

Protection of Abducting Mothers in Return Proceedings: Intersection  
between Domestic Violence and Parental Child Abduction ('POAM')

**CROATIAN REPORT**

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# POAM CROATIAN REPORT

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# 1. Child Abduction Procedures in the Republic of Croatia – Protection Measures in Focus

## 1.1. Legal Framework

The international child abduction regime is subject to a general framework of child protection, as well as general human rights protection. The main international treaties that Croatia has acceded to are:

- UN Convention on the Rights of the Child of 1989 (hereinafter: CRC);<sup>1</sup>  
(ratified by Croatia 1993);<sup>2</sup>
- Council of Europe Convention on Protection of human rights and fundamental freedoms of 1950 (hereinafter ECHR) <sup>3</sup> (ratified by Croatia 1997);
- Charter of Fundamental Rights of the European Union of 2000.<sup>4</sup>

When dealing with child abduction cases, Croatian authorities are bound by international conventions:

- Hague Convention on International Child Abduction of 1980 (hereinafter: Child Abduction Convention);<sup>5</sup>
- Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996 (hereinafter: Child Protection Convention).<sup>6</sup>

The relevant EU legal framework comprises:

- 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 (hereinafter: Brussels II*bis* Regulation).<sup>7</sup>

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<sup>1</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577.

<sup>2</sup> Official Gazette – International Treaties, No. 12/93.

<sup>3</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

<sup>4</sup> OJ C 83, 30.3.2010, p. 389–403.

<sup>5</sup> HCCH, The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, [www.hcch.net/en/instruments/conventions/full-text/?cid=24](http://www.hcch.net/en/instruments/conventions/full-text/?cid=24).

<sup>6</sup> HCCH, The 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, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70).

<sup>7</sup> OJ L 338, 23.12.2003, p. 1–29. The Brussels II*bis* Regulation has been revised - Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters

The Republic of Croatia became a party to the Child Abduction Convention on 8 October 1991 following the Notification of Succession after the Socialist Federal Republic of Yugoslavia ceased to exist.<sup>8</sup> Croatia has been a party to the Child Protection Convention since 1 January 2010.<sup>9</sup> The Brussels II**bis** Regulation has been applicable in Croatia since Croatian accession to the EU on 1 July 2013. The Central Authority is the same for all three instruments and it is seated within the Ministry for Demography, Family, Youth and Social Policy.<sup>10</sup>

Other relevant Croatian sources of law include:

- Act on Implementation of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: Implementation Act) (became applicable in January 2019);<sup>11</sup>
- Act on Private International Law (became applicable in January 2019);<sup>12</sup>
- Croatian Family Act;<sup>13</sup>
- Civil Procedure Act.<sup>14</sup>

## 1.2. General Data on the Implementation of the Child Abduction Convention

National research conducted<sup>15</sup> in the four largest courts (Zagreb, Osijek, Rijeka, Split) over a four-year period (1 July 2013 – 1 July 2017) indicated that a small number of child abduction proceedings are brought before the national courts. The research showed that the four chosen courts had dealt with total of 16 cases in which 37 decisions were rendered. The number is

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of parental responsibility, and on international child abduction OJ L 178, 2.7.2019, p. 1–115, and its amended version would oblige Croatian authorities as of 1 August 2022.

<sup>8</sup> Official Gazette - International Treaties, No. 4/94.

<sup>9</sup> For decision on ratification, see: Law on ratification of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Zakon o potvrđivanju Konvencije o nadležnosti, mjerodavnom pravu, priznanju, ovrsi i suradnji u odnosu na roditeljsku odgovornost i o mjerama za zaštitu djece), Official Gazette, International Treaties, No. 5/2009.

<sup>10</sup> Ministry for Demography, Family, Youth and Social Policy (Ministarstvo za demografiju, obitelj, socijalnu politiku i mlade), <https://mdomsp.gov.hr/medjunarodna-suradnja-u-podrucju-zastite-djece/561>.

<sup>11</sup> Act on Implementation of the Hague Convention on the Civil Aspects of International Child Abduction (Zakon o provedbi Konvencije o građanskopravnim vidovima međunarodne otmice djece), Official Gazette, No. 99/2018.

<sup>12</sup> Act on Private International Law (Zakon o međunarodnom privatnom pravu), Official Gazette, No. 101/17.

<sup>13</sup> Family Act (Obiteljski zakon), Official Gazette, No. 103/15.

<sup>14</sup> Civil Procedure Act (Zakon o parničnom postupku), Official Gazette, No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.

<sup>15</sup> See: M. Župan, M. Drventić and T. Kruger, Cross-border Removal and Retention of a Child – Croatian Practice and European Expectation, *International Journal of Law, Policy and Family*, Oxford University Press (accepted for publication in January 2020).

comparable with Lowe's analysis of 2017.<sup>16</sup> Lowe's study on incoming cases before all Croatian courts indicates that there were 7 cases in 1999, 3 cases in 2003, 3 cases in 2008 and 2 cases in 2015.<sup>17</sup> At the time 24 municipal courts were dealing with the return requests at the first instance and 3 county courts were functioning as second instance courts in family matters in the Republic of Croatia.<sup>18</sup> In light of the low number of international child abduction cases, this dispersion of the cases across the different courts proved to be inefficient.

Following several ECtHR rulings pointing out the inefficiency of child abduction proceedings in Croatia<sup>19</sup> the Implementation Act was enacted. The Implementation Act introduced a concentration of jurisdiction in child abduction cases and placed all international child abduction cases within the jurisdiction of the Municipal Civil Court of Zagreb and all appeals in this matter within the jurisdiction of the County Court of Zagreb.<sup>20</sup> The appellate court has to adjudicate in a chamber composed of three judges. The Implementation Act unfortunately failed to prescribe specialization of judges within each of the specialized courts.

The Implementation Act has introduced more stringent and specialized rules of procedure to be applied in international child abductions.<sup>21</sup> To ensure that the first instance procedure lasts no longer than six weeks, courts are empowered with additional tools to depart from ordinary family law procedures. These include: parties may be summoned by phone call, telefax or email, the court does not have to hold an oral hearing, the court has to render its decision within eight days of the date of conclusion of the hearing. The Implementation Act also encourages judicial cooperation, with the aim of speeding up the collection of evidence from abroad. The Act also introduced a requirement that a second instance decision must be issued within 30 days.<sup>22</sup> No extraordinary appeal is permitted.

In 94% of cases conducted before the Croatian courts, the parent who had abducted the child was the mother.<sup>23</sup> Several possible reasons for abduction may appear in each case. In approximately half of the cases, the abducting mother indicated that domestic violence perpetrated

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<sup>16</sup> N. Lowe and V. Stephens, *Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report – provisional edition, pending the completion of the French version (Preliminary Doc No 11A)* (Revised version, February 2018) <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>.

<sup>17</sup> *Ibid.*, Annex II.

<sup>18</sup> Act on Areas and Seats of Courts (*Zakon o područjima i sjedištima sudova*), Official Gazette, No. 67/18. See M. Župan and P. Poretti, Concentration of jurisdiction in cross-border family matters – child abduction at focus, in M. Vinković (ed), *New developments in EU labour, equality and human rights law* (Osijek: Faculty of Law Osijek, 2015) 341–359.

<sup>19</sup> Such as *Karadžić v Croatia*, App. No. 35030/04, 15 December 2005 and *Adžić v Croatia*, App. No. 22643/14, 12 March 2015, both denouncing the long duration of return proceedings; *Vujica v Croatia*, App. No. 56163/12, 8 October 2015, which concerned the way in which the proceedings were conducted more broadly.

<sup>20</sup> Art 14.

<sup>21</sup> Art 16-19.

<sup>22</sup> Art 16(4).

<sup>23</sup> In global studies Lowe and Stephens found that 73% of abducting parents in 2015 were mothers, even more than the 69% in 2008.

by the other parent was a reason for abduction. However, in only half of these cases was the violence reported to the authorities in the country of habitual residence of the child. Proof of domestic violence is an additional challenge for the abducting mother. In some of these cases, the abducting parent had spent some time in a safe house in the country of habitual residence of the child. In half of the return cases where domestic violence was raised, the court deciding upon return found that the violence against the abducting parent was proved.

Procedures upon return applications in Croatia end with the court ruling to reject the return of a child in the vast majority of cases, more than 70%. In vast majority of cases the courts have based their decision to refuse a return on the ground of existence of a grave risk of harm. Interpretation of the grave risk of harm has been too wide, arguably departing from internationally accepted standards.<sup>24</sup> Domestic violence is one of the factors that have contributed towards such a wide interpretation of the grave risk of harm defence by the Croatian courts.

The courts, however, tend to refuse the grave risk of harm objection raised by the mother if she has never initiated any proceedings to obtain measures for the protection of the child.

### 1.3. Measures for the Protection of the Child in Return Proceedings

#### 1.3.1. Provisional Measures

The Brussels II *bis* Regulation in Article 20 (same as the Child Protection Convention in Article 11) enables deviation from the rules of jurisdiction, prescribing that, in urgent cases, the courts of a Member State may take provisional, including protective, measures in respect of persons or assets in that state even if the court of another Member State has jurisdiction as to the substance of the dispute.

This jurisdiction has been further regulated at the national level through the Implementation Act. The Implementation Act provides that the court may, at the proposal of the parties, the social welfare centre or *ex officio*, impose the necessary measures to protect the best interests and well-being of the child, to secure the return of the child and to exercise the right of contact. These security measures must be proportionate to the danger for which they are imposed, and the court should determine the duration of the measure. The Act enumerates the following

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<sup>24</sup> In the vast majority of cases the courts conducted a thorough analysis of the child's situation in order to evaluate the child's best interests. Thus, this procedure was not significantly different from regular parental responsibility procedures, while the goal of the Child Abduction Convention was precisely to implement a very particular procedure. In most cases the courts did not actually consider the risk in the country of origin, but rather the fact that a parent would be better suited to a child, in the court's view, and that due to a close connection between the child and abducting parent the separation would constitute a grave risk of harm

measures in particular: 1. prohibition on removing the child from his/her place of residence or prohibition on removing the child from the territory of the Republic of Croatia if there is a justified fear that the person with whom the child is located will change the place of residence of the child; 2. ensuring the contact between the child and the parent if there is a justifiable fear that the person with whom the child is located will obstruct the contact; 3. seizure of all the child's personal documents that may serve to cross the state border if there is a justifiable fear that the child will be taken to another country; 4. obligation to report to the police during the period of contact, in accordance with a court decision, if there is a justifiable fear that the person entitled to contact may abuse their contact rights; 5. supervision of contact by an expert, if necessary even in the presence of another family member, if there is a justifiable fear that the contact will harm the welfare of the child or if the contact has not taken place for a long time and there is a need to prepare the child for the contact; 6. obliging the contact parent to inform the other parent in advance of a detailed contact plan if there is a fear that the parent will abuse their contact rights; and 7. deprivation of contact with the child if there is a justifiable fear that the life, health and psychophysical development of the child are endangered.<sup>25</sup>

Additionally the same provision provides that, if the court determines the measure of confiscation of the child's travel document or the measure of prohibition of the removal of the child's from his place of residence or the territory of the Republic of Croatia, the court shall immediately: 1. inform the competent police administration about this, in order to record the prohibition of issuance or seizure of any personal document used to cross the state border in the records of prohibitions and safeguards, and 2. determine the registration of the ban on leaving the territory of the Republic of Croatia in the national or cross-border information system.<sup>26</sup>

Research into prior national court practice had shown that Croatian authorities are often not aware of the possibility of imposing provisional and protective measures in cases where they do not have jurisdiction as to the substance of the matter. This was confirmed by a case from the Municipal Court of Split,<sup>27</sup> which ruled on the request of the father to return the unlawfully removed child to Slovenia. The father claimed that he did not give the child's mother permission to remove the child to Croatia. The mother stated in the court that she was a victim of domestic violence and hence stayed for a while at a safe house in Slovenia. The Croatian court found in the return proceedings that, based on the request for sole custody of the child the father lodged before the competent court in Slovenia, a provisional measure was adopted by which the child was entrusted in the mother's care and the father was granted contact rights. Likewise, the court stated

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<sup>25</sup> Implementation Act, Art 20(1)-(4).

<sup>26</sup> Implementation Act, Art 20(5).

<sup>27</sup> Municipal Court of Split (Općinski sud u Splitu), R1 Ob-637/2016 of 26 June 2017.

that a court settlement on a visitation schedule between the father and the mother regulating the time the father spends with the child was concluded before the competent Slovenian court shortly thereafter. As during the proceedings in Croatia the father continued to harass the mother and the child and was violent, the mother requested the adoption of a provisional measure before the court in Croatia as to who the child would live with and how contact with the other parent would be arranged. The court declared that it had no jurisdiction as to the adoption of a provisional measure, explaining that due to the fact that the child was habitually resident in Slovenia before the abduction, the parental responsibility proceedings were conducted before the Slovenian court, and that there already existed a provisional measure regulating visitation and contact. The Appeal Court confirmed the contested decision. A provisional measure and the settlement made before the Slovenian authorities do not have any legal effect in Croatia without the recognition procedure carried out, so it is wrong to refer to them in the explanation as one of the reasons for not imposing a provisional measure in Croatia. The court could have found the grounds for action at the request of the mother for the adoption of a provisional measure in Article 20 of the Brussels II *bis* Regulation or explained its reasons for not adopting the measure on other grounds.

In the proceedings for the return of the child brought from France to Croatia by its mother, when deciding on the father's request for the adoption of a provisional measure to regulate his contact with the child in Croatia, the Municipal Civil Court of Zagreb decided not to impose a provisional measure, arguing that the petitioner had no legal interest in the imposition thereof.<sup>28</sup> The Appeal Court accepted the appeal filed by the appellant and revoked the decision in which the court refused to issue a provisional measure and remanded the case to the Municipal Civil Court instructing it to state the reasons for rejecting the proposal.<sup>29</sup> The two instances were without prejudice to their jurisdiction, although in the explanatory statement, authorisation to issue a provisional measure was not based on Article 20 of the Brussels II *bis* Regulation. In fact, the courts did not make any referral to the grounds of jurisdiction for issuing such a provisional measure. It is to be assumed that they were not considering the cross-border element and by this had been guided by the national rules.<sup>30</sup>

The practice of the national courts has shown a lack of understanding of the legal effects of provisional measures taken in another Member State. In one example, the Municipal Court of Osijek acted upon the request of the petitioner for the return to Germany of his minor daughter who had been unlawfully taken to Croatia by her mother for reasons of domestic violence against

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<sup>28</sup> Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), 144-R1 Ob-830/16-43 of 31 January 2017.

<sup>29</sup> County Court of Zagreb (Županijski sud u Zagrebu), 68 Gž Ob-400/17-2 of 10 April 2017.

<sup>30</sup> See: Župan, M., Drventić, M., *Kindesentführung vor kroatischen Gerichten mit besonderer Rücksicht auf die aus Deutschland kommenden Anträge*, Revija za evropsko pravo, Vol. 20, No. 1., 2018, pp. 63-83.



her and the child. In the course of the return proceedings, the father obtained a provisional measure in Germany entitling him to decide on the place of residence of the child. After having conducted the proceedings, the Croatian court decided to order the mother to return the child to the father to the place of her habitual residence in Germany, explaining that the conditions for the application of Article 13(1)(b) of the Convention had not been met, referring also to the provisional measure adopted in Germany as an additional reason for rendering a decision ordering the return of the child.<sup>31</sup> This provisional measure had been issued in the state of the child's habitual residence and it was not recognised in the Republic of Croatia. In order to gain the legal force in the Republic of Croatia the measure needed to be recognised under the Article 23 of the Hague Convention of on Measures for the Protection of Children. Otherwise, the measure was not effective in the Republic of Croatia. It was the Appeal Court that stressed in its reasoning that the German provisional measure lacked legal force in Croatia.<sup>32</sup>

### *1.3.2. Measures Securing the Return of a Child*

In intra-EU abductions the special nature of Article 11(4) serves as a prerequisite for refusing a return of a child. It states that a court cannot refuse to return a child on the basis of Article 13(1)(b) of the Child Abduction Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

The Implementation Act highlights the possibility to use this provision.<sup>33</sup> It provides that the court may, at the request of the parties, the social welfare centre or on its own motion, request guarantees from the state where the child had his or her habitual residence immediately before the unlawful removal or retention. These guarantees may concern: 1. the personal safety of the child and the parent; 2. protection of life and health of the child and parents; 3. temporary assurance of adequate living conditions for the child and the parent; and 4. other appropriate guarantees.<sup>34</sup> The Act also enables the parties to agree on the terms of the return or stay of the child during the family mediation process, in which case guarantees will be an integral part of the agreement.<sup>35</sup>

The application of Article 11(4) has not proven to be successful in the practice of the Croatian courts. The rather small number of applications where this provision was used during the

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<sup>31</sup> Municipal Court of Osijek (Općinski sud u Osijeku), 12 R1 Ob-566/2016-26 of 3 October 2016 (INCADAT reference: HC/E/HR 1394).

<sup>32</sup> County Court of Zagreb (Županijski sud u Zagrebu), 1 Gž Ob-1456/2016-2 of 2 December 2016 (INCADAT reference: HC/E/HR 1395).

<sup>33</sup> Art 20-21.

<sup>34</sup> Art 21(1).

<sup>35</sup> Art 21(2).

research period and an example of unsuccessful cooperation with authorities of another Member State was observed.<sup>36</sup>

The aforementioned case of the Municipal Court of Osijek<sup>37</sup> was one of the few cases in which the court ordered the return of the child to the father habitually resident in Germany. According to the circumstances of the case, the mother was a victim of domestic violence in Germany. She reported the violence to the German police and stayed at a safe house in Germany for some time before coming to Croatia. It is unknown whether the mother proved the existence of domestic violence before the court in Croatia, but it is clear that the court did not request any reports by the German authorities about the circumstances, which it was authorised to do on the basis of Article 13 of the Child Abduction Convention. A special guardian appointed to represent a child in court proceedings emphasised in the course of the return proceedings that, if the child were to return to the Germany, the court should seek guarantees from the competent German authority aimed at securing the conditions for the return of the mother and the child to Germany. The court did not accept the opinion of the special guardian, and despite the existence of legitimate reasons for a more careful handling of the case, it ruled that the minor child should be returned to the father, together with her travel document. The indiscriminate treatment of the court was confirmed later in the case. The appeal court annulled the first-instance judgment and returned the case for a retrial. However, before the judgment was delivered in the repeated trial, the father came into direct contact with his child during the exercise of his contact rights in Croatia, and took the child to Germany without the mother's permission. The above circumstances indicated that the court had the grounds for seeking a guarantee from the German authorities, but also for the adoption of a provisional measure under Article 20 of the Brussels II *bis* Regulation which would have protected the child during the return proceedings, such as a measure requiring that the contact between the father and the child be exercised in the presence of an expert worker from the Social Welfare Centre.

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<sup>36</sup> The court has not received any from the central authority of the requesting State by the judgment delivery date, and hence could not use them in the proceedings prior to judgment delivery.

<sup>37</sup> Municipal Court of Osijek (Općinski sud u Osijeku), 12 R1 Ob-566/2016-26 of 3 October 2016 (INCADAT reference: HC/E/HR 1394).

## 1. 4. Lack of Protection of Abducting Mothers in Return Proceedings

### *1.4.1. Securing the Protection of Mother upon Return - Burden of Proof with Alleged Domestic Violence*

Allegations of domestic violence are often raised in return proceedings. The Hague Child Abduction Convention places a burden of proof on the person invoking one of the exceptions to return as one of the justified reasons for the refusal of the return.<sup>38</sup> In Croatian practice it is the abducting mother.

In addition to the case examples outlined previously, two additional cases which include allegations of domestic violence will be discussed. They should serve as examples of case scenarios in which the measures for the protection of the abducting mother should have been considered by the authorities in the return proceedings. However, due to the mother being unable to provide sufficient proof of the alleged domestic violence, securing the protection of the mother upon the return was hindered.

I. The first case concerned proceedings for the return to Germany of a child who had been retained in Croatia, initiated by the father before the Croatian Court.<sup>39</sup> The mother came to Croatia in December 2015 to assist with the care of her sick mother. The child came to Croatia with the mother with the express consent of the father. In February 2016, the mother informed her husband that she would remain permanently in Croatia. The father initiated a return procedure in March 2016. The mother refused to return the child voluntarily. She brought allegations of mental and physical abuse perpetrated by her husband during their life together in Germany. The judicial proceedings in Croatia commenced on 30 May 2016. The child's retention in Croatia was held to have breached the father's custody rights, which he shared with the mother under the German Civil Code. The court therefore found the retention to be unlawful. Still, the Court rejected the return of the child. In its analysis of the grounds for refusal to order return, the Court concluded that conditions for the application of Article 13(1)(b) had been met and that there was a grave risk of exposing the child to physical or psychological harm. The Court took into account available evidence (including Social Welfare Reports, minutes and opinions; evidence from the German kindergarten; e-mails of the applicant; SMS messages; photographs; medical statements; and expert opinions of the clinical psychologist, psychotherapist, and children's home in Rijeka), as well as the opinion of the child and the social report issued by the Social Welfare Centre. During the

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<sup>38</sup> Art. 13 para 1. E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (1982), para 114.

<sup>39</sup> Municipal Court of Rijeka (Općinski sud u Rijeci), R1 Ob-336/16 of 27 July 2016 (INCADAT reference: HC/E/HR 1392).

procedures, the Court asked the Social Welfare Centre to examine and determine, having regard to his age and maturity, whether the child was opposed to return, and whether such a decision would affect his mental development and cause trauma. The Report contained a statement on suspicion of domestic violence in the family home in Germany. The Report indicated the child had polarised views in respect of his parents: he claimed his father beat him and hence he did not want to return, whereas his views of his mother were completely positive. The special guardian appointed for the child urged the Court to request the use of Central Authority co-operation measures to ascertain whether any social care measures had been taken to monitor the exercise of parental care over the child or whether any reports of domestic violence had been made in Germany. In addition, the special guardian asked the Court to request information on the measures that could be taken to ensure protection of the child if return were to be ordered. The special guardian expressed concerns over the possible return of the child due to the illness of the father, noting that there was a lack of objective information on his condition and ability to care for the child.

The first instance court decision on non-return was appealed by the applicant father and the special guardian.<sup>40</sup> The appellate court considered the appeals founded. It accepted the facts as partially established by the first instance court, and held that the Brussels II *bis* Regulation should have been applied, and that the applicant had not been heard even though he had requested a hearing. The Court further held that Article 11(4) of the Brussels II *bis* Regulation should have been considered before making the final order refusing return.

When the case was remitted back to the first instance court for further consideration, the Court ordered the return of the child to Germany.<sup>41</sup> The Court noted that, during the first trial of this case, the Croatian first instance court had requested information from the German authorities on whether measures to protect the child upon his return could be taken, in accordance with Article 11(4) of the Brussels II *bis* Regulation. By the time the hearings had concluded, the Court had not received the requested information. Nevertheless, the Court considered that there would be no serious danger if the child were to return. Finally, the Court considered that those who opposed the return of the child had not proven that, within the meaning of Article 13(1)(b), there was a grave risk of exposing the child to physical or psychological harm upon return. Besides merely alleging that the police had intervened in the family's affairs in Germany, the mother had failed to provide the Court with evidence to explain why this police intervention had occurred in Germany in the first place, and how it had ended. It was noted that she could have asked the Court to obtain

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<sup>40</sup> County Court of Zagreb (Županijski sud u Zagrebu), 15 Gž Ob-1264 / 16-2 of 11 October 2016 (INCADAT reference: HC/E/HR 1393).

<sup>41</sup> Municipal Court of Rijeka (Općinski sud u Rijeci), R1Ob-649/16 of 16 June 2017 (INCADATE reference: HC/E/HR 1396).

such evidence but had not done so. The Court found that other parts of the mothers' testimony (the possible psychiatric illness of the father and the assertion that the father had physically and psychologically harmed the son) had not been conclusively proven in the course of the proceedings. The return decision was confirmed by the appellate court.<sup>42</sup> The decision was enforced and child was returned to the father.

Following a constitutional claim submitted by the mother, the Constitutional Court quashed the decisions of the lower courts and returned the case to the court of first instance for retrial, finding that the competent courts in the repeated proceedings did not carry out an "in-depth examination of the whole family situation" and, through the results obtained, give "an assessment of what is in the best interests of the child."<sup>43</sup> However, since the child had already returned to the father, the return proceedings were withdrawn.

II. In the second case example, the return proceedings were initiated by the father who submitted his return application via the Belgian Central Authority, in accordance with the Child Abduction Convention and Brussels II *bis* Regulation.<sup>44</sup> The applicant asked the court to issue a decision on the return of his minor child who had been taken by the mother from Belgium to Croatia. There was no court decision regulating parental responsibility at the time of the abduction. Subsequently, the court in Belgium issued a decision granting the father the right to exclusive care and forbidding the mother to cross the border with the child without the father's permission. The mother refused to return the child voluntarily. She claimed that she was a victim of domestic violence that she had reported to the competent bodies in Belgium. She claimed that the applicant was aggressive toward her and had molested her emotionally, physically and psychologically, in most cases in front of the child. The Court rejected the return application based on Article 13(1)b) of the Child Abduction Convention. It relied on the report received from the Centre for Social Welfare. The report noted the child was strongly attached to the mother and the exposure of the child to a new stressful situation would be traumatizing for his further development. Also, the court considered the evidence provided by the mother in support of her allegations of domestic violence: medical documentation, police records and photographs. The court applied Article 11(4) of the Brussels II *bis* Regulation and considered that the applicant had not proved that he had secured an adequate place of living for the mother and the child, nor provided her with the financial security.

Following the applicant's appeal against the non-return decision, the second instance court altered the first instance decision and ordered the return of the child to Belgium. The court

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<sup>42</sup> County Court of Zagreb (Županijski sud u Zagrebu), Gž Ob-803/17-2 of 14 July 2017.

<sup>43</sup> Constitutional Court of the Republic of Croatia (Ustavni sud Republike Hrvatske), U-III/4419/2017 of 28 December 2017.

<sup>44</sup> Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), 131-R1 Ob-649/17-11 of 12 July 2017.

expressed the view that the opinion from the Centre for Social Welfare could not be considered as a reason for the application of Article 13(1)b) and that the grave risk for the child was not proven in the proceedings.<sup>45</sup>

Consequently, the mother submitted a constitutional claim stating that the second instance court decision violated her fundamental freedoms and human rights guaranteed by the Constitution of the Republic of Croatia. The Constitutional Court noted that the second instance court issued the contested judgment after considering the fact that the child had been illegally removed from Belgium and needed to be returned there in accordance with the Convention. The opinion of the Constitutional Court was that the second instance court had failed to sufficiently justify the non-existence of the reasons for the application of the Article 3(1)(b) regarding the protection of the child's best interest. The Constitutional court overturned the second instance court decision and returned the case for a retrial.<sup>46</sup>

#### *1.4.2. Intersection of Civil Child Abduction and Criminal Offence of Child Abduction*

It is very common in child abduction scenarios that there are more procedures between the same parties conducted before different courts, both in the state of abduction and in the state of origin. With the pending Hague return procedure initiated by the applicant, there are often parallel proceedings on parental responsibility initiated by the abducting mother.<sup>47</sup> In addition, criminal proceedings are often brought before a criminal court in the state of origin against the abducting mother for committing the crime of child abduction. In the context of incoming abduction cases the Croatian criminal authorities can be confronted with the request for recognition and execution of the European arrest warrant issued against the abducting mother in criminal proceedings in another Member State.

The facts of the case presented below are known from a decision issued on the basis of the mother's request to the Croatian Court to issue a decision on parental responsibility. The marriage of the plaintiff and defendant was ended by the decision of Municipal Court in Munich from 2 July 2015. The parental responsibility over the children was not agreed in the divorce proceedings. Due to the defendant's violent behaviour, a restraining order was placed against him by the decision of

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<sup>45</sup> County Court of Pula (Županijski sud u Puli), Gž Ob-275/2017-2 of 28 November 2017.

<sup>46</sup> Constitutional Court of the Republic of Croatia (Ustavni sud Republike Hrvatske), U-III-5232/2017 of 29 March 2018.

<sup>47</sup> Although Article 16 of the Hague Child abduction prevents any procedures on the merits before the courts of the state of the abduction, mother usually initiate the claim. Sometimes, Croatian courts (erroneously) accept jurisdiction to deal with such cases. See: Župan, M., Šego, M., Poretti, P., Drventić, M., Report on the EUFams's III Croatian Exchange Seminar, available at: <http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=10>, p. 17.

Municipal Court in Munich from 22 December 2014. The mother came to Croatia in August 2015 with the parties' two children. When the father realized that the mother had taken the children away, he made an application for a provisional measure in Germany. On 20 October 2015, the Municipal Court in Munich issued the provisional measure by which parental responsibility had been taken away from the mother and also had ordered the children's return to Germany, explaining that the children would be placed in an institution, if necessary. Also, the defendant reported the mother for the crime of the child abduction according to the Article 235 of the German Criminal Code and there were proceedings based on the European arrest warrant pending before the County Court in Rijeka.

In these proceedings the Croatian Court decided that according to Articles 8, 9 and 17 of the Brussels II*bis* Regulation it was not competent to decide this legal matter. Namely, the Court explained that the mother had taken the children from Germany and brought them to Croatia wrongfully. The habitual residence of the two minor children was in Germany, where they were born and had attended kindergarten until their wrongful removal to Croatia. Also, the Court explained that returning the children to Germany had been ordered also by the Decision of the Municipal Court in Munich from 20 October 2015. According to the available documents it was not clear whether the proceedings under the Child Abduction Convention were conducted as well.

The criminal proceedings records showed that first, in November 2015, the County Court of Rijeka, acting under Art 26 of the Act on International Judicial Cooperation in Criminal Matters and Article 98(1) and (5) together with the Article 123(1)1) of the Criminal Procedure Act, issued against the abducting mother the following measures: prohibition to leave her residence and county area (Article 98(2)1)); obligation of the defendant to call periodically a certain person or authority (Article 98(2)) and temporary seizure of passport or another travel document (Article 98(2)1). With the subsequent decision from February 2016 the same measures were extended, until the court reached a decision on the recognition and execution of the European arrest warrant.

In March 2016, a new decision was taken which suspended the execution of the European arrest warrant towards the abducting mother and abolished all the above measures. Following a request from the German criminal authorities, the Croatian State Attorney took over the criminal prosecution and the European arrest warrant was withdrawn.

Parental child abduction is a criminal offence in many States. The general stance is that provisions in domestic law criminalising the abduction or attempted abduction of a child from a jurisdiction may deter abduction.<sup>48</sup> Still, there are the divergent views on the criminalisation of

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<sup>48</sup> HCCH, Guide to Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures, available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=3639>, p. 13.

international child abduction. It can be argued that initiating criminal proceedings against the abducting parent can be counter-productive and can hamper the return of the child in Hague proceedings.<sup>49</sup> An arrest warrant or criminal charge against the abducting mother in the State of origin would likely deter her from a voluntary return of the child. In cases where the return is ordered, enforcement of the return can be delayed because the abducting parent cannot re-enter the country of origin because of a criminal warrant.<sup>50</sup> In order to support the return proceedings, the authorities of the state of origin can be asked to create conditions for the return of a child. This may include ensuring the suspension or withdrawal of the criminal charges against the abducting parent.<sup>51</sup> The Croatian courts are authorised to ask for the guarantee that the criminal charge will be suspended/withdrawn by virtue of Art 21 Para 1 of the Implementation Act. Such a guarantee can be exercised in the state of origin by the applicant themselves withdrawing the criminal claim. Difficulties, however, may occur with the implementation of this provision. Namely, the Croatian court deciding upon a return request may seek a guarantee in respect of the mother pursuant to Croatian national law, which requires an action in the state of origin. However, authorities of the State of origin may find this request falling outside the scope of the EU civil justice framework and refuse to provide the guarantee in respect of the mother.

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<sup>49</sup> Report of the Third Special Commission meeting to review the operation of the *Hague Convention on the Civil Aspects of International Child Abduction* (17 - 21 March 1997) drawn up by the Permanent Bureau, available at: <https://assets.hcch.net/upload/abduc97e.pdf>, para 4.

<sup>50</sup> HCCH, Guide to Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, available at: <https://assets.hcch.net/docs/49dc30cf-79cb-42ae-af36-dd2fc20bb11e.pdf>, p. 21.

<sup>51</sup> Schuz, R., *The Hague Child Abduction Convention. A Critical Analysis*, Hart Publishing, 2013, p. 291.



## 2. Croatian Legislative Framework for Domestic Violence

### 2.1. Protection Against Domestic Violence - Legislative Framework

In order to determine the legal framework for domestic violence within the Croatian legal system, basic principles, institutes and fundamental human rights considerations have to be set out. Croatia has acceded to numerous international treaties aimed at preventing and combatting domestic violence. These treaties set a standard of protection that has to be implemented at the national level.

The general framework of human rights protection is provided by the Convention on Protection of human rights and fundamental freedoms<sup>52</sup> of the Council of Europe of 1950 (ratified by Croatia 1997) and in European regional context the Charter of Fundamental Rights of the European Union.<sup>53</sup>

Treaties targeting domestic violence derive from the United Nations, and regional European Union and Council of Europe initiatives in particular.

- United Nations
  - Convention on the Elimination of all forms of discrimination against women, adopted by the UN General Assembly of 1979 (entry into force 1981, ratified by former Yugoslavia 1981, notification of Croatian succession 1991)<sup>54</sup> with Optional Protocol of 1999 (entry into force 2000, ratified by Croatia 2001);<sup>55</sup>
  - United Nations Convention on the rights of persons with disabilities of 2006 (entry into force 2008, ratified by Croatia 2007);<sup>56</sup>
  - General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19;<sup>57</sup>
  - UN Declaration on the Elimination of violence against women of 1993;<sup>58</sup>

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<sup>52</sup> European Treaty Series - No. 5.

<sup>53</sup> OJ C 326, 26.10.2012, p. 391–407.

<sup>54</sup> Official gazette of SFRJ International Treaties No. 11/1981; notification of Croatian succession Official Gazette No. 12/93.

<sup>55</sup> Alongside the obligation to provide periodical reports, additional control mechanisms were added with the entry into force of the Optional Protocol. The role of the *Committee on the elimination of discrimination against women* has been altered, to enable it to receive and consider complaints by individuals and groups regarding violations of the Convention in their respective States, after exhausting all legal remedies before national institutions. The Committee has the power to initiate proceedings to examine cases where women's rights in individual States were severely and systematically violated. Official Gazette - International Treaties No. 3/01, 14/03.

<sup>56</sup> Act on Ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, Official Gazette – International Treaties, No. 6/2007, 3/2008 and 5/2008.

<sup>57</sup> CEDAW/C/GC/35, 14 July 2017.

<sup>58</sup> UN General Assembly resolution 48/104 of 20 December 1993.

- Beijing Declaration and Platform for Action September 1995;<sup>59</sup>
- Human Rights Resolution 2005/41.<sup>60</sup>
  
- Council of Europe
  - Convention on prevention and combat, against violence committed against women and domestic violence of 2011 (entry into force 2014, ratified by Croatia 2018);<sup>61</sup>
  - Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on protection against violence.<sup>62</sup>
  
- European Union
  - Directive 2012/29 / EU of the European Parliament and of the Council of 2012 establishing minimum standards for the rights, support and protection of victims of crime;<sup>63</sup>
  - Directive 2011/99 / EU of the European Parliament and of the Council of 13 December 2011 on the European protection order;<sup>64</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>65</sup>
  - Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters;<sup>66</sup>
  - Council Framework Decision 2002/584 / PUP of 13 June 2002 on a European arrest warrant and surrender procedures between Member States.

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<sup>59</sup> UN Fourth World Conference on Women, September 1995.

<sup>60</sup> UN Commission on Human Rights E/CN.4/RES/2005/41.

<sup>61</sup> (Konvencija Vijeća Europe o sprečavanju i borbi protiv nasilja nad ženama i nasilja u obitelji). Official Gazette International Treaties No. 3/18.

<sup>62</sup> Vijeće Europe Preporuka Rec(2002)5 Odbora ministara državama članicama o zaštiti žena od nasilja i Memorandum s objašnjenjima. Smjernice za praćenje uvođenja preporuke Rec(2002)5 o zaštiti žena od nasilja. Vlada RH, Ured za ravnopravnost spolova 2006.

<sup>63</sup> OJ L 181, 29.6.2013

<sup>64</sup> OJ L 338, 21.12.2011.

<sup>65</sup> OJ L 181, 29.6.2013.

<sup>66</sup> OJ L 263, 3.9.2014.

The national legal framework relevant to domestic violence is contained in a mosaic of legal sources:

- Act on Judicial Cooperation in Criminal Matters with Member States of the European Union,<sup>67</sup>
- Misdemeanour Act,<sup>68</sup>
- Criminal Code,<sup>69</sup>
- Criminal Procedure Act,<sup>70</sup>
- Act on Protection against Domestic Violence<sup>71</sup>
- Act on the Implementation of the Regulation No. 606/2013<sup>72</sup>

Any form of violence against women jeopardises gender equality. Gender equality is positioned as a basic human right within Article 3 of the Croatian Constitution.<sup>73</sup> The Constitution further stipulates that a freedom of a person and personality are inviolable, they cannot be taken away or restricted (Article 22) and no one should be subjected to any form of abuse (Article 23). The Constitution also guarantees the respect and legal protection of personal and family life, dignity, reputation and honour (Article 35). It also stipulates that the state protects motherhood, children and young people (Article 62) and that parents are responsible for ensuring the right of the child to the complete and harmonious development of his personality (Article 63 para 2). The Act on Gender Equality adopted in 2003<sup>74</sup> establishes a general legal framework for the protection and promotion of gender equality as the fundamental value of the Croatian constitutional order. At the same time, it has defined and regulated the way of protection against discrimination on the basis of gender and the creation of equal opportunities for women and men. It has established the gender-based forms of discrimination, defining *discrimination* as any normative or real, direct or indirect gender-based discrimination, exclusion or restriction that hinders or negates the equal recognition, enjoyment or exercise of human rights of men and women in political, educational,

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<sup>67</sup> Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije), Official Gazette No. 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70/19.

<sup>68</sup> Misdemeanour Act (Prekršajni zakon), Official gazette No. 107/2007, 39/2013, 157/2013, 110/2015, 70/2017, 118/2018, 01.01.2019.

<sup>69</sup> Criminal Code (Kazneni zakon), Official Gazette No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018.

<sup>70</sup> Criminal Procedure Act (Zakon o kaznenom postupku), Official Gazette No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017.

<sup>71</sup> Act on Protection against Domestic Violence (Zakon o zaštiti od nasilja u obitelji), Official Gazette No. 70/2017..

<sup>72</sup> (Zakon o provedbi Uredbe (EU) br. 606/2013 Europskog parlamenta i Vijeća od 12. lipnja 2013. o uzajamnom priznavanju zaštitnih mjera u građanskim stvarima, NN 92/14).

<sup>73</sup> Constitution of the Republic of Croatia (Ustav Republike Hrvatske), Official Gazette No. 56/1990. 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

<sup>74</sup> Act on Gender Equality (Zakon o ravnopravnosti spolova), Official Gazette, No. 116/2003, 14/2008.

economic, social, cultural, civil and any another area of life (Article 6). Harassment and sexual harassment as well as its manifestations are defined as any unwanted verbal or non-verbal or physical conduct of a sexual nature, aimed at, or actually violating, personal dignity, creating an unpleasant, hostile, degrading or abusive environment. The Act on Gender Equality introduced two independent law enforcement bodies - the Office for Gender Equality and the Anti-Discrimination Body in the field of gender equality - the Ombudsman for Gender Equality. The Act on Gender Equality was repealed as a result of a decision of the Croatian Constitutional Court.<sup>75</sup> The new Act on Gender Equality of 2008<sup>76</sup> expanded the grounds for the prohibition of discrimination in the field of employment and work, introduced a system of quotas for elections at all levels, and improved the area of judicial protection by extending the powers and scope of the Ombudsman for Gender Equality.

This legislative framework was expanded with the adoption of the Anti-Discrimination Act.<sup>77</sup> The Anti-Discrimination Act sets preconditions for achieving equal opportunities and regulates protection against discrimination on the basis of race or ethnic origin or colour, gender, language, religion, political or other belief, national or social origin, wealth, union membership, education, social status, marital or family status, age, health status, disability, genetic inheritance, gender identity, expression or sexual orientation.

Domestic violence was for the first time explicitly prohibited in Croatia in the late nineties. However, the Family Act of 1998 merely stated that “Any form of abusive behaviour by a spouse or adult is prohibited within the family” (Article 18). Domestic violence has now been extracted out of the Family Act in 2003 and regulated by a separate law. Revised Family Act of 2015<sup>78</sup> on a general level prohibits any form of gender discrimination and violence against a partner. It declares solidarity and mutual respect as a paramount principles of family life, whereas domestic violence is declared as its particularly grave violation which is regulated by a separate law (Article 3 and 4).

The misdemeanour offense of domestic violence was introduced as a separate offence in the Croatian legal system by the Act on Protection against Domestic Violence which entered into force on 30 July 2003.<sup>79</sup> The Act has defined persons who constitute a family for the purpose of domestic violence offence. Distinction between groups of persons who form a family is created depending on: a) the form of kinship and the legal relationship between those persons; b) duration of the relationship between the persons.

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<sup>75</sup> The Act was abolished by a Constitutional court decision (No. UI-2696/2003 of 16 January 2008) due to a procedural error in voting in the Croatian Parliament, as well as for the purpose of aligning it with the provisions of EU directives.

<sup>76</sup> Act on Gender Equality (Zakon o ravnopravnosti spolova), Official Gazette No. 82/2008, 125/2011, 20/2012, 138/2012 and 69/2017.

<sup>77</sup> Anti-Discrimination Act (Zakon o suzbijanju diskriminacije), Official Gazette, No. 85/2008, 112/2012.

<sup>78</sup> Family Act (Obiteljski zakon), Official Gazette, No. 103/15.

<sup>79</sup> Act on Protection against Domestic Violence (Zakon o zaštiti od nasilja u obitelji), Official Gazette, No. 116/2003.

In 2009, a new Act on Protection against Domestic Violence was adopted.<sup>80</sup> It sought to improve the work of state bodies responsible for combating domestic violence and to bring it into line with recent legal practice regarding the regulation of manifestations of domestic violence. The list of persons constituting a family was extended, and the definition of domestic violence was widened to include a new category of “economic violence”.

Further revision to the basic domestic violence legal framework has taken place recently. A new Act on Protection against Domestic Violence was adopted in 2017, and it is in force as of 2018. Revision of the Act of 2017 is currently ongoing.<sup>81</sup>

Domestic violence is sanctioned also in the criminal sphere. The criminal offence of violent behaviour in the family was introduced to the Criminal Code in 2000<sup>82</sup>. However, the new Criminal Code enacted in 2011<sup>83</sup> did not include this offence. It was estimated that violent behaviour towards family members could be adequately sanctioned through other criminal offences, by imposing more severe sanctions if the offence was committed towards a family member (close person). However, the offence of domestic violence was re-introduced to the Criminal Code by 2015 Amendments.<sup>84</sup>

Cross-border protection of a victim of domestic violence may be secured through EU legislation, namely the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.<sup>85</sup>

It is well known that a Directive does not impose an obligation to introduce new protective measures, besides those already existing in national systems of each Member State. A European protection order may only be issued when a protection measure has been previously adopted in the issuing State, imposing on the person causing danger one or more of the following prohibitions or restrictions:

- (a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits;
- (b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or

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<sup>80</sup> Act on Protection against Domestic Violence (Zakon o zaštiti od nasilja u obitelji), Official Gazette No. 137/2009, 14/2010, 60/2010.

<sup>81</sup> See *infra*. Draft.

<sup>82</sup> Act on Amendments of Criminal Code (Zakon o izmjenama i dopunama Kaznenog zakona), Official Gazette No 129/00

<sup>83</sup> Criminal Code (Kazneni zakon), Official Gazette No 125/11

<sup>84</sup> Act on Amendments to Criminal Code (Zakon o izmjenama i dopunama Kaznenog zakona), Official Gazette No 56/15

<sup>85</sup> OJ L 338, 21.12.2011.

(c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

The Directive 2011/99/EU has been transposed into the Croatian legal system by the Act on Judicial Cooperation in Criminal Matters. The Act has defined European protection order as a “decision, taken by a judicial or other competent authority of a Member State in relation to a protection measure, on the basis of which a judicial or other competent authority of another Member State takes appropriate measures under its own national law with a view to continuing the protection of the protected person. The Act has defined a protection measure as a “measure imposed by a decision in criminal matters adopted in the issuing State in accordance with its national law, imposing on the person causing danger one or more of the following prohibitions or restrictions:

- a) prohibition on visiting a certain place or area;
- b) prohibition on approaching a certain person;
- c) prohibition on establishing or maintaining contact with a certain person;
- d) prohibition on stalking or harassing the victim or another person;
- e) removal from home.”<sup>86</sup>

The Act also prescribes that the European protection order is to be issued by the county court in whose territory the proceedings are being conducted or the probation decision or alternative sanction is enforced.<sup>87</sup>

Measures under the Act on Judicial Cooperation in Criminal Matters that correspond to the Directive are precautionary measures (*mjere opreza*) in the course of the criminal proceedings and special measures (after the probation decision or alternative sanction) (*nakon probacijske odluke ili alternativne sankcije*).

A European protection order is issued on a request of a protected person. To our knowledge, there is one example in the Croatian practice where a European protection order issued in Slovenia was recognized.<sup>88</sup>

## 2.2. Contemporary Regulation of Domestic Violence through Act on Protection against Domestic Violence and Misdemeanour Act

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<sup>86</sup> Article 2, para 27-8.

<sup>87</sup> Article 6, para 8.

<sup>88</sup> See *infra*.

If domestic violence is qualified as a misdemeanour offense, protective measures and other rights of victims are prescribed by the Act on Protection against Domestic Violence as *lex specialis*, and Misdemeanour Act as *lex generalis*.

The Act on Protection against Domestic Violence applies to a spouse, cohabitee, life partner (*i.e.* registered partner), informal life partner, their common children and children of each of them, blood relatives in the direct line of descent, collateral relatives up to the third degree, relatives according to the law in marital and cohabitee relationships up to the final second degree, adopter and adoptee. A special category of persons constituting a family within the meaning of the Act is one relating to former spouses and partners (gender neutral) who lived together as cohabitees, the children of each of them and their common children. In comparison to previous versions of this legal regime, the 2018 revised Act on Protection against Domestic Violence has left out of the scope the guardian and the child under guardianship, the foster parent, the foster child, and their family members during such a relationship.<sup>89</sup>

The Act on Protection against Domestic Violence prohibits six types of domestic violence<sup>90</sup>:

1. Physical violence,
2. Corporal punishment and other methods of degrading treatment against children;
3. Psychological violence that has caused feelings of violation of dignity and harassment;
4. Sexual harassment;
5. Economic violence which means prohibition or obstruction of the use of personal and matrimonial property, deprivation of rights or prohibition of disposing of personal income or property acquired through personal work or inheritance, obstruction of employment or work, denial of funds for the maintenance of common household and care of children;
6. Neglect of the needs of a disabled person or an elderly person, which causes her anxiety or offends her dignity and thereby causes her physical or mental suffering.

The proceedings are conducted before a municipal misdemeanour court. The Misdemeanour Act (Article 109) stipulates that the authorized prosecutor may be a competent state prosecutor, a state administration body, a legal person with public authority and the injured party. According to the Act on Protection against Domestic Violence, bodies dealing with domestic violence are obliged to inform the competent social welfare centre in order to take further measures within their competence.

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<sup>89</sup> Art. 3 para 1 of the 2009 Act.

<sup>90</sup> Article 10 of the Act of 2018.

### 2.3. Contemporary Regulation of Domestic Violence in Criminal Law

Within Croatian legal regulation of domestic violence a distinction is drawn between misdemeanour offenses on the one side, and criminal offenses on the other.

In that regard, when proceeding with an indictment for domestic violence, courts have to be cautious in order to avoid duplication of proceedings and the breach of the *ne bis in idem* principle.

The criminal offense of domestic violence and accompanying safety measures are set out by the Criminal Code, whereas the precautionary measures are set out by the Criminal Procedure Act.

Where the offense is prosecuted as a criminal offense, the proceedings are conducted before a municipal criminal court or a county court (if a sentence of imprisonment of more than 12 years is prescribed for the indictment charged).

In cases where domestic violence was committed by a minor who has reached the age of 14 and has not reached the age of 18, or an adult of 18 to 23 years of age, the Act on Juvenile Courts<sup>91</sup> shall apply. Those proceedings are conducted with a participation of municipal / county state attorney for youth and / or police officer for youth (depending on whether it is a criminal offense or a misdemeanour offense). Social welfare centre also has to be notified and invited to participate in the procedure.

Chapter XVIII of the Criminal Code is dedicated to the protection of the family through criminal law. However, in addition to criminal offenses in which the object of protection is a family, a punishment for violence against a family member is also possible under certain other offenses where a more severe punishment is prescribed if the violence is committed against a close person (a concept which includes family members). Examples of such offences against a close person are: personal injury, grievous bodily harm, especially grievous bodily harm, unlawful deprivation of freedom, abduction, coercion, threatening, serious crimes against sexual freedom. Due to the introduction of these more serious forms of criminal offenses, the Criminal Code of 2013 dropped the criminal offense of domestic violence. However, it was reintroduced with the 2015 Code amendments, because it was assessed that the more serious forms of these crimes did not cover all aspects of domestic violence. The criminal offense of domestic violence is committed by a person who severely violates the rules on protection against domestic violence and thereby causes a family member or close person to fear for his or her safety or the safety of those close to him/her or puts

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<sup>91</sup> Act on Juvenile Courts (Zakon o sudovima za mladež), Official Gazette No. 84/11, 143/12, 148/13, 56/2015.



him / her in a degrading position without committing a serious crime (Article 179a of the Criminal Code).

#### 2.4. Precautionary and Protective Measures in the Modern Misdemeanour Law

First, a clear distinction has to be made between precautionary measures and protective measures.

Precautionary measures are measures aiming at securing the presence of the defendant during the trial or preventing the defendant from committing new misdemeanour offenses or preventing or obstructing evidence (Article 127, paragraph 1, point 3 Misdemeanour Act). They are imposed on the defendant during the trial.

Protective measures, on the other hand, are a type of misdemeanour sanction that may be imposed on the defendant if they have been found guilty of a misdemeanour offence. (Article 5, para 1, Misdemeanour Act). The purpose of protective measures is to eliminate the conditions which enable or encourage the perpetration of another misdemeanour offense.

In addition to protective measures set out in the Misdemeanour Act, the Act on Protection against Domestic Violence sets out specific protective measures that may be imposed on the perpetrator of domestic violence. The specific purpose of these protective measures is to prevent domestic violence, to ensure the protection and health of victims of domestic violence, and to eliminate circumstances that favour or encourage the commission of a new offense, and are issued explicitly in order to eliminate the endangerment of the victim of domestic violence.<sup>92</sup>

It is important to emphasize that both protective and precautionary measures cannot be ordered at the same time.

##### 2.4.1. Precautionary Measures in Misdemeanour Law

The Misdemeanour Act provides for six precautionary measures.<sup>93</sup> Two of these correspond with the measures set out in the Directive 2011/99EU and the Regulation 606/2013 (Article 2 para 1):

- 1) prohibition of visiting a certain place or area,

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<sup>92</sup> Article 13 para 7.

<sup>93</sup> The remaining measures are: prohibition to leave the place of residence without court permission, prohibition to undertake certain business activities, temporary seizure of travel and other documents for crossing the state border, with a prohibition, temporary withdrawal of a driver's license to operate a vehicle or a license to operate a vessel, aircraft or other means of transport.

2) prohibition of approaching a certain person and ban upon establishing or maintaining contact with a certain person.

Precautionary measures may be imposed by the municipal misdemeanour court in a procedure initiated *ex officio* or at the request of the prosecutor. Such measures may last as long as necessary, up to the moment the final decision on the offense has been reached (Article 130 paragraph 4 and 5 of the Misdemeanour Act). There is an obligation of the municipal misdemeanour court to examine *ex officio* whether there is still a need for a precautionary measure. Such an examination would take place every two months, starting from the day of the previous ruling ordering a precautionary measure. If the reason for ordering the measures has ceased, or a legal requirement for their application no longer exists, the measures will be terminated even before the expiry of the two-month period. (Article 130 paragraph 5 Misdemeanour Act).

There is an exception to the procedure described above of pronouncing a measure by the municipal misdemeanour court. In particular, the measure may be provisionally ordered by the police against a person suspected of committing an offense prescribed by law. Such an order is valid for up to eight days. If within that period the authority that issued the order does not file an indictment with a proposal to the municipal misdemeanour court to extend the application of the precautionary measure, or if the municipal misdemeanour court upon receipt of the indictment with the proposal for the extension of the precautionary measure does not decide on the precautionary measure within 3 days, the precautionary measure ceases. (Article 130 para 7 Misdemeanour Act).

**Precautionary measure on the prohibition of visiting certain places or areas,** determines the location or area and the distance within which the defendant cannot get close.

**Precautionary measure prohibiting a person from approaching a particular person and establishing contact with a particular person** determines the distance within which the defendant must not approach a particular person and the person is prohibited from establishing or maintaining a direct or indirect relationship.

The precautionary measures relating to domestic violence are carried out by the police.

In a situation where the defendant would have acted contrary to a part or the entirety of a precautionary measure, the police shall inform the municipal misdemeanour court that could impose a fine on the defendant amounting up to HRK 10,000.00 (cc 1200eur). For repeated violation of a precautionary measure a fine of up to HRK 20,000.00 (cca 2800 EUR) is can be imposed.

The Act sets a restriction on issuing a precautionary measure in that it cannot restrict the defendant's right to his own home, the right to unhindered relations between the spouses, extra-marital or ex-spouses, with the children of each of them, parents, adoptive parents, adoptive parents and a person with whom he or she has common children, with a same-sex partner with whom he or she lives in a life union, and with a former same-sex partner with whom he has lived in a life union, unless proceedings are conducted for domestic violence offenses.

If, before or during the course of the proceedings, a precautionary measure has been imposed on the defendant which, in its content and purpose, is equivalent to the protective measure imposed by the decision on the defendant, the duration of the precautionary measure shall be calculated at the time of the application for the protective measure.

#### *2.4.2. Protective Measures in the Misdemeanour Law*

Protective measures, as misdemeanour sanctions, may be imposed together with other misdemeanour sanctions, but also independently, without imposing a sentence or other misdemeanour sanction. They can be pronounced *ex officio*, at the suggestion of an authorized prosecutor, victim or social welfare centre.

Protective measures issued should be proportionate to the behaviour and the weight of the misdemeanour offense they relate to, and correspond to the expected degree of the risk posed by the offender.

Both the Misdemeanour Act and the Act on Protection against Domestic Violence provide protective measures that can be issued in relation to misdemeanour acts of domestic violence. The Misdemeanour Act regulates seven protective measures<sup>94</sup>, while the Act on Protection against Domestic Violence regulates four protective measures<sup>95</sup>. Bearing in mind the specific focus of the project, this report will explain in more detail measures relevant in the context of domestic violence and the EU legislative framework.

A **protective measure prohibiting a visit to a particular place or territory** may be imposed by the municipal misdemeanour court on the perpetrator of the offense when there is a risk that he/she will commit the same offense again by visiting that place or area within a certain period (Article 58a Misdemeanour Act). This protective measure may not be imposed for a period

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<sup>94</sup> These are as follows: 1. mandatory treatment for addiction, 2. prohibition of performing certain duties or activities, 3. prohibition of performing certain activities or activities to a legal entity, 4. prohibition of obtaining licenses, authorizations, concessions or subsidies, 5. prohibition on dealing with users of the state and local budgets, 6. prohibition on operating a motor vehicle, 7. prohibition on visiting a specific place or area (Article 50, paragraph 1 of the Misdemeanour Act).

<sup>95</sup> Article 13 of the Act on Protection against Domestic Violence

of less than one month or more than two years. When a protective measure has been imposed with a suspended sentence and the municipal misdemeanour court in the process of verification finds that the convicted person acted contrary to the prohibition ordered by the measure, the court may revoke the suspended sentence and order the execution of the imposed sentence.

As already stated, the Act on Protection against Domestic Violence acknowledges four protective measures that are prescribed exclusively for the unlawful treatment of perpetrators in domestic violence cases. They are: 1. mandatory psychosocial treatment, 2. prohibition of approaching, harassing or victim stalking, 3. removal from a shared household, 4. mandatory treatment for addiction.

It is important to note that, in the context of domestic violence, two protective measures provided in the Act on Protection against Domestic Violence may exceptionally be imposed even before initiating misdemeanour procedures. These are: restraining, harassment or stalking of victims of domestic violence and removal from the common household. The imposition of these measures is initiated at a proposal of the victim(s) or other authorized prosecutor, if there is a direct threat to the safety of the victim or family members or members of a shared household. Such arrangements provide for the protection of victims of domestic violence who are in imminent danger even before the formal initiation of misdemeanour proceedings. In the case of a request to order these measures, the law stipulates that the municipal misdemeanour court will issue a decision imposing such a protective measure without delay, no later than twenty-four hours after the motion is filed. The municipal misdemeanour court will reach its decision after hearing from the victim and the person against whom a protective measure is sought. The appeal, if launched, does not delay the enforcement of the decision. Procedural provisions of the Act on Protection against Domestic Violence indicate that the municipal misdemeanour court immediately has to forward the imposed protective measure to the competent police station for enforcement. The same court shall suspend the measure if the victim or other authorized prosecutor does not file an indictment within eight days of the decision. The municipal misdemeanour court shall immediately inform the competent police station of the decision abolishing the measure. The above regulation represents an exception to the rule that protective measures are imposed as sanctions and applies only to the two protective measures specified above. Other measures can only be pronounced in the course of proceedings following a finding of guilt in relation to the defendant for the misdemeanour charge.

The **protective measure of mandatory psychosocial treatment** may be imposed on the perpetrator of domestic violence to eliminate his or her abusive behaviour or if there is a danger

that he / she may repeat domestic violence. This protective measure can be imposed for a duration of at least six months.

A **protective measure prohibiting the approaching, harassment or stalking of a victim** may be imposed on the perpetrator of domestic violence if there is a risk that the perpetrator may repeat domestic violence against that person. In its decision the municipal misdemeanour court will determine the places or areas and the distance within which the perpetrator must not approach the victim of domestic violence, or prohibit harassment or stalking of the victim. This protective measure may not be fixed for a period of less than one month or more than two years. (Article 16 of the Act on Protection against Domestic Violence).

A **protective measure of removal from a shared household** may be imposed on a perpetrator of domestic violence who has committed violence against a family member with whom he or she lives in an apartment, home or other living space that forms a shared household if there is a risk that he or she may repeat domestic violence. This protective measure cannot be imposed for period of less than one month, or for more than two years (Article 17 Act on Protection against Domestic Violence).

**Protective measure of mandatory treatment for addiction** may be imposed on the perpetrator of domestic violence who has committed the violence whilst under the influence of alcohol, drug or other addiction, if there is a risk that he / she will repeat domestic violence. This protective measure cannot be imposed for a period of more than one year (Article 18 of the Act on Protection against Domestic Violence).

## 2.5. Precautionary Measures in Criminal Law

The basic regulation of the imposition of precautionary measures and the purpose of each precautionary measure is prescribed by the Criminal Procedure Act.

Precautionary measures are issued when there are legal grounds to order an investigative detention, but the court determines that the same purpose can be achieved by a precautionary measure.

In this regard, an investigative detention may be ordered if there is a reasonable suspicion that a person has committed a criminal offense and if:

- the person is on the run or special circumstances indicate that the person may run away (hiding, her identity cannot be determined, etc.),

- particular circumstances suggest that they will destroy, conceal, alter or forge evidence relevant to the criminal proceedings or that they will interfere with the criminal proceedings by affecting witnesses, experts, participants or concealers,
- particular circumstances indicate the danger that he or she will repeat the criminal offense or complete the attempted criminal offense, or that he or she may commit a serious criminal offense for which a five-year prison sentence or a more serious sentence may be imposed by law,
- an investigative detention is necessary for the smooth running of proceedings for a criminal offense for which a long-term prison sentence is prescribed and in which the circumstances of the commission of the criminal offense are particularly grave,
- the defendant duly summoned avoids the hearing.

Precautionary measures may be ordered before indictment and during criminal proceedings. Prior to the indictment, the state prosecutor determines, prolongs and abolishes the measures by a decision. The investigative judge decides on the measures when he is called to decide on investigative detention. The state prosecutor or the investigative judge, that has determined the measure, is responsible for extending or terminating the measure. After the indictment has been filed and until the verdict becomes final or enforceable, the measure is determined, extended and revoked by the court of first instance.

The precautionary measures may last as long as necessary but at the latest until the judgment becomes final. In event of non-compliance, the precautionary measure will be replaced by sentencing imprisonment.

Precautionary measures may not restrict a defendant's right to his or her own home and the right to unhindered relationships with a spouse, parent, child, adoptive parent or adoptive parent, unless the proceedings are being conducted for the purpose of committing an offense to the detriment of one of these persons.

Precautionary measures prescribed by the Criminal Procedure Act relevant for this research are: prohibition of approaching to a specific person, prohibition of establishing or maintaining contact with a specific person, prohibition on visiting a particular place or are, prohibition of stalking or harassment of a victim, or other persons, and removal from home.<sup>96</sup>

## 2.6. Safety Measures in Criminal Law

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<sup>96</sup> Other measures are: prohibition on leaving the place of residence, obligation to report regularly to a specific person or government body, prohibition of performing certain business activities, temporary seizure of travel and other documents for crossing the state border, temporary revocation of a license to operate a motor vehicle.

The safety measures in the Criminal Code are similar to the protective measures regulated by the Misdemeanour Act regarding their purpose and the principle of proportionality. However, unlike protective measures under misdemeanour law, safety measures in criminal law cannot be pronounced on their own, but only in conjunction with other criminal sanctions. Furthermore, safety measures may not be pronounced prior to initiation of the criminal proceedings. The Criminal Code prescribes nine safety measures,<sup>97</sup> out of which only two (prohibition on approaching, harassment and stalking; and removal from a shared household) correspond to the Directive 2011/99EU and the Regulation 606/2013.

The individual safety measures that are relevant to this research project will be discussed below.

The safety measure of **prohibition on approaching, harassment or stalking** under the Criminal Code will be imposed when there is a danger that the perpetrator might commit further criminal offences against particular persons or at particular locations. The measure may last from one to five years. (Article 73 Criminal Code).

The safety measure of **removal from a common household** may be imposed on a perpetrator of a criminal offence of violence against a person he or she is living with in a shared household if there is a high degree of danger that, if this measure was not implemented, the perpetrator might again commit violence against a member of the shared household. After the judgment imposing a safety measure becomes final, the defendant is obliged, with the presence of police officers, to vacate the apartment, house or other living space constituting a common household. (Article 74 Criminal Code).

In the end national measures compatible with the measures under the Directive 2011/99EU and Regulation 606/2013 can be highlighted. Protective measures regulated by the Regulation 606/2013 that substantially correspond with the domestic protective measures within the misdemeanour regulation and the safety measures within the criminal regulation of the Republic of Croatia are:

1. prohibiting the approaching, harassment or stalking of a victim (Act on Protection of domestic Violence, Criminal Code, Criminal Procedure Act),
2. prohibition on visiting a specific place or area (Criminal Procedure Act; Misdemeanour Act),
3. removal from a shared/common household (Act on Protection of domestic Violence, Criminal Code).

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<sup>97</sup> Mandatory psychiatric treatment; mandatory treatment for addiction; mandatory psychosocial treatment; prohibition on performing a specific duty or activity; prohibition on operating a motor vehicle, prohibition of internet access; protective supervision upon full execution of the sentence.

## 2.7. Way forward

Legal answers to domestic violence are subject to revision and improvement. The significance of the issue in Croatian society is confirmed by recent research which indicates a growing number of domestic violence incidents in 2018.<sup>98</sup> The Republic of Croatia addresses the long-term battle against domestic violence with the National Strategy for the Protection of Domestic Violence for the Period from 2017 to 2022, September 2017.<sup>99</sup>

Revision of the Act on Protection of Domestic Violence 2017 is currently underway.<sup>100</sup> The motive for this revision is to impose a clear demarcation of violent behaviour within a family falling into misdemeanour vs criminal deeds. In particular the revision should clearly define the physical violence falling into misdemeanour sphere as use of physical force not resulting in bodily injury. The revision further attempts to align the circle of family members with that contained within the Criminal Code. The current difference is in respect of the relatives by law, which should in respect of misdemeanour responsibility also be protected up to second stage. The revision should bring, in general, tightening of legal sentencing, both monetary and imprisonment.

## 2.8. Croatian Case Law in respect of Protective Measures for Domestic Violence

The methodology of desk research adopted in respect of the case law analysis was as follows: requests for cooperation in respect of the POAM project topic were addressed towards approximately 20 courts judging in misdemeanour and criminal sphere, both at the level of first and second instance. The research team requested that the courts deliver/inform them about the relevant cases. A substantial number of cases received are here classified into several groups. The conclusions we reached are therefore based on a non-representative case sample.

In municipal jurisdiction in a misdemeanour trial of 81 judgments received, 8 judgments contained protective measures to prohibit the approaching, harassment or stalking of a victim and / or a protective measure of removal from a common home pronounced in accordance with the Act on Protection Against Domestic violence and the Misdemeanour Act. There is, to our knowledge, not a single municipal misdemeanour court ruling where Article 3 para 1 a), b) and c) of Regulation 606/2013 was invoked.

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<sup>98</sup> Irma Kovčo Vukadin (ur.), *Obiteljsko nasilje: Priručnik za stručnjake*. Edukacijsko-rehabilitacijski fakultet Sveučilišta u Zagrebu, 2017. p. 14.

<sup>99</sup> 22 September 2017, <https://mdomsp.gov.hr>.

<sup>100</sup> Draft Proposal available at: <https://vlada.gov.hr> › UserDocsImages › Sjednice › Listopad



As a result, 8 judgments pronounced protective measure that are substantially identical to the protective measure of the Protective Measures Regulation, which have a cross-border element and which convicted perpetrators for committing domestic violence. In 1 case a specific obligation that is substantially identical to the specific obligations under the Directive 2011/99 / EU was issued.

This desk research indicated several judgments that contain a protective measure to prevent the perpetrator from approaching, harassing or stalking the victim.<sup>101</sup> Several judgments contained the protective measure of removal from a common home.<sup>102</sup> The desk research identified one judgment imposing a protective measure of forbidding approaching each other at a certain distance.<sup>103</sup> At the same time, a special obligation was imposed upon the offender by a judgement ordering him to prohibit approaching a victim of violence.<sup>104</sup>

In the municipal jurisdiction, within the criminal justice sphere, of the 9 received judgments, only one included safety measures such as restraining, harassment or victim stalking, prohibition of approaching the place of residence of the victim and the security measure of the removal from common household<sup>105</sup> which correspond to article 3 paragraph 1 indent a ), b) and c) of the Regulation 606/2013 on protective measures.

One judgement called for not enforcing a decision in order to protect the welfare of the child described in Article 173 paragraph 1 of the Criminal code.<sup>106</sup> In this judgment, the request of father D.P. for the return of the abducted child by the other parent was rejected. The municipal criminal court in Zagreb conducted the evidentiary procedure in disputed circumstances. The court did not find the essential element of the crime proven, which is that the defendant would move with her child to another state to prevent the enforcement of a decision to protect the welfare of the child determined by the court.

Two County court decisions related to a recognition and enforcement of a European protection order. Jurisdiction for this procedure lies with the judge of investigation.<sup>107</sup>

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<sup>101</sup> Misdemeanor court of Rijeka No.: 20. Pp J-725/17 (in which the perpetrator was an Italian citizen), Misdemeanor court of Rijeka No.: 37. Pp J-2524/18 (where the perpetrator was Italian), Misdemeanor court of Rijeka No.: 37. Pp J-1138/18 (in which the perpetrator was a Slovenian citizen), Misdemeanor Court in Zagreb No.: 59. Pp J-4010/17 (in which the perpetrator was a German citizen), Misdemeanor Court in Zagreb No.; 84. Pp J-2136/18 (in which the perpetrators were a Serbian citizen and a Croatian citizen), Misdemeanor court of Zagreb No.: 57. Pp J-918/19 (in which the perpetrator was a Romanian citizen).

<sup>102</sup> Misdemeanor Court of Zagreb No. 75. Pp J-1808/2016 (in which the offender was an Italian citizen), this measure was also pronounced in the verdict: Misdemeanor Court of Zagreb No.: 57. Pp J-918/19, Misdemeanor Court in Zagreb No. 75. Pp J-1808/2016 (in which the perpetrator was an Italian citizen).

<sup>103</sup> Misdemeanor Court in Split No.: 29. Pp J-4361/16 (in which the perpetrator was a Romanian national).

<sup>104</sup> Misdemeanor Court in Rijeka No. 20. Pp J-1202/2018 (the offender was a German national).

<sup>105</sup> Municipal court in Bjelovar No.: K-517/2017-53.

<sup>106</sup> Municipal criminal court in Zagreb No.: 2.Kzd-19/2017-51.

<sup>107</sup> Art. 131.u. Act on judicial cooperation in criminal matters with the Member States of the EU.

The county court of Varaždin decision of 2017<sup>108</sup> dealt with the recognition of a European protection order issued in Slovenia.<sup>109</sup> A protection order was pronounced against D.K., Slovenian national with declared domicile both in the Republic of Slovenia and the Republic of Croatia. The Slovenian decision prohibited D.K. from intentionally approaching his wife J.K., a Slovenian citizen residing both in the Republic of Slovenia and the Republic of Croatia, within a distance of less than 200 meters for the period from 21<sup>st</sup> August 2017 from 4.40 pm to 5<sup>th</sup> September 2017 to 4:40 pm. The aforementioned protective measure also included a protective measure against the harassment of J.K. through any means of communication. Consequently, the Varaždin County court exercised its right for an adjustment of a foreign order and, as appropriate, pronounced a precautionary measure<sup>110</sup> in accordance with the national legal framework under the Criminal Procedure Act.<sup>111</sup> The Croatian adjusted ruling set a precautionary measure that prohibited D.K. from approaching J.K. within a distance of less than 200 meters, and prohibited establishing or maintaining direct or indirect relationship with J.K. for the time period until 5<sup>th</sup> September, 2017, until 4:40 pm. The European protection order was issued, in the first place, because of a suspicion that D.K. would commit the crime of domestic violence under Art. 191 (1) of the Slovenian Criminal Code against his wife J.K. The decision on recognition of the European protection order was followed by a rather plain reasoning. The Varaždin County Court merely declared that the formal legal requirements had been fulfilled and no grounds for refusing recognition and enforcement of the European protection order existed.<sup>112</sup> The investigative judge rendered a decision on the enforcement of a precautionary measure by the police. The court also ordered that should D.K. violate the measure, the Ptuj District Court would have to be notified immediately. For a breach of the precautionary measure, D.K. would be fined 300.00 to 800.00 euros<sup>113</sup> or a retention would be determined.<sup>114</sup>

The second decision in relation to the European protection order was issued as a continuation of a European protection order described above.<sup>115</sup> The county court received a request from the Ptuj District Court for an extension of precautionary measures against the defendant D.K. until 20<sup>th</sup> October, 2017. The request was grounded on the Ptuj District Court decision<sup>116</sup> which extended the injunction to 60 days, until October 20, 2017 to 4:40 pm. The

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<sup>108</sup> Kir-eu-34 / 2017-2.

<sup>109</sup> First instant decision of the Gorišnica Police Office, No.: 2300-75 / 2016/14 (3F699-13) of 21 August 2017; confirmed and extended by second instance decision of Ptuj District court, No.: I Kpd 36362/2017 of 22.8.2017.

<sup>110</sup> Art. 131.v Act on judicial cooperation in criminal matters with the Member States of the EU.

<sup>111</sup> Art. 98 para 2 item 4 and 5 of the Criminal Procedure Code.

<sup>112</sup> Art. 131.z Act on judicial cooperation in criminal matters with the Member States of the EU

<sup>113</sup> Art. 162 para 3 Slovenian Act on Police tasks and powers

<sup>114</sup> Art. 64. Slovenian Act on Police tasks and powers

<sup>115</sup> 3.Kir-eu-34 / 2017-9.

<sup>116</sup> No. I Kpd 36362/17 of 4 September 2017.

Croatian Court extended the precautionary measure based on previously recognized and adapted Slovenian European protection order.

Another set of judgments relates to the issue whether to prolong or abolish precautionary measures. It is within the jurisdiction of the county court judicial council to decide on the extension or abolition of the precautionary measure in individual cases, as prescribed by the Act on judicial cooperation in criminal matters with EU member states, applying the Croatian Code of criminal procedure. Two decisions of the Rijeka County court (No.: Kv-eun-12/2015 and Kv-eun-4/2016) have ruled on these matters and are analysed below.

By a decision of the Rijeka County court,<sup>117</sup> an execution of the European arrest warrant No.: 455 JS 197095/15 of 15 October 2015 was suspended. The European arrest warrant was issued in Germany by the State attorney's office in Munich against I.Ć.V., a citizen of the Republic of Croatia. I.Ć.V. was given a precautionary measure which prohibited leaving the residence<sup>118</sup>, the apartment in O., and the area of the P.-g. county, with the obligation to report regularly to the duty officer of Police Station O. twice a month. A record of how the measure was executed by the police officer had to be registered in accordance with Rulebook on the manner of exercising a precautionary measure<sup>119</sup>. The Court temporarily ordered the seizure of the passport belonging to I.Ć.V., issued by Germany, and the ID card issued by PD. State Attorney's Office in Munich No. 455 JS 197095/15 of 15 October 2015. Indicate the European arrest warrant order was issued for the person I.Ć.V. for handing over to FR Germany in connection with the initiation of prosecutions for the criminal offense of abduction of the minor under the German Criminal code.<sup>120</sup> The court eventually received a notification from the Leading State attorney's office Munich 1, stating that they were withdrawing their extradition request for I.Ć.V. It follows from the foregoing facts that Germany, as the issuing State of the EAW, had annulled the EAW and therefore the Court suspended the proceedings and annulled the measures.<sup>121</sup>

### **3. Application of the Protective Measures Regime to International Child Abduction Cases – Croatian Perspective. Conclusions and Recommendations**

The POAM research project results are based on desk research as well as workshops held in Zagreb and Osijek (4<sup>th</sup> and 6<sup>th</sup> June 2019). The purpose of the workshops was to establish communication and a dialogue amongst relevant stakeholders that could potentially use the

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<sup>117</sup> Kv-eun-12/2016.

<sup>118</sup> Art. 98 para 2 item 1. Croatian Act of Criminal procedure.

<sup>119</sup> Art. 15. Ordinance on the manner of exercising precautionary measures (Official Gazette 92/2009 & 66/2014).

<sup>120</sup> Art. 235. German Criminal code.

<sup>121</sup> Art. 24 c Act on judicial cooperation in criminal matters with the Member States of the EU.

protection measures legal package (authorities responsible for handling and implementation of the measures, the recognition of measures and cooperation between the courts, central authorities, police departments and other stakeholders). The participants were chosen carefully, 3 ppt presentations were prepared by the research team, 2 hypothetical case scenarios were provided for discussion, more cases settled by Croatian authorities (relating to either protection in event of domestic violence or child abduction) were discussed.

The European legal framework covering child abduction cases involving allegations of domestic violence is very complex. The subject matter is regulated by diverse legal sources, the primary focus here has been on placing the European package of protection measures and child abduction (Regulation on protection measures, the Directive on the European protection order, Brussels II a, Hague 1980, Hague 1996) into the national context of legal rules covering all relevant areas (domestic violence as a misdemeanour / criminal offence, child abduction, protective measures, private international law).

The mosaic of legal sources and remedies available to Croatian authorities affect criminal courts / misdemeanour courts / civil courts. The research team presented this mosaic of legal sources and remedies in procedures before criminal and misdemeanour courts. In Croatian legislation dealing with domestic violence it is necessary to distinguish misdemeanour from criminal acts:

- a) Domestic violence as a misdemeanour offense: protection measures and other rights of victims are prescribed by the Croatian Act on Protection against Domestic Violence and the Misdemeanour Act;
- b) Domestic violence as a criminal offense: security measures and precautionary measures are prescribed by the Croatian Criminal Code.

The research team presented the mosaic of legal sources and remedies in procedures before civil courts:

- protective measures that would correspond to EU protective measures package, related to domestic violence, cannot be issued before civil courts;
- other measures of protection of a child and an adult may be rendered before civil courts;
- note: international child abduction proceedings are dealt with before the civil court.

Legal sources presented in terms of possible measures of protection in civil procedures;

- in relation to a child (Hague child abduction convention, Hague 1996 convention, Brussels II *bis* regulation)

- in relation to an adult (Croatian PIL Act)
- in relation to both, in the child abduction proceedings the Croatian Law on Implementation of the Hague Child Abduction of 2018.

This POAM project Report therefore focuses separately on the functioning of the child abduction regime and functioning of the protection measures (in respect of a child and a mother) across the border. Those aspects are, however, merged and interconnected through available case law and doctrinal findings. The overall aim of this report is to place protection measures in the context of child abduction.

As far as the measures of civil law are concerned, the analyses of child abduction proceedings with domestic violence objection to return have been discussed. The conclusion that may be drawn is that a large percentage of child return cases end up with a denial of return due to allegations of domestic violence.

If in these processes a court would ensure the protection of the parent who returns with the child, it would be possible to increase the number of decisions ordering the return. The aim of the Hague Convention on Child Abduction is to return the child, and the exception of Article 13, paragraph 1, line b. should be used only exceptionally. The court in the abduction proceedings has no burden of proof in respect of the alleged domestic violence - all evidence should be presented by the parent who has abducted the child and who opposes the return. The decision making and decision ordering the return of a child would be facilitated, if the court would have confirmation that the returning parent would be protected in the country of origin, ie if the court could be sure that the parent has a protection measure that would follow him or her abroad.

Employment of recently adopted Croatian child abduction implementing legislation has been set out. The Act on the Implementation of the Hague Convention on Civil Aspects of International Child Abduction prescribes by Art. 20 para 4, item 4 that a court making a decision in return proceedings may issue a measure of protection. Such a measure may be issued upon a proposal of the parties, the social welfare center or ex officio. The purpose of the measure is to protect the best interests and the welfare of the child, in order to ensure the return of the child and to exercise the right of personal contact. The court may also impose the necessary measures in order to issue measure of obligation to report to the police during the period of contacts according to the court's decision, if there is a justified fear that a person who has the right of contact with the child could misuse that right. Broad interpretation of this provision has been advocated by the participants of the workshop discussions. If a broad interpretation of this provision is employed, it may also include the protection of a person who has been a victim of domestic violence.

The guarantees provided for in Art. 11 para 4 of the Brussels IIbis Regulation have also been further implemented through the provision of Art. 21 of the Law on Implementation of the Hague Convention. The question that was raised is a proof of alleged violence – what is the sufficient proof for a judge dealing with the return application to request such a measure? The workshop participants have also doubted whether, if a reverse scenario is employed, and another member states request issuing of a measure of protection in creation (pursuant to Art 11/4, as a precondition to order a return of a child), would our misdemeanour court as relevant authorities for the implementation of a Directive be keen to issue a measure of protection if the violence has not been processed as a criminal offence?

Mothers who abduct a child from Croatia often do not believe in the system of judicial protection and do not report a fact of domestic violence/do not seek medical assistance or any form of formal protection. In such a scenario the proof of domestic violence becomes cumbersome, a *probatio diabolica*, so it becomes difficult or even impossible to prove such a misdemeanour offence. This research has also indicated that the Croatian criminal authorities are usually faced with the request for recognition and execution of the European arrest warrant issued against the abducting mother.

In relation to misdemeanour court practice the workshop participants expressed their view on possible situations where the EU acquis could take place. The situation where a municipal misdemeanour court issues a precautionary measure of prohibition of approach, in proceedings concerning domestic violence committed on the territory of the Republic of Croatia, could be one of them. More precisely, it could be a situation in which the violence against the victim of foreign nationality/domicile/residence was committed in the presence of a child and sanctioned as a misdemeanour offence. This hypothetical case was highlighted as an example in which a European protection measure should follow the victim when they return to their home country. Some of the workshop participants have actually been faced with such a scenario, but the EU regulation was not employed. The vast majority of cases dealing with domestic violence, settled before Croatian authorities, are at a purely national level, i.e., do not contain any cross-border elements. There were parental child abduction cases (national and international), where interventions of criminal courts were sought, in terms of issuing measures. Examples of precautionary measures may be found in practice, but not in child abduction cases. There is only one available example of the recognition of the European Protection Order issued by the Slovenian Judicial Authority, but not in a child abduction case. To our knowledge and based upon the available information, no protective measures pursuant to the Regulation 606/2013 have been issued in Croatia so far.

One of the findings of this research is also that of a lack of communication between municipal civil and misdemeanour courts. More precisely, the municipal civil courts are not informed / aware of the fact that there is an ongoing/conducted procedure against a particular perpetrator in misdemeanour proceedings, or if any measures of protection have been issued. The issue gets more complicated with the recent concentration of jurisdiction for child abduction cases to the Municipal Civil Court of Zagreb solely. There is an informal practice of municipal misdemeanour courts to deliver measures issued in the misdemeanour proceeding to municipal civil courts. It was questioned among the participants whether in such a situation the judge of the municipal misdemeanour court should notify the competent social welfare center. Improvement in communication between municipal civil courts and municipal misdemeanour courts is expected by merging the electronic court records data into one software programme. The way forward is the introduction of some formal path of communication.

This POAM project Report is based on project activities (workshop and desk research) that indicate that the application of the Protection Measures Regulation and the European Protection Order Directive is rare. The Directive has been implemented in domestic legislation. The Regulation has direct application, but implementing law has been enacted. The POAM project raised the issue of appropriateness of the Croatian implementation and application of the Regulation 606/2013. The Republic of Croatia has submitted data on domestic application of the relevant Regulation to the judicial atlas. It stated that the civil law system of the Republic of Croatia does not provide the possibility of issuing protection measures as described and defined by the Regulation. We recall the fact that in the area of civil litigation in family affairs the application of the Family Law in the area of the issuing of protection measures in domestic violence cases refers to the *lex specialis* Act on Protection against Domestic Violence, which provides for misdemeanour proceedings before municipal misdemeanour courts.

Croatia has indicated in the judicial atlas that in civil matters it is not possible to issue a certificate pursuant to Regulation 606/2013 because there is no "issuing body" (Article 4, paragraph 4). This is despite the fact that the Regulation clearly prescribes the obligation of autonomous interpretation of the "issuing bodies", and that the national system may belong to either civil, criminal or administrative body (recital 10). Bearing in mind the obligation set by art. 18 of the 606/2013 Regulation, there is a failure of proper application of the Regulation. Adjustment of the judicial system to the acceptance of an autonomous interpretation of the *acquis communautaire* is envisaged.

Foregoing, Croatia is obliged by the Commission Regulation (EU) no. 939/2014 of 2<sup>nd</sup> September 2014 on the introduction of the certificates referred to in Articles 5 and 14 of Regulation

(EU) No. 606/2013 EP and EC in the relevant forms provide that the Croatian authorities may issue a certificate (see Form I and Form II). Civil Judges in civil area are to a greater extent familiar with the concept of issuing of certificates provided by regulations. *Pro futuro* attention has to be afforded to familiarising criminal and misdemeanour judges with that concept.

A conclusion on mandatory direct application of the Regulation can also be reached. EU principles and CJEU case law clearly indicate that a failure of a Member State to properly apply the EU secondary legislation may not affect the legal rights that citizens are given by that legislation. In other words, a consequence of false implementation may not be a deprivation of citizens' rights and enjoyment of the same level of protection as in the rest of the EU.

The case law of the CJEU provides an additional argument in respect of the legal consequences of failure of a Member State to notify the European Commission of a body responsible for issuing a certificate. The Croatian implementation of the Regulation no 606/2013 lacks nomination of authority responsible to issue a certificate. The Court of Justice of the EU has recently rendered a 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>122</sup> Failure of a Member State to notify the Commission of body responsible to issue a measure is of merely indicative value.<sup>123</sup> It is argued here that such failure cannot deprive a person of the right to request a certificate under the Regulation. A logical question arises – “where”? The Regulation clearly indicates that it does not touch upon a national system of judicial functions, but on the contrary relies upon them. Formal failure of notification does not affect the substantial situation that a certain body within Croatian system is responsible to order protection measures. Consequently, it is the court issuing a measure corresponding to measures prescribed by the Directive 2011/99EU and the Regulation 606/2013 that should issue the certificate.

This report finishes by tackling the issue of execution of the protective measures.<sup>124</sup> Police in their information system have a record of issued security measures and protection measures. Any such measure that is issued has to be visible in the system. When a party against whom the measure was issued leaves the territory of the Republic of Croatia, the system automatically marks that the person has gone abroad (a system of border check). At the same time police cooperation among the EU Member States has improved with the signing of the Schengen agreement, which Croatia is a part of. It involves the use of the Schengen Information System (acronym SIS) and the Schengen Information System of the second generation (acronym SIS II) through the Office for

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<sup>122</sup> ECLI:EU:C:2019:444 Case C-658/17, 23 May 2019.

<sup>123</sup> Recital 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>124</sup> Report of June 2019.



processing the request for additional information on the national entry (acronym S.I.R.e.N.E.). Through this co-operation, all forms of protection measures can be exchanged at the EU level.

The research team has developed a scenario on the possible application and potential of the EU protective measures legal package that might have been used in the context of child abduction triggered by a domestic violence.

The research team simulated two child abduction scenarios, to encourage further discussion.

- Mother abducted a child and fled to Croatia. In both scenarios the mother claims that she was/is a victim of domestic violence but
  - in the first scenario
    - the abuser is present in Croatia (left behind parent has to take part in mediation and other attempts of a voluntary return of the child, he takes part in the court proceedings, he possibly has contact rights and meets with the child)
    - there is a danger to the victim of domestic violence
    - the mother asks for protection under a national procedure (later she could request the same court to issue a certificate under the Regulation 606/2013 meaning the measure would follow her in the return proceedings to the country of residence)
    - does the misdemeanour court require evidence of domestic violence?
  - in the second scenario
    - the mother raises a domestic violence objection in a return proceedings
    - alleged abuser is not present in Croatia (he was heard by video conference, does not have contact with the child)
    - the mother claims that her security is endangered if she is ordered to return (she goes back with the child) and the special child abduction court has to reconsider her protection
      - Is it expected that she is protected through a protection measures issued in domestic proceedings (as in the first scenario) so the measure follows here when she goes abroad?
      - Is it instead expected that the specialized abduction court uses possible traditional PIL remedies (Art. 11/4 Brussels) and requires protection in the member state of the habitual residence of the child

- Is it expected that the courts of the habitual residence of the child would, upon a request of a foreign court, issue a measure of protection, if the violence was never reported at the time the family lived there.

The overall conclusion of this Report, based on the workshops and the desk research, is that stakeholders are not familiar with the mechanisms under the European Protection Measures package in general. There is no application of this legal package either in return proceedings in child abduction cases involving allegations of domestic violence. The implementation of the Regulation is not fully achieved. To address this issue, a dialogue should be established among relevant ministries responsible of a) justice, b) interior and c) family. Further steps should be taken to target stakeholders at every level.