



# Best Practice Guide

## EXECUTIVE SUMMARY



Protection of Abducting Mothers in Return Proceedings: Intersection between domestic violence and parental child abduction

PREPARED UNDER THE AUSPICES OF THE POAM PROJECT



Pravni fakultet Osijek  
*Sveučilište J. J. Strossmayera u Osijeku*



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

## EXECUTIVE SUMMARY

### 1. INTRODUCTION

This Best Practice Guide ('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), funded by the European Commission from the European Union's Rights, Equality and Citizenship Programme. It presents the findings of the POAM project, collated from the project [local workshops](#), [international experts' workshop](#) and [national reports](#) 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').

The aim of the Guide is 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. The objectives are as follows:

- 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 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, and its recognition of the value of evidence based research (paragraph 81).<sup>1</sup>

The methodology and scope are set out in detail in the Guide, but to summarise, 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: 'HCCH Guide').<sup>2</sup> The present Guide is intended to complement the HCCH Guide through providing in-depth guidance on these specific issues. Among other pertinent matters, the present Guide analyses the utility of Regulation 606/2013 and Directive 2011/99 in the context of parental child abductions

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<sup>1</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>2</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)' (hereafter: 'HCCH Guide', published on 9 March 2020, available at <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>).

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

## 2. PROTECTION OF ABDUCTING MOTHERS IN RETURN PROCEEDINGS

### 2.1 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>3</sup> Alarming, many of these mothers are fleeing domestic violence. 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 almost 70% of child abductions committed by mothers<sup>4</sup>. This suggests that over a half of the returning abducting mothers may potentially be at risk of re-victimisation at the hands of their violent ex-partners.

### 2.2 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 re-victimisation 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 already overwhelmed with the repercussions of that relationship.

### 2.3 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>5</sup> is particularly pertinent to abductions committed against the background of domestic violence.<sup>6</sup> Indeed, it is often raised by abducting mothers opposing the return, either based 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>7</sup> Among such effects are impaired parenting capacities of the mother resulting from

<sup>3</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>4</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) (hereafter: 'Domestic and Family Violence'), available at <https://assets.hcch.net/upload/wop/abduct2011pd09e.pdf>; and M Župan, M Drventić 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>5</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>6</sup> See HCCH Guide (n 2), paras 57-59.

<sup>7</sup> Domestic and Family Violence (n 4), para 11.

the impact of the violence on her physical and/or psychological health.<sup>8</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>9</sup>

It has therefore been recognized 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>10</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>11</sup>

## 2.4 Policy considerations

The underlying philosophy of the 1980 Hague Convention is that international child abduction is harmful to children and therefore should be discouraged.<sup>12</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>13</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 is only a limited number of exceptions available to the abducting parent, whilst these exceptions are to be interpreted in a narrow fashion.<sup>14</sup>

As the Convention return policy and the objective of protecting abducting mothers in return proceedings may seem as 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>15</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 a debate, there is strong evidence that protection orders are useful tools in tackling domestic violence.<sup>16</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 wellbeing of the victim and even if the contact does not

<sup>8</sup> HCCH Guide (n 2), para 57.

<sup>9</sup> *Ibid*, para 63.

<sup>10</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 (n 2), para 58.

<sup>11</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.'

<sup>12</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>13</sup> *Ibid*.

<sup>14</sup> *Ibid*, para 34.

<sup>15</sup> See section 5 'Summary Recommendations' below.

<sup>16</sup> S van der Aa, et. al, 'Mapping the Legislation and Assessing the Impact of Protection Orders in the European Member States', p. 102 (hereafter: 'POEMs Project Final Report'), available at <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf>.

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stop completely, the overall frequency and intensity of violence tends to decrease.<sup>17</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>18</sup> However, given the concerns over the effectiveness of protective measures, this Guide recommends that the employment of protection orders in return proceedings should be approached carefully and with caution in all cases where there is a risk of severe future violence, or where there is a history of disobeying court orders.<sup>19</sup>

### 3. PROTECTIVE MEASURES WITHIN THE EU

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: the Directive 2011/99 on the European Protection Order and the Regulation 606/2013 on mutual recognition of protection measures in civil matters.

*See section 4.1 of the Guide*

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. Protection orders available to victims of domestic violence may be regulated in generic law<sup>20</sup> or in specific laws on domestic violence.<sup>21</sup> Although the terminology to denote individual types 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>22</sup>

*See section 4.2 of the Guide*

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

The appropriate protective measures and their effectiveness will differ from case to case and from jurisdiction to jurisdiction, depending on the circumstances of the case and the confines of national law.<sup>23</sup> Protective measures may be issued either in the State of refuge or in the State of habitual residence. The Guide is concerned with the former, i.e. protective measures issued in the State of refuge.

<sup>17</sup> Ibid, p. 238.

<sup>18</sup> Ibid, p. 252.

<sup>19</sup> See section 5 'Summary Recommendations' below.

<sup>20</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>21</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-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) (n 20).

<sup>22</sup> POEMs Project Final Report (n 16), p 234.

<sup>23</sup> *Re E* (n 10), para 36.

*See section 3 of the Guide*

The research findings have identified two avenues for protecting abducting mothers involved in return proceedings by the courts of the State of refuge: first, through protective measures issued *ex officio* by the Hague Convention return court in the return proceedings, and second, through protective measures ordered outside of the return proceedings (usually on application by the abducting mother). The below summary is structured around this dichotomy.

#### **4.1 Protective measures for the mother as indirect protective measures for the child – issued by the Hague Convention return court in the return proceedings**

This avenue for the protection of abducting mothers is based on the premise that protective measures for the mother are in effect indirect protective measures for the child. Indeed, case-law from various jurisdictions dictates that protective measures for the mother are by extension measures that protect the child. Therefore, where a court is assessing the grave risk of harm i.e. psychological harm on a child on the basis of domestic violence perpetrated primarily on the abducting mother, in protecting the well-being of the child from this impact, the court is compelled to protect the abducting mother so that the child may benefit from the safeguards afforded to that mother.

#### **General points**

The key question the court should ask is whether

*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 allegations of domestic violence:* 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.

*See section 5.1.1. of the Guide*

#### **The court's approach to grave risk of harm**

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>24</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, and (2) 'the protective measures approach'<sup>25</sup> where the court assumes the allegations of domestic violence to be true and without any assessment of the

<sup>24</sup> See also HCCH Guide (n 2). 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, p. 651. See also POAM Project Report – United Kingdom (n 21) 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>25</sup> See e.g. *Re E* (n 10).



veracity of the claims decides whether there are adequate protective measures to ameliorate the grave risk. The latter approach focuses on assessing the adequacy of protective measures as a substitute for investigating the disputed facts. This Guide endorses the assessment of allegations approach over the protective measures approach.

*See section 5.1.2 of the Guide*

The Guide advocates for a ‘thorough, limited and expeditious’<sup>26</sup> investigation of the merits of the allegations of domestic violence, and sets out how such investigation should be approached, including matters such as evidence, burden of proof and the factors to consider.

*See sections 5.1.2 and 5.1.3 of the Guide*

## Evidence

As domestic violence by its very nature usually occurs behind closed doors, supporting or corroborative documentary evidence can be scarce. Notwithstanding, 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.

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.

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.

*See section 5.1.3.1 of the Guide, which set out ‘the evidence roadmap’ – separately for documentary evidence (Figure 6), oral evidence (Figure 7), and Figure 8 on navigating the evidence types.*

## 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>27</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>28</sup>

## Factors to consider

### *a) The level of harm*

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’

<sup>26</sup> *X v Latvia* (Application no.27853/09) Grand Chamber [2013] (hereafter: ‘*X v Latvia*’).

<sup>27</sup> See e.g. *Re E* (n 10), para 32.

<sup>28</sup> *Ibid.*

denotes the risk rather than the harm, there is a connection between the two.<sup>29</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>30</sup> The Guide adopts case-law interpretation that (1) the risk must be real and of a level of seriousness to constitute ‘grave’<sup>31</sup> and (2) the level of harm must be one which a child should not be expected to tolerate.<sup>32</sup>

Further, 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>33</sup> The third category refers to cases where the risk of harm is ‘clearly grave’ and 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 nature, frequency, intensity and circumstances in which the violence was committed will all be relevant considerations.<sup>34</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>35</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>36</sup>

#### *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 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>37</sup> Therefore, the court may consider that the risk is the result of objective reality or of the abducting mother’s subjective perception of reality<sup>38</sup> or whether the mother’s anxieties are reasonable or unreasonable.<sup>39</sup>

*See section 5.1.3.3 of the Guide*

### **Jurisdiction, cross-border circulation and applicable law**

The below ‘pathways’ to establish jurisdiction to issue protection measures and secure their circulation offer three different approaches. Each of these pathways presumes that the measures

<sup>29</sup> *Re E* (n 10), para 33.

<sup>30</sup> *Ibid.*

<sup>31</sup> HCCH Guide (n 2), p. 26

<sup>32</sup> *Ibid.*

<sup>33</sup> *Simcox v Simcox*, 511F.3d 594 (6th Cir. 2007)

<sup>34</sup> HCCH Guide (n 2), p. 38.

<sup>35</sup> *Re E* (n 10), para 34.

<sup>36</sup> *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, para 52; and *Re S* (n 10), para 27.

<sup>37</sup> *Re E* (n 10), para 34; and *Re S* (n 10), para 34.

<sup>38</sup> *Re E* (n 10), para 34; and *Re S* (n 10), para 31.

<sup>39</sup> *Re S* (n 10), para 34.



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>40</sup> It is up to the Hague Convention return court to determine, within the confines of its national law, which pathway to follow. When determining the protection measures, the court shall apply the *lex fori*.

*See section 5.2.1.1 of the Guide.*

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

Article 20 of the Brussels IIa 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 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 *Purrucker*<sup>41</sup> decision of the CJEU (although this will change after 1 August 2022 when the Brussels IIa Recast becomes applicable).<sup>42</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 1: Pathway 1

<sup>40</sup> Regulation 606/2013, Art 1.

<sup>41</sup> *Bianca Purrucker v. Guillermo Vallés Pérez*, Case C-256/09, 15 July 2010.

<sup>42</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 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 Recast Regulation. Nevertheless, the underlying considerations concerning the approach to the grave risk of harm set out in section 5.1 of the POAM Best Practice Guide will remain relevant.

**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 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 below).



Figure 2: 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 case, circulation of the measures would be facilitated by the 1996 Hague Convention. (Figure 12 below).



Figure 3: Pathway 3

#### **4.2 Protective measures for the mother as self-standing measures – issued in proceedings that are separate from the Hague Convention return proceedings**

This avenue for the protection of abducting mothers assumes circumstances where the abducting mother seeks a protection order from a competent court in the State of refuge in proceedings that are separate from the return proceedings, prior to the return to the State of habitual residence. The emphasis is on the role of Regulation 606/2013 and Directive 2011/99 in facilitating mutual recognition of protection orders in civil and criminal matters respectively. 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 sections 4.3.1 and 4.3.2 of the Guide*

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. 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.<sup>43</sup>

*See sections 4.2.1 and 4.4 of the Guide*

#### **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>44</sup> The protection order should

<sup>43</sup> 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. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, Art 1.

<sup>44</sup> Cf POEMs Project Final Report (n 16), p. 244.

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>45</sup> Ideally, the prohibited areas should be designated in radiuses (i.e. meters/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>46</sup>

*See section 5.2.1.2 of the Guide*

### **Inclusion of mutual children in the protection order**

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>47</sup> If the left-behind father poses a risk also to the child and there is a no-contact order in place in the State of habitual residence, the protection order should always include also the child (if permitted by national law). If the issuing authority considers that the left-behind father poses a risk also 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, bearing in mind 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.<sup>48</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>49</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 is facilitated by a third person), the protection order should allow for continued contact between the child and the left-behind father.<sup>50</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 urgent measure of protection from a competent court in the State of refuge.<sup>51</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.

### **Jurisdiction, cross-border circulation and applicable law**

The below 'pathways' to establish jurisdiction to issue protection measures and secure their circulation offer two different approaches. The underlying rationale is that protective

<sup>45</sup> Regulation 606/2013, Recital 20.

<sup>46</sup> Cf POEMs Project Final Report (n 16), p. 222.

<sup>47</sup> Cf POEMs Project Final Report (n 16), p. 245.

<sup>48</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>49</sup> Depending on the national rules of internal jurisdiction, such competent court may coincide with the court dealing with the return application.

<sup>50</sup> Cf POEMs Project Final Report (n 16), p. 245.

<sup>51</sup> Depending on the national rules of internal jurisdiction, such competent court may coincide with be the court dealing with the return application.

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. When determining the protection measures, the court shall apply the *lex fori*.

*See section 5.2.1.1 of the Guide*

**Pathway 4: Jurisdiction based on Article 20 of the Brussels IIa Regulation (pending matrimonial proceedings)**

Where there are matrimonial proceedings pending between the abducting mother and the left-behind father in the State of refuge, Article 20 of the Brussels IIa Regulation gives jurisdiction to the courts of the State of refuge to take provisional protective measures, based on the presence of the abducting mother on the territory of that Member State. However, as mentioned in respect of Pathway 1 (see above), protective measures taken under Article 20 are not enforceable outside of the territory of the Member State where they were taken.<sup>52</sup> Nevertheless, on a functional construction of Regulation 606/2013, this Guide envisages the possibility that protective measures are circulated under that Regulation (see Pathway 1 above and Figure 13 below).



Figure 4: Pathway 4

**Pathway 5: Jurisdiction based on Article 7(2) of the Brussels Ia Regulation<sup>53</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.*

<sup>52</sup> *Bianca Purrucker v. Guillermo Vallés Pérez*, Case C-256/09, 15 July 2010.

<sup>53</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.

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 threatened the abducting mother via electronic means (telephone, e-mail) 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 Regulation 606/2013 rather than under Brussels Ia. The rationale is that the judgment is concerned with a specific type of protection measures that are 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 – unlike as to the delineation with Brussels IIa – remains silent on that question. Therefore, one could apply both instruments alternatively. 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>54</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 the 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.

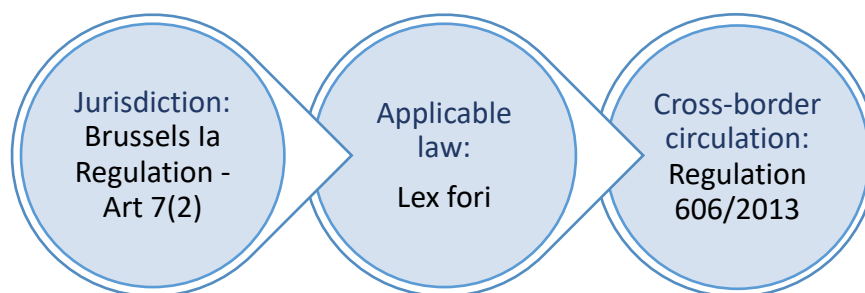


Figure 5: Pathway 5

#### 4.3 Circulating protective measures under Regulation 606/2013: The certificate under Article 5

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. The only formal requirement is the presentation of a certificate issued by the Member State of origin under Article 5 of the Regulation. The Guide provides guidance on matters pertinent to the certificate, in particular:

<sup>54</sup> *Denilauler*, Case 125/79, 21 May 1980.



- Application for Article 5 certificate
- Standard form for issuing the certificate
- Requirements for the issuing of the certificate
- Content of the certificate
- Notification of the certificate
- Transliteration or translation of the certificate
- Legalisation of documents
- Rectification or withdrawal
- Consequences of a *suspension, limitation or withdrawal of the certificate*

*See section 5.2.1.2 of the Guide*

## 5. SUMMARY RECOMMENDATIONS

- 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 psychological harm or other intolerable situation' pursuant to Article 13(1)(b). Accordingly, protective measures for the abducting mother should be considered also as protective measures for the child.
- The appropriate protective measures and their effectiveness will differ from case to case and from jurisdiction to jurisdiction, depending on the circumstances of the case and the confines of national law.
- Given the concerns over the effectiveness of protective measures, the employment of protection orders in return proceedings should be approached carefully and with caution in all cases where there is a risk of severe future violence, or where there is a history of disobeying court orders.
- Given the advantages of civil protection orders over criminal protection orders and the strengths of Regulation 606/2013 over Directive 2011/99, 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.
- Two avenues for protecting abducting mothers involved in return proceedings by the courts of the State of refuge have been identified: first, through protective measures issued *ex officio* by the Hague Convention return court in the return proceedings, and second, through protective measures ordered outside of the return proceedings (usually on application by the abducting mother).
- In the absence of a jurisdictional rule in Regulation 606/2013, 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 of the Guide. The decision as to which pathway to apply will depend on the national law and the facts of the case in question.

- In the protection order proceedings, the issuing Member State should apply the *lex fori*.
- 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.
- The scope and duration of the protection order should be formulated carefully, taking account of the facts of the case.<sup>55</sup>
- The prohibited areas should be designated in radiuses (i.e. meters/kilometres/miles) rather than by naming streets so as to make it easier to transpose the protection order in the State of habitual residence upon the abducting mother's return.<sup>56</sup>
- The court issuing an order for the protection of the abducting mother should consider carefully whether to include also mutual children of the couple in the protection order.
- The abducting mother should apply for the Article 5 certificate at the same time as when applying for the protection order. Nevertheless, 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>57</sup>

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<sup>55</sup> Cf POEMs Project Final Report (n 16), p. 244.

<sup>56</sup> Cf POEMs Project Final Report (n 16), p. 222.

<sup>57</sup> As opposed to the cross-border element arising subsequently.