COUNCIL REGULATION (EU) 2019/1111: NEW PROGRESS IN INTERNATIONAL CHILD ABDUCTIONS

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Abstract

Council Regulation (EU) 2019/1111, recently entered into force, brought significant progress for EU Member States in the specific area of international child abductions.

In the context of freedom of movement within the European Union guaranteed by art. 21 TFEU, there is an ever-increasing number of transnational families, and an equally increasing risk of international child abductions when these families break up.

Strongly supporting the general principle according to which an abducted child shall promptly be returned to the state of habitual residence, Council Regulation (EU) 2019/1111 narrows the application of the most frequently encountered exception to this principle, namely the "grave risk" exception.

The purpose of the article is to analyse the child protection measures ensuring the application of the principle of prompt return, even when a serious risk is associated with the return of the child to the state of habitual residence.

Hence, the objectives of the present study are to identify the progress from private international law to EU law, and also the way in which the relevant EU regulations - Council Regulation (EC) 2201/2003 and Council Regulation (EU) 2019/1111 - have constantly evolved in relation to protection measures, intended to remove from application the serious risk defense.

Moreover, as these protective measures are not indicated even by the actual Council Regulation (EU) 2019/1111, the article will further examine the most significant procedural and substantive aspects, as they arise from legislation in force and the case-law of the courts in Member States.

Keywords: *EU regulations, international abduction, prompt return, grave risk, measures of protection.*

1. Introduction

The issue of international child abduction is not new, as it was already approached in private international law by the well-known Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[1].

Nevertheless, this phenomenon has grown exponentially in recent years all over the world and especially in the European Union, in the context of freedom of movement of EU citizens[2].

This led to adoption of specific instruments in European Union law - the former Council Regulation (EC) 2201/2003[3] and the actual Council Regulation (EU) 2019/1111[4], which took over and developed the experience gained through private international law.

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[1] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, entered into force on 01 December 1983.

[2] Art. 21 para. 1 TFEU (consolidated version) stipulates: „Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". European Union citizenship is afforded to all nationals of member states of the EU, was introduced by the 1992 Treaty on European Union (art. 3 para. 2 consolidated version) and is additional to national citizenship. Art. 45 para. 1 of the Charter of Fundamental Rights of the European Union confirms that: „Every citizen of the Union has the right to move and reside freely within the territory of the Member States".

[3] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L 338/1/23.12.2003.

[4] Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178/1/02.07.2019.

Both private international law and EU law acknowledge the evident tension between the principle of prompt return of the child to the state of habitual residence and the exceptions to this principle, of which the most disputed in practice is the „grave risk" exception.

Indeed, an order of return to the state of habitual residence issued in order to apply the prompt return principle might expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The subject has great importance, as the answer to the question how to accommodate the principle with the above-mentioned exception is difficult, especially as both EU law and private international law leave a large margin of discretion to courts dealing with international abduction cases.

Nevertheless, EU law conceived new means to harmonise the principle of prompt return with the "grave risk" exception, by introducing the concept of "protective measures" of the child.

The study intends to explore this concept, destined to remove from application the serious risk defense and thus ensure safe return of the child to the state of origin.

To reach this aim, the study will extensively engage with EU law and also the work of The Hague Conference on Private International Law, exploring the origin and evolution of protective measures.

The analysis will further focus on particularities of these measures of protection, as no definition is provided by EU law, and most of substantive and procedural aspects are left for the national legislations.

As Romanian juridical literature and case-law have not yet approached the subject in relation to Council Regulation (EU) 2019/1111, doctrinal opinions and jurisprudence identified abroad will be presented.

2. Content

2.1. Evolution of legal context

Private international law and EU law coexist in the area of international child abductions.

Eu law, adopted approximately 20 years after the private international law, represents nevertheless progress from several perspectives, as a response to the need to adapt legal norms to the new social realities (progressive increase of the number of international abductions).

The study will concentrate on a singular progressive aspect, namely the concept of „protective measures" of the child.

2.1.1. The beginning: private international law

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (to which Romania is a member state[5]) is the key juridical instrument of private international law, which seeks to protect children from the harmful effects of wrongful removal and/or retention across international boundaries.

The principle of prompt return of the child to the state of origin is stipulated form the very first article[6].

Exceptions to this principle are consecrated by art. 12 (integration of the child in the state of refuge), art. 13 (grave risk for the child in case of return to the state of habitual residence) and art. 20 (protection of human rights and fundamental freedoms) of the same 1980 Hague Convention.

These exceptions consist in situations when it is considered to be in the best interests of the child to remain in the state of origin, although the she/he has been wrongfully removed or retained.

The most problematic exception in practice is the "grave risk" exception, as it generates the majority of non-return orders and thus non-compliance with the prompt return principle.

The 1980 Hague Convention does not include any instrument intended to reduce the effects of the previously mentioned serious risk exception.

[5] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[6] Art. 1: „The objects of the present Convention are: a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State (…)."

Nevertheless, the HCCH[7] has recently published a Guide to Good Practice regarding the application of the above-mentioned exception[8], where an important concept later conceived by EU law („protective measures") was acknowledged and extensively discussed.

2.1.2. A step forward: EU law

As already indicated, EU law intervened in the area of international child abductions as a progress compared to private international law, because it introduced the concept of the „protective measures" of the child.

In essence, these measures are destined to protect the child in the state of habitual residence and thus ameliorate or remove the serious risk, so that the prompt return principle may still be applied.

Council Regulation (EC) no. 2201/2003 of 27.11.2003 (also known in practice as Regulation Brussels IIa) is the first important progress in the area of protective measures of the child.

According to the Practice guide for the application of the Brussels IIa Regulation, the Regulation „goes a step further by extending the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return"[9].

To this end, art. 11 para. 4 stipulates that: „A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return" (our underline).

As a novelty compared to the 1980 Hague Convention, Regulation Brussels IIa connected the grave risk defense to protective measures in benefit of the child returned to the state of origin. Practically, even if a grave risk exists, the court is still under the obligation to return the child, if adequate protective measures have been taken.

The mere fact that EU law enshrined the concept of „protective measures" (even if no other legal or practical elements were provided) is by itself sufficient to signify a step ahead compared to private international law.

We underline that measures of protection under Regulation Brussel IIa are to be taken in the state of the habitual residence to which the minor's return is ordered.

The present Council Regulation (EU) 2019/1111 (known as Brussels IIb) entered into force rather recently, starting from 01.08.2022.

Although the new regulation repealed Regulation no. 2201/20023, the latter is still of practical importance, as it continues to apply for different instruments (judgements, authentic acts, agreements) registered or concluded before 01.08.2022[10].

Regulation Brussels IIb strengthened and further expanded on the concept of „protective measures".

According to art. 27 para. 3: „Where a court considers refusing to return a child solely on the basis of point (b) of art. 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return" (our underline).

By means of the previous provisions, Regulation Brussels IIb strengthened the concept, as new elements were addressed (burden of proof related to protective measures).

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[7] The Hague Conference on Private International Law is an intergovernmental organisation the mandate of which is "the progressive unification of the rules of private international law" (art. 1 of the Statute). To this end, HCCH elaborated different Guides to Good Practice, Explanatory Reports, Practical Handbooks or Brochures, in order to facilitate the application of different juridical instruments belonging to the area of private international law.

[8] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), published by The Hague Conference on Private International Law, 2020, *https://www.hcch.net/en/publications-and-studies/details4/?pid=7059*, last consulted on 10.05.2024, 20.38.

[9] Practice Guide for the application of the Brussels IIa Regulation, published by Directorate-General for Justice and Consumers (European Commission), 2014, para. 4.3.3.

[10] According to art. 100 of Regulation Brussels IIb: „(1). This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022. (2). Regulation (EC) No 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation."

Subsequently, art. 27 para. 5 indicates that: „Where the court orders the return of the child, the court may, where appropriate, take provisional, including protective measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings" (our underline).

In this case, sphere of application of protective measures was significantly widened, as they may not only be taken in the state of origin, but also in the state of destination (specifically, buy the court dealing with the international abduction).

According to the Practice Guide for the application of the Brussels IIb Regulation: „Article 27(5) of the Regulation provides for additional possibility for the court of the Member State of refuge (…) The access to these provisional, including protective measures under Article 27(5) does not change the concept that the court of the Member State of refuge may decide only on the return"[11].

Moreover, art. 27 para. 5 of Regulation Brussels IIb overrun the limits of art. 20 of Regulation Brussels IIa.

While protective measures taken under the latter Regulation were not enforceable outside of the territory of the Member State where they were taken, those based on art. 27 para. 5 of Brussels IIb Regulation may be recognized and enforced in all other Member States (including the state of origin).

2.1.3. Relation between private international law and EU law: complementarity and progress

First, EU law did not replace private international law, not even in relation between Member States. Complementarity is articulated by art. 22 of Regulation Brussels IIb, according to which „Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention".

Secondly, progress of EU law comes not only from introducing the new substantial concept of „protective measures" (as already pointed out), but equally from the mere nature of the juridical instrument chosen by the European legislator.

It is indeed quite relevant that regulations, and not directives, have been chosen to legiferate.

This comes as a corollary to the fact that, according to art. 288 para. 2 TFEU, EU regulations are directly applicable on the territory of all Member States (there is no need of transposition measures), and are also entirely binding (both goals to be achieved, and also means of achievement)[12].

Juridical literature[13] also underlined that: „the regulation, being binding in all its elements, is distinguished, on the one hand, from the directive, which is binding only with regard to the intended purpose, and, on the other hand, from acts without legal force (recommendation and opinion)."

Lack of transposition measures in case of EU regulations leaves no room for intervention of domestic legislation[14], and therefore regulations have the most important advantage of cancelling the deficiencies related to differences among national legislations of EU Member States.

Therefore, in aspects regulated by Brussels IIa and IIb Regulations, uniformity in the EU is ensured.

Moreover, various domestic legislations cease to apply, consequent to the principle of supremacy of EU law in its entirety, including regulations („priority is part of the very nature of European Union law, because its uniform application depends on it"[15]).

[11] Practice Guide for the application of the Brussels IIb Regulation, published by Directorate-General for Justice and Consumers (European Commission), 2023.

[12] Art. 288 para. 2 TFEU stipulates that a regulation „shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

[13] A. Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți* , Universul Juridic Publishing House, Bucharest, 2016, p. 45.

[14] According to the European Court of Justice, „all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardising their simultaneous and uniform application in the whole of the Community" (ECJ, Decision adopted on 07.02.1973, C-39/72, case *Commission of the European Communities v. Italy*; para. 17 (3) in A. Fuerea, *Manualul Uniunii Europene*, 6th ed., Universul Juridic Publishing House, Bucharest, 2016, p. 235.

[15] R.-M. Popescu, *Specificul aplicării prioritare a dreptului European în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional*, in Revista Română de Drept Comunitar no. 3/2005, p. 17.

E.g., while there are some states whose domestic legislation allows the courts dealing with international abductions to take measures to protect the child accompanying the return order[16], many other states do not recognize such possibility[17].

Due to the fact that the possibility to take protective measures was acknowledged by art. 27 para. 5 of Brussels IIb Regulation for courts in the state of refuge, all national courts dealing with abduction cases may issue such measures based on EU law, and independently of their domestic provisions.

2.1.4. What about national law?

EU Regulations do not include substantive provisions concerning the type of protective measures to be applied, and therefore it belongs to the national legislator to lay down the measures available in each domestic system.

Uniformity is thus not ensured in this substantial area, and national legislations differ significantly with respect to protection measures (which may cause some difficulties, especially where the specific protection measures adopted in one state do not even exist in other states).

Also, it is for the Member States/states parties to the 1980 Hague Convention to establish procedural rules applicable to issuance of protective measures.

2.2. Measures of protection in practice

There is an obvious tension between the inability of the court dealing with a summary international abduction process to determine factual disputes, and the risk that the child will be harmed if the disputed allegations are actually true.

Two main orientations were identified in juridical literature and case-law: the „protective measures approach" and the „assessment of allegations approach" [18].

According to the „protective measures approach", a court dealing with the serious risk defense will refuse to carry out a fact finding exercise to determine the truth of the allegations and will concentrate only on protective measures.

„(…) the court will take the allegations at their highest and decide, whether on that basis, there is a grave risk that if the child returns to the requesting State he/she will be exposed to physical and psychological harm or otherwise placed in an intolerable situation. Afterwards, the court will consider whether protective measures sufficient to mitigate the harm are available (…). This approach relies on the availability of adequate and effective protective measures as a substitute for determining facts."[19]

By contrast, the „assessment of allegations approach" will take into account both allegations of serious risk, and also protective measures.

In this case, the court will first seek to establish, to the extent possible (given the summary nature of return proceedings), the merits of the disputed allegations of grave risk. Only after having determined that a grave risk of harm exists, the court will afterwards proceed to assess the availability of protective measures.

We support the second orientation, arguing that existence of grave risk and protective measures are closely connected.

In our opinion, choice and effectiveness of the protective measures to be adopted may only be assessed *in concreto* related to the intensity and level of the actual risk of harm, as appreciated in the context of evidence in the case.

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[16] This is the case of USA. See, for example, United States District Court for the District of Maryland, case *Sabogal v. Velarde*, 106 F. Supp. 3d 689, decision from 20.05.2015, in Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., p. 35, n.s. 60. The USA court was prepared to order the children's return subject to some specific conditions. In short, the return was to take place after the left-behind parent had arranged to have the temporary custody order in his favor vacated, so that the underlying temporary custody order in favor of the taking parent was reinstated, and after he had arranged to have the criminal charges against the taking parent dismissed or the investigation closed.

[17] This is the case of Romania. Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction (published in the Official Gazette of Romania no. 888/29.09.2004 and republished successively, last time in the Official Gazette of Romania no. 144/21.02.2023) makes no reference to protective measures in the competence of the Romanian court where the application for return is pending.

[18] See K. Trimmings, O. Momoh, *Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, in International Journal of Law, Policy and The Family, 2021, pp. 6-9, *https://research.abdn.ac.uk/wp-content/uploads/sites/15/2021/06/POAM-journal-article.pdf*, last consulted on 11.05.2024.

[19] Idem, pp. 6-7.

Also, this orientation seems to be supported by the jurisprudence of the ECtHR[20], as the Grand Chamber introduced the concept of „effective examination".

At the same time, this orientation corresponds with the HCCH Guide to good practice on Article 13(b)[21].

2.2.1. Connection to the grave risk defense

It cannot be emphasised enough that the minor's protection measures are related exclusively to the grave risk exception, without any correlation to the other exceptions to the principle of prompt return.

The mechanism is simple: where courts recognize the existence of serious risk, it is necessary to correlatively analyse the possibility of adopting protective measures.

„This does not amount to a two-stage test. Rather, the question of whether Article 13 (b) has been established requires a consideration of all the relevant matters, including protective measures". Subsequently, if „the court decides that the protective measures meet the risk, then the terms of Article 13(1)(b) will not be made out."[22]

2.2.2. Who is empowered to provide protective measures?

It follows from the previous conclusions that a double perspective must be taken into account, namely measures adopted in the state of origin and measures issued in the state of refuge.

In the first case, measures can currently be ordered by courts, competent national (other than judicial) authorities, as well as undertaken the left behind parent.

In the second case, it is only for the courts (particularly those where the international abduction case is pending) to issue the protective measures.

For this second hypothesis, art. 27 para. 5 of Brussels IIb Regulation indicates that „examining and taking of such measures would not unduly delay the return proceedings".

Procedurally, we do not see any impediment for these measures to be taken/proof of these measures to be submitted to the file both in the first instance, and also in subsequent phases of the case (depending on national law)[23].

The recent increase of competences for the abduction courts consisting in the possibility to order protective measures themselves is yet to be explored, given the relatively short period from entry into force of Regulation Brussels IIb[24].

2.2.3. How long do protective measures take effect?

Protection measures are provisional by their own nature, and therefore they cease to apply when the court of the Member State having jurisdiction on the substance has taken the measures it considers appropriate.

This is the conclusion resulting from specifications in the Practical Guide for the application of the Brussels IIb Regulation[25], and also from the Guide to Good Practice on art. 13(1)(B)[26].

Consequently, protective measures must be of limited duration (sufficient for the courts of the state of habitual residence to make a judgment by which to resolve these issues).

2.2.4. Identification of protective measures

Since no definition of protective measures is provided by EU law, there is a wide margin of appreciation of the courts upon this issue.

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[20] ECtHR, Decision adopted on 26.11.2013, app. no. 27853/09, Case *X. v. Latvia,* para. 106. As Judge Albuquerque explained in his concurring opinion, „effective examination" means a „thorough, limited and expeditious examination".

[21] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), p. 33.

[22] J. MacDonald, *Article 13 Exceptions – Return and Best Interests of the Child in the Jurisdiction of England and Wales*, in The Judges' Newsletter on International Child Protection, vol. XXIII, Summer-Winter 2018, Spring 2019, pp. 18-19, 21 (*https://www.hcch.net/en/publications-and-studies/details4/?pid=6636*, last consulted on 10.05.2024).

[23] To the same conclusion, see Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.1: „Adequate arrangements may be considered by the court of first instance or by the court of the higher instance in the Member State of refuge. It is up to the national procedural law of that Member States (…)".

[24] Research of Romanian jurisprudence did not reveal any case in which the Romanian courts seized with international abduction cases have themselves ordered protective measures.

[25] Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.2.

[26] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., para. 61.

In practice, courts accepted any measure that could annihilate the serious risk given the specificity of the case, and not only certain specific measures proposed by the parties.

Among examples of such measures taken by the courts, as offered by Recital 45 of Regulation no. 2019/1111, there are court orders prohibiting the left-behind parent to approach the child. Also, there are measures allowing the child to stay with the abductor parent, who will ensure the effective care until upon the pronouncement of a decision by which the issue of custody is settled on the merits.

Also, some courts accepted that protective measures can take the form of voluntary undertakings assumed by the left-behind parent[27] (which should be incorporated in the court decision, or otherwise no enforceable character may be attached)[28].

However, increased awareness and careful consideration of this parent's behavior are recommended (for example, in the event of repeated previous breach of protective orders, the undertakings should not be considered adequate and sufficient[29]).

Some examples of undertakings offered by practice are providing separate housing only for the abducting parent and the child or the withdrawal of criminal proceedings initiated by the abandoned parent in the country of origin (this aspect, however, depends on the national law of the respective state, and these procedures, once initiated, might not be stopped by the simple will of the initiating parent)[30].

Among measures taken by authorities (other than judicial) in the country of origin, proof that medical equipment is available for a child in need of treatment is exemplified in the same Recital 45 already mentioned.

In the same sphere of the measures taken by the authorities, there are police interventions, offering a place to live or financial aid, assistance in various forms for victims of domestic violence (legal services etc.).

Consequently, protection measures may cover a wide variety of services, assistance mechanisms or judicial interventions, as legislated by the domestic law.

Determination of the type of measure considered appropriate in each particular case depends on the concrete serious risk to which the child might be exposed as a result of his return in the absence of such measures[31].

Finally, we point out that protective measures should not be confused with various practical provisions, sometimes adopted by courts in when ordering return, as their role is different.

Thus, practical provisions have the aim of facilitating practical aspects related to the return (e.g., identifying the person who will accompany the child on the return flight), while protective measures aim to remove the serious risk.

2.2.5. Burden of proof

In the context of art. 27 para. 3 of Regulation no. 2019/1111 („if the party seeking the return of the child satisfies the court by providing sufficient evidence"), the burden of providing that appropriate protective measures have been taken to ensure the protection of the child rests in principal with the party requesting the return of the child[32].

[27] Undertakings were described in juridical literature (K. Trimmings, O. Momoh, *op. cit.,* p. 12) as „promises offered or in certain circumstances imposed upon an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child".

[28] "The parent seeking the return of a child is often ready to provide undertakings required to facilitate the issuance of the return order (…) In most cases, the judge will make these undertakings as an integral part of the return order" (J. Camberland, *Domestic violence and international child abduction: some avenues of reflection*, in The Judges' Newsletter on International Child Protection - Vol. X / Autumn 2005, p. 71, *https://www.hcch.net/en/publications-and-studies/details4/?pid=3758*, last consulted on 10.05.2024).

[29] J. Camberland, *op. cit.*, p. 73.

[30] For an extensive presentation of undertakings accepted by British courts, see K. Trimmings, O. Momoh, *op. cit.,* p. 12. The author identified: non-molestation/non-harassment undertakings (*e.g.*, not to use violence or threats towards the abducting parent, nor to instruct anybody else to do so), undertakings related to financial support (e.g., to provide financial support/maintenance to the abducting mother and the child upon their return), undertakings related to access to the child (*e.g.*, not to seek contact with the child unless awarded by the court or agreed).

[31] „Which type of arrangement is adequate in the particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return without such arrangements" (Recital 45 of Regulation no. 2019/1111).

[32] For the idea that the same applied in the context of Regulation Brussels IIa, see K. Trimmings, O. Momoh, *op. cit.*, p. 8: „He (the British judge – our note) pointed out that Article 11(4) of Brussels IIa placed on the left-behind parent the burden of demonstrating that adequate arrangements had been made to protect the child upon the return".

In subsidiary, the court may be „otherwise satisfied" and therefore take into consideration evidence provided by parties other than the applicant (*e.g.*, by the abducting parent) or may order evidence *ex officio*[33].

According to Recital 45 of Brussels IIb Regulation, the court may also consider to request the assistance of Central Authorities or network judges, in particular within the European Judicial Network in civil and commercial matters[34] and the International Hague Network of Judges[35].

Also, Recital 46 of the same Regulation indicates that, if necessary, the court seised with the return proceedings should consult with the court or competent authorities of the Member State of the habitual residence of the child.

2.2.6. Criteria to be fulfilled: adequate and effective character

The mere existence of the possibility of protective measures is not enough, as it is also compulsory that measures of protection should have an adequate and effective character.

In other words, the appropriateness and effectiveness of protective measures cannot be presumed or deducted, as it is necessary to be assessed *in concreto* for each individual case in relation to the particular circumstances[36].

We refer on this to the Practice Guide for the Application of the Brussels IIa Regulation, which states that „[i]t is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question".[37]

Similarly, the Practice Guide for the Application of the Brussels IIb Regulation underlines that „[t]he arrangements must be sufficiently established, so legally valid, proven and - if in doubt - also enforceable".[38]

Irrespective of whether the protective measures are adopted in the state of origin or refuge, their adequacy is assessed of the case by the court dealing with the international abduction.

In our opinion, adequacy and effectiveness should also be connected to enforceability, which implies executory decisions according to national law (and not necessarily definitive)[39].

2.2.7. And (some) limits of protective measures

A. Abduction to non-EU State Members

One limit related to measures of protection is that they are unavailable when the child is removed/retained in third states (contracting states to the 1980 Hague Convention, but not members to the EU).

This is because private international law embodied by the above-mentioned Convention has no provision formally acknowledging such measures.

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[33] See Bucharest Trib., 5th civ. s., dec. no. 1201/18.09.2017 pronounced in case no. 17837/3/2017, definitive, not published, where the court requested (based on art.11 para. 4 of Brussels IIa Regulation and via Romanian and Belgian authorities) information regarding the protective measures that can be taken to guarantee the minor's safety in the event of her return to Belgium.

[34] Established by Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters 2001/470/EC, OJ L 174/27.06.2001 (amended by Decision no 568/2009/EC of the European Parliament and of the Council of 18.06.2009).

[35] It was established in 1998, as a result of the first De Ruwenberg Seminar for Judges on the international protection of children, which had recommended that „the relevant authorities (*e.g.*, court presidents or other officials as appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect of issues relevant to the 1980 Hague Convention.

[36] Bucharest Trib., 5th civ. s., dec. no. 1201/18.09.2017, already cited: „(…) there was no mention of measures that could be ordered to prevent the risk of recurrence of domestic violence, such as protection orders or other similar procedures, the possibility of providing the mother and the minor a safe living environment, the limitation of the financial and residential dependence of the mother on the aggressor parent (possible facilities in obtaining/renting a house, a job, temporary support services for the mother and child until the situation is clarified and the method of exercising parental authority is established), so that it cannot be concluded, in the sense of art 11 para. 4 of the Regulation, that concrete, adequate and effective measures have been proven (…)."

Similarly, see CA Bucharest, 3rd civ. s. and for cases with minors and family, dec. no. 460/17.05.2023, definitive, not published: „(...) in this case, it was not proven that the return of the child to the United States of America would expose her to a serious risk, given that the American authorities have taken protective measures for the minor (by issuing the previously mentioned orders)".

[37] Para. 4.3.3.

[38] Para. 4.3.6.1.2.

[39] For the same opinion, see Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.2: „However, in case of court measures those only need to be enforceable, but not necessarily final".

Even if protective measures might be available under domestic law, there is no mechanism in the 1990 Hague Convention to render these decisions executory in the state of habitual residence of the child.

Outside of the EU, in cases where the requesting and the requested states are both Contracting Parties to the 1996 Convention[40], this instrument might be utilised to facilitate the cross-border recognition and enforcement of protective measures in return proceedings.

B. Lack of enforceability in the state of origin

Regardless of the method and form of protection measures, it is essential that they are enforceable in the state of habitual residence, inasmuch as otherwise the finality of removing the serious risk cannot be achieved.

„Since such measures are adopted on the basis of provisions of national law, the binding and executory nature of those measures must stem from the national legislation concerned"[41].

In order to overcome this difficulty, common law jurisdictions ask for a parallel order to be issued by courts in the state of origin[42].

However, „civil law jurisdictions are of the view that they do not have the authority to issue such an order"[43].

These difficulties are nevertheless encompassed when applying Brussels IIb Regulation, where Recital 46 indicates that protective measures should be recognized and enforced in all other Member States (including the Member States having jurisdiction), until a court of such a Member State has taken the measures it considers appropriate[44].

To this end, art. 2 para. 1 (b) of the same Regulation stipulates that, for the purposes of Chapter IV (Recognition and Enforcement), „decision" comprises „provisional, including protective, measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter or measures ordered in accordance with Article 27(5) in conjunction with Article 15"[45].

C. Undertakings from left-behind parent

The principal limit with undertakings is that they are generally ineffective as a means of protection outside the common law jurisdictions.

„This is because undertakings as a legal concept are practically unknown and thus unenforceable in civil law jurisdictions"[46], and this state of facts renders them as unsatisfactory remedies.

A solution to overcome this limit might be (as already stressed) to incorporate the undertakings in the return order itself, and thus change the legal nature from a promise of a parent to an obligation imposed by the court.

D. No reference to the protection of the returning parent

Recitals 45 and 46 of Regulation Brussels IIb make it clear that this juridical instrument is concerned solely with the protection of the child.

We consider it regrettable that the Brussels IIb Regulation, in contrast to the Guide to Good Practice 1980 Child Abduction Convention, missed the opportunity to point out that the risk to the child and the risk to the mother are often intertwined (especially in case of domestic violence).

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[40] Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague, 19.10.1996.

[41] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A,* para. 52.

[42] „Mirror orders" or „safe harbor orders" have been indicated as a solution also in Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., para. 47. They are identical/similar judgments issued by the courts in the states of origin/destination, each of these judgments being enforceable in the state in which it was issued.

[43] J. Camberland, *op. cit*., p. 72.

[44] Juridical literature underlined that „no declaration of enforceability is required under the Protection Measures Regulation as this instrument allows for direct recognition of protection orders issued as a civil law measure between EU Member States." (K. Trimmings, O. Momoh, *op. cit.,* p. 16).

[45] The court in the Member State of refuge issues, at the request of a party, a certificate regarding decisions ordering the return of the child to another Member State under the 1980 Hague Convention and any provisional measures which accompany the decisions, instituted in accordance with art. 27 para. (5) of the regulation, using the form provided in Annex IV to the Regulation.

[46] K. Trimmings, O. Momoh, *op. cit.,* p. 12.

In such circumstances, in order to protect the child, the mother also needs to be protected, or otherwise the violence which probably was the cause of abduction will repeat and a new abduction can be envisaged.

3. Conclusions

Private international law and EU law continue to coexist in the area of international child abductions, in a process characterised by complementarity and progress.

In intraEU abductions, EU law (Brussels Regulations IIa and IIb) shall complement private international law (the 1980 Hague Convention).

Both private international and EU law rest on the principle that it is in the best interests of the child not to be removed from its place of habitual residence, safe for a number of exceptions, among which the „grave risk" exception[47].

As a response to progressive increase of the number of international abductions, Eu law (adopted approximately 20 years after the private international law and recently revised after another 20 years), presents significant aspects of progress.

A particularization of this progress is represented by the introduction of the substantive concept of „protective measures", conceived to remove the serious risk of harm to the child by securing protection upon his/her return and application of the prompt return principle.

The progress comes equally from the nature of juridical instruments chosen by the European legislator (namely, regulations) which have the advantage of cancelling the differences among national legislations, and thus ensure uniformity within the EU by means of principle of supremacy of EU law.

The mere existence of the possibility of protective measures is not enough. It is compulsory that such measures should have an adequate, effective and enforceable character, which is to be evaluated *in concreto* in each case, based on specific circumstances.

Protective measures may be issued in the state of origin or the state of refuge and are by nature provisional (they take effect only until courts of the Member State having jurisdiction on the substance taken the measures considered appropriate).

In the state of habitual residence, measures may be ordered by courts, adopted by competent national (other than judicial) authorities, as well as undertaken the left behind parent.

In the state of destination, it is only for the courts (particularly those where the international abduction case is pending) to issue the protective measures.

The role of abduction courts is enhanced in the context of the recent increase of competences consisting in the possibility to order protective measures themselves.

Yet, it remains to be explored, given the relatively short period from entry into force of Regulation Brussels IIb, and in this context, specialisation is a useful tool to gain better understanding.

A new revision of Regulation IIb on protective measures of the returning parent in case of domestic violence would be beneficial, all the more since this aspect has already been acknowledged in private international law with the adoption by HCCH of the Guide to Good Practice 1980 Child Abduction Convention.

Measures of protection provided by EU law remain nevertheless a valuable concept, destined to protect and put in practice the vector principle governing family law, namely the best interests of the child.

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[47] The prompt return mechanism, although generally appropriate and valuable, is not a solution for all cases and all children (see ECtHR, Decision adopted on 06 July 2010, Application no. 41615/2007, case *Neulinger and Shuruk* v. Switzerland, para. 138: „It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances.")

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