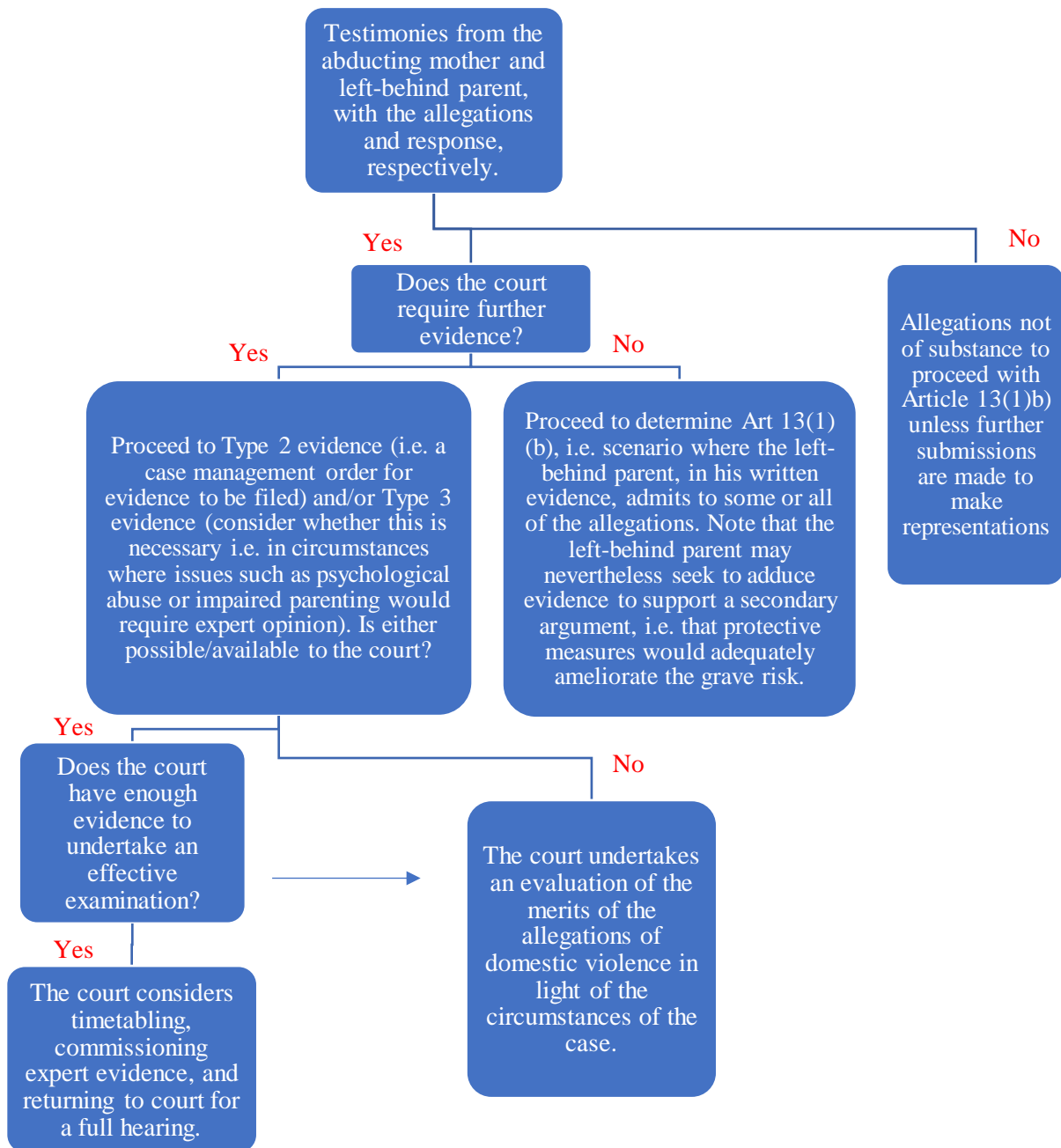


Figure 7 – Navigating the evidence types

### 5.1.3.2. Burden and standard of proof

The burden of proof that Article 13(1)(b) (or any other exception to return) applies, rests with the person opposing the child's return.<sup>163</sup> It is, therefore, for the abducting mother to produce evidence to corroborate the defence raised.

The court should be required to evaluate the evidence against the civil standard of proof, i.e. the ordinary balance of probabilities.<sup>164</sup>

### 5.1.3.3. Factors to consider

#### a) The level of harm

Firstly, Article 13(1)(b) requires that the risk to the child must have reached such a level of gravity that it can be classified as 'grave'. It is not enough for the risk to be 'real'. Although 'grave' denotes the risk rather than the harm, there is a connection between the two.<sup>165</sup> This means that 'a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm'.<sup>166</sup> The Guide adopts case law interpretation that: (1) the risk must be real and of a level of seriousness to constitute 'grave';<sup>167</sup> and (2) the level of harm must be one which a child should not be expected to tolerate.<sup>168</sup>

As set out above, situations which a child should not be expected to tolerate include not only physical or psychological abuse or neglect of the child himself, but also exposure to the harmful effects of witnessing physical or psychological abuse of his own parent, and/or the consequences of such abuse, such as reduced parenting capacities of that parent, or ensuing separation from the abducting parent, should she not be able to return with the child<sup>169</sup> (see Figure 9 below). It follows that, in child abductions motivated by domestic violence, the risk of harm to the mother and the risk of harm to the child may be intertwined to the extent that, even if the domestic violence had been directed solely towards the mother, possible return may constitute a grave risk of harm to the child under Article 13(1)(b) of the Convention. Accordingly, protective measures for the abducting mother should also be considered as protective measures for the child.

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<sup>163</sup> See e.g., *Re E*, para. 32.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Re E*, para. 33.

<sup>166</sup> *Ibid.*

<sup>167</sup> HCCH Guide, p. 26.

<sup>168</sup> *Ibid.*

<sup>169</sup> See section 2.2, 'The grave risk of harm defence and allegations of domestic violence', above.

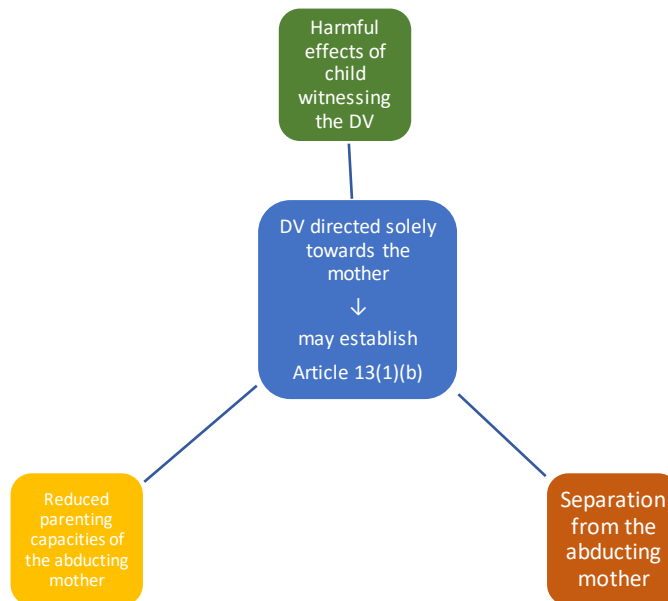


Figure 8- The effect on the child on domestic violence directed solely towards the mother

Secondly, case law shows that the level of harm, where it relates to domestic violence, may be categorised into three groups: i) cases where the abuse is relatively minor; ii) cases that ‘fall somewhere in the middle’; and iii) cases where ‘the risk of harm is clearly grave’.<sup>170</sup> The third category refers to cases where protective measures would not ameliorate the risk, i.e. grave physical, sexual or psychological abuse, significant, severe and repeated violence, with a disregard for the law, to include breaches of previous protection orders. The second category is perhaps the most common, i.e. cases that fall somewhere in the middle, where the abuse is substantially more than minor, but is less obviously intolerable.<sup>171</sup>

The nature, frequency, intensity and circumstances in which the violence was committed will all be relevant considerations.<sup>172</sup>

#### b) The type of harm

In line with the wording of Article 13(1)(b), the harm to the child may take the form of ‘physical harm’, ‘psychological harm’, or ‘other intolerable situation’. The words ‘physical or psychological harm’ are not qualified; however, they ‘gain colour’ from the third limb of the defence (i.e. ‘or otherwise ... placed in an intolerable situation’).<sup>173</sup> ‘Intolerable’ is a strong word, but when applied in the context of Article 13(1)(b) refers to ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.<sup>174</sup>

<sup>170</sup> *Simcox v. Simcox*, 511F.3d 594 (6th Cir. 2007)

<sup>171</sup> *Ibid.*

<sup>172</sup> HCCH Guide, p. 38.

<sup>173</sup> *Re E*, para. 34.

<sup>174</sup> *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, para. 52; and *Re S*, para. 27.

The Guide recognises the significance of, and impact on, the victim of domestic violence at all levels, and acknowledges that different jurisdictions use different definitions of domestic violence/domestic abuse, with ‘domestic violence’ often denoting physical violence, whilst ‘domestic abuse’ usually refers to acts of psychological and emotional abuse.

### c) Impact of domestic violence on the abducting mother’s mental health

Anxieties of an abducting mother about a return with the child which are not based on objective risk to her but are, nevertheless, of such intensity as to be likely, if she is returned, to affect her mental health so as to destabilise her parenting of the child to a point where the child’s situation would become intolerable, can constitute a ‘grave risk of harm’ defence under Article 13(1)(b).<sup>175</sup> Therefore, the court may determine whether the risk is the result of objective reality, or of the abducting mother’s subjective perception of reality,<sup>176</sup> or whether the mother’s anxieties are reasonable or unreasonable.<sup>177</sup> This means that if the court concludes that there is a grave risk of harm to the child, the source of the risk is not the determining factor. It follows that the ‘grave risk of harm’ defence may successfully be established, for example, ‘where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child’.<sup>178</sup>

The court shall, however, examine an assertion of intense anxieties not based upon objective risk very critically, and shall consider whether it can be dispelled through protective measures.<sup>179</sup> However, if there is enough evidence for the court to make a conclusion as to what the objective reality is for the child, the court does not need to proceed to examining the mother’s subjective perceptions.<sup>180</sup>

The above reasoning can, analogically, be applied to a situation where it is the child (rather than the abducting mother) who holds intense anxieties about a return, not based on the objective reality, which would amount to the child’s situation on return being intolerable.<sup>181</sup>

## 5.2. Protective measures as civil law measures: Regulation 606/2013

### 5.2.1. Outgoing protection measures

#### 5.2.1.1. Jurisdiction, cross-border circulation and applicable law

For protection measures ordered in the State of refuge to be circulated (i.e. recognised and enforced) in other Member States, including the State of habitual residence, the court issuing the protection measures must first establish its international jurisdiction. As explained above,<sup>182</sup> the Regulation, strangely, contains no rules on jurisdiction. Therefore, other international instruments must be resorted to for this purpose. The ‘pathways’ below, to

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<sup>175</sup> *Re E*, para. 34; *Re S*, para. 34.

<sup>176</sup> *Re E*, para. 34; *Re S*, para. 31.

<sup>177</sup> *Re S*, para. 34.

<sup>178</sup> *Re E*, para. 34.

<sup>179</sup> *Re S*, para. 27.

<sup>180</sup> *Ibid.*, para. 29. See also *B v. P* [2017] EWHC 3577 (Fam), para. 67.

<sup>181</sup> *B v. P* [2017] EWHC 3577 (Fam), para. 66.

<sup>182</sup> See section 4.3.3, ‘(Relative) weaknesses of civil protection orders and the Regulation’, above.

establish jurisdiction to issue protection measures and secure their enforceability, under the Regulation, offer five different approaches for application in different jurisdictions and/or factual case scenarios.

As explained above,<sup>183</sup> Regulation 606/2013 does not contain any rules on applicable law. In the absence of such rules, the court or other authority of the Member State of origin that has been seised with an application for a protection measure under the Regulation shall apply the *lex fori* in the protection order proceedings.

a. Protective measures for the abducting mother as indirect protective measures for the child – issued by the Hague Convention return court in the return proceedings

The underlying rationale for the three pathways below is that protective measures to protect the mother also serve as measures for the protection of the child, i.e. to ameliorate the grave risk of psychological harm or other intolerable situation to the child. As such, each of these pathways presumes that the measures for the protection of the abducting mother will be taken by the Hague Convention return court in the course of the return proceedings. These measures will then be circulated under Regulation 606/2013, which establishes ‘rules for a simple and rapid mechanism for the recognition of protection measures ordered in a Member State in civil matters’.<sup>184</sup> Although Article 2(3) of Regulation 606/2013 states that the Regulation shall not apply to protection measures falling within the scope of the Brussels Ila Regulation, it is suggested here that a ‘functional’ interpretation of Article 2(3) be adopted.<sup>185</sup> Accordingly, as Regulation 606/2013 contains no rules on international jurisdiction, Brussels Ila jurisdictional rules, namely Article 20 or Article 11(4), have to be relied on (see below, Figures 10 and 11, respectively). However, measures for protection against domestic violence taken under either of these jurisdictional bases cannot be recognised and enforced under Brussels Ila (see below). Therefore, such measures for protection against domestic violence as ‘special’ measures of protection should be able to circulate under Regulation 606/2013.<sup>186</sup>

**Pathway 1: Jurisdiction based on Article 20 of the Brussels Ila Regulation (matters related to parental responsibility)**

Article 20 of the Brussels Ila Regulation gives jurisdiction to the courts of the State of refuge, based on the presence of the child on the territory of that Member State. Article 20(1) states:

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in

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<sup>183</sup> Ibid.

<sup>184</sup> Regulation 606/2013, Art. 1.

<sup>185</sup> In other words, it is proposed here that the purposive approach to statutory interpretation should be adopted when interpreting Article 2(3). According to this approach, the courts should construe statutory language in accordance with the object and intent of the legislation. A principal corollary to the teleological method is the doctrine of ‘effectiveness’, invariably called by its French name, ‘*effet utile*’. The doctrine provides that, once the purpose of a provision is clearly identified, its detailed terms will be interpreted so ‘as to ensure that the provision retains its effectiveness’: K. Gombos, ‘EU Law Viewed Through the Eyes of a National Judge’, p. 4, available at [https://ec.europa.eu/dgs/legal\\_service/seminars/20140703\\_gombos\\_speech\\_en.pdf](https://ec.europa.eu/dgs/legal_service/seminars/20140703_gombos_speech_en.pdf), citing K. Lenaerts, ‘L’égalité de traitement en droit communautaire. Un principe unique aux apparences multiples en Cahiers de droit européen’ 1991, pp. 3–41, particularly p. 38.

<sup>186</sup> It is believed that such interpretation does not contradict Recital 11, which explains that Regulation 606/2013 ‘should not interfere with the functioning of the Brussels Ila Regulation’ and, where possible, ‘[d]ecisions taken under the Brussels Ila Regulation should continue to be recognised and enforced under that Regulation’.

respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

The problem with Article 20, however, is that protective measures taken under this provision are not enforceable outside of the territory of the Member State where they were taken, according to the CJEU decision in *Purrucker*<sup>187</sup> (although this will change after 1 August 2022, when Brussels IIb becomes applicable).<sup>188</sup> Nevertheless, on a functional construction of Regulation 606/2013, this Guide envisages the possibility that protective measures are circulated under Regulation 606/2013 (see above, and Figure 10 below).



Figure 9: Pathway 1

### **Pathway 2: Jurisdiction based on Article 11(4) of the Brussels IIa Regulation ('adequate arrangements' to secure a safe return of the child)**

Arguably, Article 11(4) of the Brussels IIa Regulation can be seen as a ground of jurisdiction for 'adequate arrangements' which would guarantee a safe return of the child in cases involving the 'grave risk of harm' defence. Article 11(4) of Brussels IIa states:

A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

Article 11(4) can be used also as a jurisdictional ground for measures to protect the mother in return proceedings involving allegations of domestic violence. On a functional construction

<sup>187</sup> *Bianca Purrucker v. Guillermo Vallés Pérez*, Case C-256/09, 15 July 2010.

<sup>188</sup> Brussels IIb (Council Regulation (EU) 2019/1111 of 25 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)), Art. 100. After 1 August 2022, cross-border circulation of protection measures issued under Article 20 of the Brussels IIa Regulation will not need to be secured through Regulation 606/2013, as it will be facilitated by the Brussels IIb Regulation. Nevertheless, the underlying considerations concerning the approach to the grave risk of harm set out in section 5.1, 'Application of Article 13(1)(b) in cases involving allegations of domestic violence', above will remain relevant.



of Regulation 606/2013, this Guide envisages the possibility that such protective measures are then circulated under Regulation 606/2013 (see above, and Figure 11 overleaf).



Figure 10: Pathway 2

### **Pathway 3: Jurisdiction based on Article 11 of the 1996 Hague Protection Convention**

Article 11 of the 1996 Hague Convention provides for the jurisdiction to issue measures based on the presence of the child on the territory of the State of refuge. Article 11(1) provides:

In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

Unlike protective measures taken under Article 20 of the Brussels IIa Regulation, protective measures taken under Article 11 of the 1996 Hague Protection Convention are enforceable outside of the territory of the Contracting State where they were issued. Nevertheless, circulation of the protective measures under Regulation 606/2013 is more advantageous than under the Convention, as the recognition mechanism under the Regulation is simpler than the recognition procedure under the 1996 Convention (no declaration of enforceability is needed under the Regulation). Therefore, circulation of the measures of protection for the child and the mother should be facilitated by Regulation 606/2013, unless the State of habitual residence is a non-EU Member State (e.g. the United Kingdom). In such cases, circulation of the measures would be facilitated by the 1996 Hague Convention (Figure 12 overleaf).



Figure 11: Pathway 3

b. Protective measures for the abducting mother as self-standing measures – issued in proceedings that are separate from the Hague Convention return proceedings

The below ‘pathway’ to establish jurisdiction to issue protection measures, and secure their circulation under Regulation 606/2013, offers an approach that is distinct from those explored in the section ‘Protective measures for the abducting mother as indirect protective measures for the child – issued by the Hague Convention return court in the return proceedings’ above. The underlying rationale for the pathway below is that protective measures are taken in the State of refuge in proceedings that are separate from the Hague Convention return proceedings. The protective measures will then be circulated under Regulation 606/2013.

**Pathway 4: Jurisdiction based on Article 7(2) of the Brussels Ia Regulation<sup>189</sup>**

Article 7(2) of the Brussels Ia Regulation makes provision for the jurisdiction to make protective measures on the basis of a tort ‘where the harmful event may occur’ (i.e. the State of refuge).

Article 7(2) states:

A person domiciled in a Member State may be sued in another Member State:

...

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

In order for Article 7(2) to be applicable, the left-behind father would either need to be physically present in the State of refuge, or have threatened the abducting mother via electronic means (telephone, email) of his intention to cause harm to/assault the mother in the State of refuge. It is envisaged here that the protection order would be circulated under

<sup>189</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.

Regulation 606/2013 rather than under Brussels Ia. The rationale is that the judgment is concerned with a specific type of protection measure that is governed by a dedicated instrument – Regulation 606/2013. However, the question is open whether Regulation 606/2013 ousts Brussels Ia. This was suggested by the European Commission in their Proposal, but Regulation 606/2013 – despite setting out its delineation with Brussels Ia – remains silent on that question. Therefore, one could apply both instruments as alternatives to one another. At least once the expiry date of the Article 5 certificate under Regulation 606/2013 has been reached, a cross-border enforcement under Brussels Ia could be possible. Recital 16 to Regulation 606/2013 points in this direction, as it says that the provisions of the Regulation ‘should be without prejudice to the right of the protected person to invoke that protection measure under any other available legal act of the Union providing for recognition’. It has, however, to be noted that, according to the CJEU,<sup>190</sup> provisional measures are only enforceable under the Brussels I regime if the respondent was heard ( cf., now, Article 2(a)(2) Brussels Ia). However, even in terms of such *ex parte* measures, these preconditions will be met after the expiry period of the certificate under Regulation 606/2013 has elapsed. An *ex parte* protection measure can only be enforced under Article 8 of Regulation 606/2013 if the certificate has been brought to the notice of the person causing the risk.

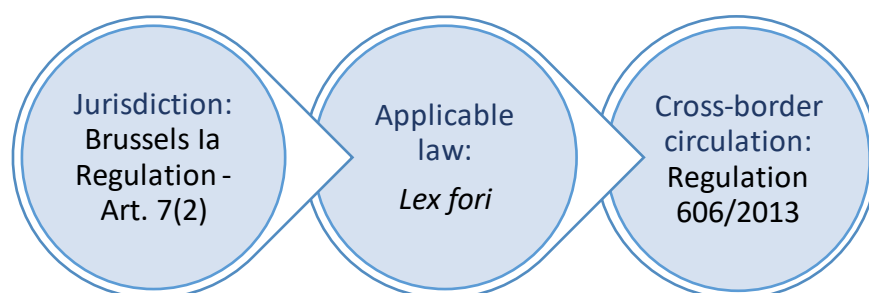


Figure 13: Pathway 4

#### 5.2.1.2. Practical considerations

##### Formulation of the prohibitions in the protection order

Within the limits of the national law, the scope and duration of the protection order should be formulated carefully, taking account of the facts of the case.<sup>191</sup> The protection order should afford protection to the abducting mother at her place of residence, place of work, or any other place which she visits regularly, e.g. the residence of close relatives, or the child’s school.<sup>192</sup>

<sup>190</sup> *Denilauler*, Case 125/79, 21 May 1980.

<sup>191</sup> Cf. POEMs Project Final Report, p. 244.

<sup>192</sup> Regulation 606/2013, Recital 20.

- ▶ Regardless of whether the place in question is described in the protection order by a specific address, or by reference to a designated area which the left-behind father may not approach or enter, the recognition of the obligation imposed by the protection order relates to the purpose which the place serves for the abducting mother, rather than to the specific address.<sup>193</sup>
- ▶ Nevertheless, ideally, the prohibited areas should be designated in radiuses (i.e. metres/kilometres/miles) rather than by naming streets. This will make it easier to transpose the protection order in the State of habitual residence upon the abducting mother's return.<sup>194</sup>

### Inclusion of mutual children in the protection order

If the issuing authority is different from the Hague Convention return court, the two authorities should cooperate in order to ensure that the resulting protection order takes into account the specific circumstances of the case that stem from the child abduction situation. In particular, the authority dealing with the protection order application should determine, taking account of possible existing contact rights of the left-behind father, whether the abducted child should also be included in the protection order (if permitted by national law).<sup>195</sup> If the left-behind father also poses a risk to the child, and there is a no contact order in place in the State of habitual residence, the protection order should also always include the child (if permitted by national law). If the issuing authority considers that the left-behind father also poses a risk to the child, but there is nevertheless a contact order in place in the State of habitual residence, the child should still be included in the protection order (if permitted by national law), however, the possibility that the recognition and, where applicable, enforcement of the protection order may be refused upon possible application by the left-behind father, under Article 13 (b) of Regulation 606/2013, should be borne in mind.<sup>196</sup> In such circumstances, the abducting mother should be advised to seek a no-contact order, under Article 11 of the 1996 Hague Convention, as an urgent measure of protection from a competent court in the State of refuge.<sup>197</sup> If the issuing authority considers that the left-behind father does not pose a risk to the child, and the exercise of contact would not hinder the protection of the abducting mother (e.g. the handover of the child would be facilitated by a third person), the protection order should allow for continued contact between the child and the left-behind father.<sup>198</sup> If the issuing authority considers that the left-behind father does not pose a risk to the child, but the exercise of contact would hinder the protection of the abducting mother, the issuing authority should consider ordering that the exercise of contact be facilitated, for example, through a contact centre. Alternatively, should the prospect of continued contact cause anxiety to the abducting mother, she should be advised to seek a no-contact order, under Article 11 of the 1996 Hague Convention, as an

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<sup>193</sup> Ibid.

<sup>194</sup> Cf. POEMs Project Final Report, p. 222.

<sup>195</sup> Cf. POEMs Project Final Report, p. 245.

<sup>196</sup> Article 13 of Regulation 606/2013 states: 'The recognition and, where applicable, the enforcement of the protection measure shall be refused, upon application by the person causing the risk, to the extent such recognition is: ... (b) irreconcilable with a judgment given or recognised in the Member State addressed.'

<sup>197</sup> Depending on the national rules of internal jurisdiction, such competent court may coincide with the court dealing with the return application.

<sup>198</sup> Cf. POEMs Project Final Report, p. 245.

urgent measure of protection from a competent court in the State of refuge.<sup>199</sup> This measure would be enforceable in the State of habitual residence under Article 23 of the 1996 Hague Convention on a temporary basis, until the substantive matters of custody and contact have been determined by the court of the State of habitual residence.

### The certificate under Article 5 of Regulation 606/2013

#### ► *Application for Article 5 certificate by the abducting mother*

An abducting mother, as a protected person under the Regulation who has been granted a protection order, will apply to the court or other authority that issued the order ('the issuing authority') for a certificate, so that the measure is recognised across the EU.<sup>200</sup> Ideally, the abducting mother should apply for the certificate at the same time as applying for the protection order; however, it shall be open to the abducting mother to apply for the certificate at any time after such application, provided that the protective measure is still in force.<sup>201</sup> Alternatively, it is suggested here that the court issuing the protection order should consider issuing the certificate *ex officio*, given the presence of the cross-border element from the outset of the proceedings.<sup>202</sup>

#### ► *Standard form*

Upon a receipt of such application, the issuing authority shall issue the certificate, following a multilingual standard form established by the European Commission in accordance with Article 19 of the Regulation, and available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1600253873672&uri=CELEX:32014R0939>. There is no right of appeal against the issuing of the certificate.<sup>203</sup>

#### ► *Requirements for the issuing of the certificate*

The Regulation sets out three requirements that need to be met before the certificate may be issued:

- 1) The certificate may only be granted where the protection measure has been brought to the notice of the left-behind father (i.e. the person causing the risk).<sup>204</sup> This obligation must be carried out in accordance with the law of the Member State of origin.
- 2) Where the protection measure was ordered in default of appearance, the left-behind father must have been informed of the initiation of the proceeding in sufficient time, and in such a way, as to enable him to arrange for his defence.<sup>205</sup>



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<sup>199</sup> Depending on the national rules of internal jurisdiction, such competent court may coincide with the court dealing with the return application.

<sup>200</sup> Regulation 606/2013, Art. 5.

<sup>201</sup> Cf. Family Procedure Rules 2010, SI 2010/2955, r. 38.2 (England and Wales).

<sup>202</sup> As opposed to the cross-border element arising subsequently.

<sup>203</sup> Regulation 606/2013, Art. 5(2).

<sup>204</sup> Regulation 606/2013, Art. 6(1).

<sup>205</sup> Regulation 606/2013, Art. 6(2).

This obligation will normally be met by serving the left-behind father with the document which instituted the protection order proceeding (or an equivalent document).<sup>206</sup> The service shall be carried out in accordance with the law of the Member State of origin.

- 3) Where the protection measure was ordered in *ex parte* proceedings (i.e. under a procedure that does not provide for prior notice to be given to the person causing the risk), the certificate may only be issued if the left-behind father had the right to challenge the protection measure.<sup>207</sup> The right to challenge the protection measure must have existed under the law of the Member State of origin.

► *Content of the certificate*

The certificate must contain the following information:

- (a) the name and address/contact details of the issuing authority;
- (b) the reference number of the file;
- (c) the date of issue of the certificate;
- (d) details concerning the abducting mother: name, date and place of birth, where available, and an address to be used for notification purposes, preceded by a conspicuous warning that that address may be disclosed to the left-behind father;
- (e) details concerning the left-behind father: name, date and place of birth, where available, and address to be used for notification purposes;
- (f) all information necessary for enforcement of the protection measure, including, where applicable, the type of the measure and the obligation imposed by it on the left-behind father and specifying the function of the place and/or the circumscribed area which the left-behind father is prohibited from approaching or entering, respectively;<sup>208</sup>
- (g) the duration of the protection measure;
- (h) the duration of the effects of recognition pursuant to Article 4(4);
- (i) a declaration that the above requirements for the issuing of the certificate have been met (Article 6);
- (j) information on the rights granted under Articles 9 and 13;
- (k) for ease of reference, the full title of the Regulation.<sup>209</sup>

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<sup>206</sup> Ibid.

<sup>207</sup> Regulation 606/2013, Art. 6(3).

<sup>208</sup> See also Regulation 606/2013, Recital 21.

<sup>209</sup> Regulation 606/2013, Art. 7.

► *Notification of the certificate*

The certificate, and the fact that it results in the recognition and, where applicable, in the enforceability of the protection measure in all Member States, must be brought to the notice of the person causing the risk.<sup>210</sup>

- The notification obligation rests on the issuing authority of the Member State of origin.<sup>211</sup>
- The notification of the left-behind father shall be effected by registered letter with acknowledgment of receipt or equivalent.<sup>212</sup>

► *Transliteration or translation*

The abducting mother may request the issuing authority to provide her with a transliteration and/or a translation of the certificate.<sup>213</sup> Ideally, the abducting mother should make such request at the time of the application for the certificate; however, it shall be open to her to make the request at any time after the application for the certificate, as long as the certificate is still in force.<sup>214</sup>

- For this purpose, the issuing authority will use the previously mentioned multilingual form.
- The transliteration or translation shall be into the official language, or one of the official languages, of the Member State addressed, or into any other official language of the EU institutions which that Member State has indicated it can accept.<sup>215</sup>

► *No legalisation of documents*

Importantly, no legalisation of documents or other similar formality is required under the Regulation.<sup>216</sup>

► *Rectification or withdrawal*

The certificate may only be rectified or withdrawn if there is a clerical error, or if it was clearly granted wrongly<sup>217</sup>

- An application for rectification of an Article 5 certificate shall be made to the court or other authority that issued the order. It should be possible for the certificate to be

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<sup>210</sup> Regulation 606/2013, Art. 8(1).

<sup>211</sup> Ibid.

<sup>212</sup> Regulation 606/2013, Art. 8(2). This rule applies as the left-behind father is resident in a Member State other than the Member State of origin. In England and Wales, for example, the notification is carried out 'by sending it by registered letter with acknowledgement of receipt or confirmation of delivery or equivalent to the last known place of residence of that person': Family Procedure Rules 2010, SI 2010/2955, r. 38.7.

<sup>213</sup> Regulation 606/2013, Art. 5(3).

<sup>214</sup> Cf. Family Procedure Rules 2010, SI 2010/2955, r. 38.4 (England and Wales).

<sup>215</sup> Regulation 606/2013, Art. 16(2).

<sup>216</sup> Regulation 606/2013, Art. 15.

<sup>217</sup> Regulation 606/2013, Art. 9(1).

rectified either on application by the abducting mother or the left-behind father, or by the issuing authority on its own initiative.<sup>218</sup>

- An application for withdrawal of an Article 5 certificate shall be made by the abducting mother or the left-behind father to the issuing authority. It should also be possible for the issuing authority to withdraw the certificate on its own initiative.<sup>219</sup>

► *Further certificate following suspension, limitation or withdrawal of the original certificate*

A further certificate may be granted, reflecting any suspension, limitation or withdrawal of the original protection measure.<sup>220</sup> Like for Article 5, the European Commission has established a standard multilingual form for the purpose of Article 14.<sup>221</sup> The form is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1600253873672&uri=CELEX:32014R0939>.

## 5.2.2. Incoming protection measures

### 5.2.2.1. Adjustment of factual elements (Article 11(1))

Upon the abducting mother's return to the State of habitual residence, the protection order may need to be adapted to suit the new circumstances. This shall be carried out through adjusting the factual elements of the protection measure in the Member State addressed, with a view to giving the protective measure effect in that Member State,<sup>222</sup> for example by replacing the address of the abducting mother in the State of refuge with her address in the State of habitual residence.

► *Factual elements*

Factual elements include the address; the general location; or the minimum distance the person causing the risk must keep from the protected person, the address or the general location.<sup>223</sup>

► *The procedure for the adjustment*

The adjustment shall be carried out on application to the court made by the protected person.<sup>224</sup> The procedure for the adjustment of the protection measure is governed by the law of the Member State addressed.<sup>225</sup> Similarly, in the event that an appeal is lodged by either the abducting mother or the left-behind father against the adjustment of the protection measure, the appeal procedure will be governed by the law of the Member State addressed.<sup>226</sup> Importantly, the lodging of an appeal does not have suspensive effect.<sup>227</sup>

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<sup>218</sup> Cf. Family Procedure Rules 2010, SI 2010/2955, r.38.8. (UK – England and Wales).

<sup>219</sup> *Ibid.*, r. 38.9.

<sup>220</sup> Regulation 606/2013, Art. 14.

<sup>221</sup> Regulation 606/2013, Art. 19.

<sup>222</sup> Regulation 606/2013, Art. 11(1).

<sup>223</sup> Regulation 606/2013, Recital 20.

<sup>224</sup> Cf. Family Procedure Rules 2010, SI 2010/2955, r. 38.12 (England and Wales).

<sup>225</sup> Regulation 606/2013, Art. 11(2).

<sup>226</sup> Regulation 606/2013, Art. 11(5).

<sup>227</sup> *Ibid.*



► *The notification of the left-behind father of the adjustment of the protection measure*

The left-behind father must be notified of the adjustment of the protective measure.<sup>228</sup> The notification shall be effected in accordance with the law of the Member State addressed.<sup>229</sup> The law of the Member State addressed will also govern situations such as when the whereabouts of the person causing risk are unknown, or that person refuses to accept receipt of the notification.<sup>230</sup>

► *The type and civil nature of the protection measure must not be affected*

The adjustment of factual elements may not affect the type and the civil nature of the protection measure.<sup>231</sup>

## 6. CONCLUSION

The POAM project has affirmed that the protection of abducting mothers in return proceedings is not ‘one size fits all’, and the mechanisms for jurisdiction and enforcement also require careful thought and consideration, taking account of the pertinent national law. As highlighted in the Guide, the approach to the assessment of the grave risk of harm plays a vital part in this process, as to understand properly the grave risk of harm posed is to be better placed to effectively assess and protect children through protecting their mothers. The POAM research project critically analysed and identified four pathways to jurisdiction and cross-border circulation of measures for the protection of abducting mothers. These pathways fall into two separate categories: (1) protective measures for the abducting mother as indirect protective measures for the child, i.e. issued by the Hague Convention return court in the return proceedings; and (2) protective measures for the abducting mother as self-standing measures, i.e. issued in proceedings that are separate from the Hague Convention return proceedings. In the first category, to achieve jurisdiction and cross-border circulation of protective measures, there are three pathways, all using *lex fori* as the applicable law. These pathways are:

- a) Jurisdiction based on Article 20 Brussels Ila Regulation, with circulation under Regulation 606/2013;
- b) Jurisdiction based on Article 11(4) Brussels Ila Regulation with circulation under Regulation 606/2013;
- c) Jurisdiction based on Article 11 of the 1996 Hague Convention, with circulation under Regulation 606/2013 or the 1996 Hague Convention (non-EU state).

In the second category, the following pathway is recommended, again using *lex fori* as the applicable law:

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<sup>228</sup> Protection Measures Regulation, Art. 11(3).

<sup>229</sup> Protection Measures Regulation, Art. 11(4).

<sup>230</sup> Regulation 606/2013, Art. 11(4).

<sup>231</sup> Protection Measures Regulation, Recital 20.

- a) Jurisdiction based on Article 7(2) Brussels Ia Regulation with circulation under Regulation 606/2013.

There are individual factors to be considered in deciding which pathway to adopt. These factors comprise circumstances of the individual case, and requirements of the national law of the State of refuge. Accordingly, whilst there is no singular ‘best practice’ to fit all child abduction cases committed against the background of domestic violence, there will inevitably be a Best Practice for each individual case. Thus, the Best Practice Guide aims to achieve a uniform appreciation and understanding of each pathway, to enable the best protective outcome for each individual child, through their mother, in the Hague Convention return proceedings.

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## GLOSSARY

Abducting mother – a mother who has wrongfully removed or retained her child(ren) across international borders, and is involved in return proceedings under the 1980 Hague Child Abduction Convention and the Brussels IIa Regulation.

Brussels IIa Regulation – 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.

1980 Hague Abduction Convention – the 1980 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Left-behind father – a father who has filed an application under the 1980 Hague Abduction Convention and the Brussels IIa Regulation for the return of his child(ren).

Regulation 606/2013 – Regulation 606/2013 on mutual recognition of protection measures in civil matters.

Directive 2011/99 – Directive 2011/99/EU on the European Protection Order.

1996 Hague (Protection) Convention – 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.

State of habitual residence – the State where the child was habitually resident prior to the wrongful removal or retention, i.e. the child's 'home' country (sometimes referred to as 'the requesting State').

State of refuge – the State to which the child has been wrongfully removed, or retained in (sometimes referred to as 'the requested State').

Hague Convention return court – the court of the State of refuge competent for the return proceedings under the 1980 Hague Convention and the Brussels IIa Regulation.