

ANNEX B

ITEM 6.2: EU REGULATION ON MUTUAL RECOGNITION OF PROTECTION MEASURES IN CIVIL MATTERS – SCOTTISH GOVERNMENT POLICY PAPER

SCOTTISH CIVIL JUSTICE COUNCIL

POLICY PAPER ON IMPLEMENTING EU REGULATION 606/2013 ON THE MUTUAL RECOGNITION OF PROTECTION MEASURES IN CIVIL MATTERS

Introduction

1. This paper is an open paper by the Scottish Government.
2. The paper suggests court rules which may be required in order to help implement EU Regulation 606/2013, on the mutual recognition of protection measures in civil matters¹.
3. EU Regulations are directly applicable in EU Member States but it is common, as in this case, to make provision to ensure that they are implemented effectively.
4. The EU Regulation applies to protection measures ordered on or after 11 January 2015.
5. The EU Regulation relates solely to civil protection orders. There is a parallel Directive on criminal matters²

Provisions in the EU Regulation

6. The general aim of the Regulation is to provide mutual recognition across the EU of civil protection orders. Key provisions in the Regulation are:
 - 6.1 The Regulation relates to measures to protect a specific person or persons rather than more general measures to protect society: see paragraph 8 below for a list of Scottish protection measures which might be covered by the Regulation.
 - 6.2 Under recital 13, there is provision so that “in no event should police authorities be considered as issuing authorities within the meaning of this regulation”. So the regulation only extends to mutual recognition of judicial and administrative decisions and only extends to administrative decisions if “the latter offers guarantees with regard, in particular, to their impartiality and to the right of the parties to judicial review”.
 - 6.3 Mutual recognition of protection measures only lasts for 12 months even if the original measure has a longer duration. (Recital 15 and Article 4(4)).
 - 6.4 There is to be a uniform model of certificate (for mutual recognition) and a multi-lingual standard form for that purpose is being established. (Recital 22).

¹ The EU Regulation is at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:en:PDF>

² http://ec.europa.eu/justice/criminal/files/directive_2011_99_on_epo_en.pdf

6.5 The issuing authority of the Member State of origin shall, on request from the protected person, issue a certificate using the multi-lingual standard form. (Recital 2 and Article 5).

6.6 “Any costs for necessary translation that goes beyond the text of the multilingual standard form are to be allocated as provided under the law of the Member State of origin”. (Recital 23).

6.7 The issue of the certificate is only possible where the person causing the risk has the opportunity to arrange his or her defence. However, “the certificate should be issued as soon as the protection measure is enforceable in the Member State of origin.” (Recital 25 and Article 6). The Regulation provides safeguards for the person causing the risk.

6.8 Details of the protection person’s whereabouts or other contact details should not be disclosed “unless such disclosure is necessary for compliance with, or the enforcement of, the protection measure”. (Recital 27 and Article 8(3)).

6.9 Article 7 makes provision on what the certificate should contain. (Article 7).

6.10 Article 8 makes provision on the person causing the risk being notified of the issue of the certificate (Article 11).

6.11 Article 11 makes provision on the adjustment of **in-coming** protection measures and on notifying the person causing the risk. It also makes provision on appeals against the adjustment by the protected person or the person causing the risk.

7. In summary, therefore, the EU Regulation makes provision on a multi-lingual certificate being provided on request to a person who has obtained a protective order, so long as the person causing the risk is aware of the protective order and can challenge it. The aim of the multi-lingual certificate is to facilitate recognition of protective orders in other EU Member States for up to 12 months. The EU Regulation also makes provision on the adjustment of in-coming orders from other Member States so that they can have effect in receiving Member States.

Protection measures covered

8. Recital 6 outlines which measures are covered by the Regulation. Recital 6 provides that:

“ This Regulation should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion. It is important to underline that this Regulation applies to all victims, regardless of whether they are victims of gender-based violence.”

9. The Regulation just applies to civil measures: as indicated above, there is a separate Directive on criminal measures.

10. Recital 18 provides that:

“ This Regulation should deal only with the recognition of the obligation imposed by the protection measure. It should not regulate the procedures for implementation or enforcement of the protection measure, nor should it cover any potential sanctions that might be imposed if the

obligation ordered by the protection measure is infringed in the Member State addressed. Those matters are left to the law of that Member State. However, in accordance with the general principles of Union law and particularly the principle of mutual recognition, Member States are to ensure that protection measures recognised under this Regulation can take effect in the Member State addressed.”

11. Bearing in mind these provisions of the Regulation, the Government considers that the following Scottish measures could be covered:

- Common law interdict (and interim interdict)
- Interdicts under the Matrimonial Homes (Family Protection) (Scotland) Act 1981
- Domestic interdicts (added to the 1981 Act by section 31 of the Family Law (Scotland) Act 2006).
- Relevant interdicts (section 113 of the Civil Partnership Act 2004 refers).
- Sections 8 and 8A of the Protection from Harassment Act 1997
- Lawburrows (insofar as these are still granted).
- Sexual Offences Prevention Order.
- Risk of Sexual Harm Order.
- Child Protection Order
- Orders made under the Children’s Hearings (Scotland) Act.

12. In Scotland, it is possible (and common) to apply under section 1 of the Protection from Abuse (Scotland) Act 2001 for a power of arrest to be attached to an interdict. Under section 3 of the 2001 Act, the police must be notified of any power of arrest. Under the Domestic Abuse (Scotland) Act 2011, it is now a criminal offence to breach an interdict where:

- The court has determined that the interdict is a domestic abuse interdict.
- That determination is in effect.
- A power of arrest has been attached to the interdict under the Protection from Abuse (Scotland) Act 2001.
- That power of arrest is in effect.

13. However, it does not appear to the Government that powers of arrest are covered by the Regulation. The Regulation excludes sanctions and procedures for implementation and enforcement (recital 18). It would be open to a person with an EU order which is adjusted by the Scottish courts to become an interdict to apply for a power of arrest to be attached.

14. Under section 1(3) of the Protection from Abuse (Scotland) Act 2001, the court must, on attaching a power of arrest, specify a date of expiry for the power, being a date not later than three years after the date when the power is attached. In relation to the EU Regulation, recognition of the protective order granted elsewhere in the EU is limited to a period of 12 months. Therefore, the duration of the power of arrest needs to be similarly limited.

Rules required

Procedures in respect of outgoing certificates

Certificates after a protective order has been issued by a Scottish court

15. In Scotland, civil protective orders are issued by the courts. The last sentence of recital 25 provides that “The certificate should be issued as soon as the protection measure is enforceable in the Member State of origin”. It appears, therefore, that what is envisaged is a seamless process so that the Article 5 certificate for use in other Member States is issued as soon as the civil protective order is granted by the courts.

Safeguards for the person causing the risk

16. However, the certificate is not to be granted as a matter of routine.

17. Both recital 25 and Article 6 make it clear that the rights of the person causing the risk have to be respected. In particular, the certificate may not be granted in cases where:

- The certificate was ordered in default of appearance of the person causing the risk or under a procedure that does not provide for prior notice to that person unless that person has had the opportunity to organise his or her defence against the protection measure. (Recital 25 and Article 6).
- The protection measure has been brought to the notice of the person causing the risk.

18. The Government suggests, therefore, that rules are needed so that when a civil protection order protecting an individual is granted, the protected person may apply to the courts for a certificate for use in other Member States. However, the judge or sheriff would only be able to grant the certificate when satisfied that the rights of the person causing the risk had been safeguarded, as outlined above.

19. A type of precedent in relation to the application process can be found in section 11 of the Protection from Harassment Act 1997 which inserted section 234A into the Criminal Procedure (Scotland) Act 1995. Under these provisions, a prosecutor may apply to the court for a non-harassment order after a person is convicted of a harassment offence. The similarity is that the process is designed to be seamless.

20. However, many interdicts granted in Scotland are interim interdicts and, as indicated above, the certificate may not be granted unless the person causing the risk has had an opportunity to organise a defence and the protection measure has been brought to his or her attention.

Duration of certificate

21. Where a certificate is granted, it cannot last more than 12 months. (Article 4(4) and Recital 15. Recital 15 does clearly recognise that domestic protective measures may be “provisional, time-limited or indefinite in nature”). The 12 month period starts from the date of the issue of the certificate.

Translations

22. The information to be contained in the certificate is outlined in Article 7 and is contained in the multi-lingual form being established under Article 19. Under Article 5(3) there is provision for the issuing authority to provide a transliteration or translation by making use of the multilingual standard form. Part of the idea behind the multi-lingual standard form is to reduce translation costs. Recital 24 provides that “any costs for necessary translation that goes beyond the text of the multilingual standard form are to be allocated as provided under the law of the Member State of origin.”

Notifying the person causing the risk

23. Article 8 makes provision on notification by the issuing authority of the Member State of origin of the certificate to the person causing the risk. Article 8 provides that where this person resides in the Member State of origin, notification shall be effected in accordance with the law of that Member State. Where the person resides elsewhere, the notification shall be effected by registered letter with acknowledgement of receipt or equivalent.

Challenges to the certificate

24. It is not possible to appeal against the issue of a certificate (recital 28) but it is possible to rectify it or withdraw it (recital 29 and Article 9). Article 9 makes provision so that certificates may be rectified when there is a discrepancy between the protection measure and the certificate and may be withdrawn when it was clearly wrongly granted, having regard to the safeguards for the person causing the risk in Article 6. Under Article 9, requests may be made by the protected person, the person causing the risk or by the issuing authority. Article 9(3) provides that the procedure shall be governed by the law of the Member State of origin.

25. The Government would suggest that provisions may be needed in the rules so that clerical errors may be rectified by the courts following a request by the protected person or the person causing the risk. In addition, if there is a suggestion that the safeguards for the person causing the risk (as in Article 6 of the Regulation) have not been followed or that it relates to a measure outwith the scope of the Regulation (recital 29), the Government would suggest that the rules should make provision for an application to be made by the person causing the risk (or by the protected person) so that the court could consider if the certificate should be withdrawn.

26. Article 14 makes provision on the suspension, limitation or withdrawal of a certificate after a successful application under Article 9(1)(b) (certificate clearly wrongly granted) or after the domestic protective order has been suspended or withdrawn or its enforceability has been suspended or limited. As indicated in paragraph 24 above, the Government would suggest that applications relating to Article 9(1)(b) should be made by the protected person or the person causing the risk. In these cases, the issuing authority may issue a further certificate (again using a multi-lingual standard form) indicating that suspension, limitation or withdrawal has been granted. It follows that if an application relating to article 9(1)(b) is successful, the further certificate should be issued: rules may be needed to provide for that.

27. The Government would further suggest that rules may be needed on the courts hearing applications by the protected person or the person causing the risk on the suspension, limitation or withdrawal of a certificate after the domestic protective order has been suspended or withdrawn or its enforceability has been suspended or limited. As with Article 9(1)(b) cases, the issuing authority may issue a further certificate indicating that suspension, limitation or withdrawal has been granted. Again, rules may be needed to allow this further certificate to be issued,

Procedures in respect of incoming certificates

Making an application

28. Article 4 of the Regulation makes provision on a person with an order from another Member State seeking to invoke a protection measure in another Member State. This lays down that the protected person shall provide the competent authority of the Member State addressed with:

- (a) A copy of the protection measure which satisfies the conditions necessary to establish its authenticity.
- (b) The Article 5 certificate issued in the Member State of origin.
- (c) Where necessary a transliteration or translation of the certificate.

29. Article 11 makes further provision on adjusting the protection measure from the other Member State. Article 11 provides that addressed Member States shall adjust the factual elements of the protection measure to give effect to them. The procedure for doing so is for national law (Article 11(2)). The adjustment is to be brought to the attention of the person causing the risk in accordance with national law when the person lives in the addressed Member State or by way of registered letter with acknowledgement of receipt or equivalent.

30. The Government would suggest that rules are needed so that, on application by the protected person, the judge or sheriff could adjust the factual elements of the protection measure in order to give effect to it in Scotland. On notification to the person causing the risk, the Government would suggest that the Rules should provide that such notification (regardless of where the person resides) should be done by the protected person or his or her agents.

31. As indicated elsewhere, the Article 5 certificate is only valid for a maximum of 12 months and so the adjusted measure must be time-limited accordingly.

Appeals

32. Article 11(5) makes provision on appeals against the adjustment. The Government would suggest that provision is needed in the rules on the courts hearing such appeals and on amending the adjustment if the appeal should be successful.

Refusal or recognition or enforcement

33. Under Article 13, applications may be made to the courts by the person causing the risk for non-recognition and non-enforcement of the protection measure from the other Member State to the extent that such recognition is:

- (a) manifestly contrary to public policy in the Member State addressed.
- (b) irreconcilable with a judgement given or recognised in the Member State addressed.

34. The Government would suggest that provision is needed in the Rules on the courts hearing such cases and on refusing recognition and enforcement when the application is granted.

Suspension or withdrawal of recognition or enforcement

35. As indicated in paragraph 27 above, the Member State of origin may issue a further certificate which suspends, limits or withdraws the Article 5 certificate after changes to the domestic

protective order. When this is done, Article 14(2) provides that on application by the protected person or the person causing the risk, the Member State addressed shall suspend or withdraw the effects of the recognition and, where applicable, the enforcement of the protection measure.

36. The Government would suggest that provision is needed in the Rules on the courts hearing such applications and on suspending or withdrawing the effects of the recognition and enforcement when the application is granted.

Conclusion

37. A list of the areas where it is suggested Rules may be required is at Annex A.

**Family and Property Law
Justice Directorate
Scottish Government**

September 2014

ANNEX A: SUMMARY OF SUGGESTED CHANGES TO THE RULES

Paragraph in paper	Suggested provision
<i>Outgoing certificates to other Member States.</i>	
18	Rules are needed so that when a civil protection order protecting an individual is granted, the protected person may apply for an Article 5 certificate for use in other Member States. However, the judge or sheriff would only be able to grant the certificate when satisfied that the rights of the person causing the risk had been safeguarded, as outlined above.
25	The Government would suggest that provisions may be needed in the rules so that clerical errors may be rectified by the courts following a request by the protected person or the person causing the risk. In addition, if there is a suggestion that the safeguards for the person causing the risk (as in Article 6 of the Regulation) have not been followed or that it relates to a measure outwith the scope of the Regulation (recital 29), the Government would suggest that the rules should make provision for an application to be made by the person causing the risk (or by the protected person) so that the court could consider if the certificate should be withdrawn.
26	Rules needed on the courts issuing a further certificate if the application under Article 9(1)(b) is successful.
27	Rules may be needed on the courts hearing applications by the protected person or the person causing the risk following changes to the domestic protective order and on issuing a further certificate if the application is successful.
<i>Incoming certificates from other Member States</i>	
30	Rules are needed so that, on application by the protected person, the judge or sheriff could adjust the factual elements of a protection measure from elsewhere in the EU to give effect to it in Scotland. On notification to the person causing the risk, the Rules should provide that such notification (regardless of where the person resides) should be done by the protected person or his or her agents.
32	Article 11(5) makes provision on appeals against the adjustment. Provision is needed in the rules on the courts hearing such appeals and on amending the adjustment if the appeal should be successful.
34	Provision is needed in the Rules on the courts hearing cases on refusing recognition and enforcement of measures from other Member States.
36	Provision is needed in the Rules on the courts hearing applications to suspend or withdraw the recognition and enforcement of measures from other Member States after changes to the domestic protective measure.