ELI
EUROPEAN
LAW
INSTITUTE

The Protection of Adults in International Situations

Report of the European Law Institute

Report
of the European Law Institute

The Protection of Adults in International Situations

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

European Law Institute
Schottenring 16/175
1010 Vienna
Austria
Tel.: + 43 1 4277 22101
Mail: secretariat@europeanlawinstitute.eu Website: www.europeanlawinstitute.eu

ISBN: 978-3-9504549-2-5

This publication was co-funded by the European Union's Justice Programme. Acknowledgment is also due to the University of Vienna which has generously hosted the ELI Secretariat under successive Framework Cooperation Agreements since 2011.

This project is co-funded by the European Union

universität wien

ACKNOWLEGDEMENTS

Project Team

Reporters
Pietro Franzina (Professor, Italy)
Richard Frimston (Lawyer, United Kingdom)

Other Members
Regina Aebi-Müller (Professor, Switzerland)
Maja Groff (Lawyer, The Netherlands)
Jan von Hein (Professor, Germany)
Thalia Kruger (Professor, Belgium)
Joëlle Long (Associate Professor, Italy)
Jean-Christophe Rega (Notary, France)
Alex Ruck Keene (Barrister, United Kingdom)
Christian Schall (Notary, Germany)
Renate Schaub (Professor, Germany)
Fumie Suga (Professor, Japan)
Frederik Swennen (Professor, Belgium)
Adrian D Ward (Lawyer, United Kingdom)

Advisory Committee

Assessors
Elena Bargelli (Professor, Italy)
Robert Bray (Lawyer and linguist, Belgium)
Sjef van Erp (Professor, the Netherlands)

Other Members
Stefania Bariatti (Professor, Italy)
Ulf Bergquist (Lawyer, Sweden)
Volker Lipp (Professor, Germany)
Corrado Malberti (Notary and Associate Professor, Italy)
Alberto Muñoz Fernández (Professor, Spain)
Louise Ellen Teitz (Professor, USA)
Bea Verschraegen (Professor, Austria)

Members Consultative Committee

Austrian Chamber of Civil Law Notaries (Stephan Matyk-d'Anjony, Austria)
Maria Rosario (Charo) Albert (Notary Officer, Spain)
Małgorzata Balwicka-Szczyrba (Professor, Poland)
Robert Bray (ELI Council Member, United Kingdom)
Danguolė Bublienė (Associate Professor, Lithuania)

Gregor Christandl (Professor, Austria)
Cecilia Gómez-Salvago Sánchez (Professor, Spain)
Florian Heindler (Assistant Professor, Austria)
Stéphanie Laulhé Shaelou (Professor, Cyprus)
Monica Navarro-Michel (Professor, Spain)
Ioana Olaru (Notary, Romania)
Valentin Rétornaz (Chair) (Assistant Professor, Switzerland)

Observers

Council of the European Union (Alain Pilette, Belgium)
European Commission (Patrizia de Luca, Belgium)
European Parliament (formerly Joëlle Bergeron, Belgium; currently vacant)
Permanent Bureau of the Hague Conference on Private International Law (Philippe Lortie, the Netherlands)
Private International Law Unit of the Swiss Federal Department of Justice (Joëlle Schickel-Küng, Switzerland)

Executive Summary

The Hague Convention of 13 January 2000 on the International Protection of Adults broke new ground in providing private international law rules regarding the protection of adults. The Convention has, however, only been ratified by nine Member States of the European Union and its practical effects, especially in relation to private mandates, has been, overall, limited.

ELI therefore proposes by the present report that the Union should consider both external action and the enactment of legislation, in order to comply with its obligations under the UN Convention on the Rights of Persons with Disabilities as well as under other instruments for the protection of human rights, and in order to ensure that all Union citizens can exercise their rights under the Treaties, and move freely (and/or freely transfer their assets) from one Member State to another.

External action, it is proposed, may take the form of a decision authorising the Member States that have not yet done so to ratify the Hague Convention in the interests of the Union. For its part, the Union should enact legislation to complement the Convention and enhance its operation between Member States, consistent with the principles that underlie the Convention itself. Possible improvements include the adoption of a provision to enable the adults concerned, when still in a position to protect their interests, to choose, subject to appropriate safeguards, the court to have jurisdiction to rule on their protection, and the creation of a European Certificate of Powers of Representation.

The Institute's report provides analysis and, where appropriate, proposals regarding further issues surrounding the application of the Hague Convention or otherwise relevant to the protection of adults in international situations. Such analysis and proposals are put forward in preparation for the Special Commission on the Convention that the Hague Conference on Private International Law plans to convene in 2022.

The report also includes a checklist intended for practitioners, to encourage the development of private mandates within the ambit of the substantive laws of the Member States.

Contents

I. The Protection of Adults in International Situations Today

1. Background

1.1. 'Adults' and 'Adults' Protection' Defined

The 'adults' to which this report refers are persons aged 18 or more who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties. The definition covers a broad range of situations. The adults concerned may in fact include persons subject to such an impairment or insufficiency from birth or from a very young age, older persons gradually losing their autonomy, victims of accidents or failed medical interventions.

Because of this condition, the adults in question may need support to exercise their legal capacity. This may occur in a broad range of situations touching the personal welfare and/or the property of those involved, such as where the consent of the person concerned is required in order to undergo medical treatment, or where capital invested in securities comes to maturity and the issue arises of whether and how it should be reinvested.

In the present report 'protection' refers, generally, to such measures as a competent authority may take, including by supervising and enforcing private arrangements, with a view to supporting an adult as regards the exercise of their legal capacity.

1.2. Adults' Protection as a Human Rights Concern

Adults in need of protection have a fundamental right to be supported in the exercise of their legal capacity.

Specifically, Article 12(3) of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the UNCRPD), adopted on 13 December 2006, to which the European Union and all of its Member States are parties (as nearly all States in the world are), requires States to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.

Pursuant to Article 12(4), States must 'provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law', and must ensure that 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body'.

As stated by the United Nations Committee on the Rights of Persons with Disabilities in its General Comment No 1, legal capacity is 'the key to accessing meaningful participation in society' and is understood by the Convention as consisting of two strands, ie legal standing to hold rights and to be recognised as a legal person before the law, and legal agency to act on those rights and to have those actions recognised by the law. Under the Convention, all people, including persons with disabilities, have both legal standing and legal agency simply by virtue of being human.

1.3. The Diversity of the Law on Adults' Protection

No attempt has been made so far to harmonise the substantive and procedural rules regarding the protection of adults.

The widespread ratification of the UNCPRD and the work carried out within the Council of Europe (notably as expressed in the Committee of Minister's Recommendation (1999)4 on principles concerning the legal protection of incapable adults, Recommendation (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity, and Recommendation (2014)2 on the promotion of human rights of older persons), have prompted some convergence among legal orders. However, the law in this area varies greatly from one State to another.

Generally speaking, support may be provided through either voluntary or non-voluntary measures.

Non-voluntary measures involve the appointment by a court or other authority of a person (an administrator, a deputy, etc) charged with assisting the adult concerned in taking decisions. The conditions for the appointment, its implications for the adult's capacity, the scope and manner of exercise of the powers vested in the adult's administrator as well as the scope and manner of exercise of the supervisory tasks of the competent courts or other authorities vary from one legal system to another.

Voluntary measures rest, instead, on an act of self-determination by the adult concerned. In many countries, legislation enables adults, while still in a position to protect their interests, themselves to appoint an attorney who will act on their behalf or assist them in taking decisions in the event of some or total loss of autonomy. The denomination of the acts entered into for this purpose varies from one legal system to another. They are known as 'lasting powers of attorney' in English law, 'mandats de protection future' in French law, 'Vorsorgevollmachten' in German law, etc. In this report they will be referred to, generally, as 'private mandates'. The rules applicable to those acts – as regards, *inter alia*, their formal requirements, the scope of the powers that the adult concerned may grant thereunder, the conditions for their coming into effect, etc – also vary from jurisdiction to jurisdiction.

2. The Current State of Affairs and its Shortcomings

2.1. The Challenges Posed by the Protection of Adults in International Situations

As a result of the mobility of individuals and their assets across borders, cases arise with increasing frequency which involve the protection of adults in international situations.

An international situation occurs, for instance, where the habitual residence of the adult concerned is not in the State where their protection is at issue, or where the powers of representation vested in the adult's representative are to be exercised in a country other than the country in which the appointment was made (for instance, because the adult concerned owns a holiday home outside the forum State, because

they regularly spend time in a foreign country with relatives or friends living there, or because they fall seriously ill outside their State of habitual residence).

Cross-border situations raise issues that are unknown to purely domestic cases. In particular, international situations bring with them the practical need to: identify the State whose authorities have jurisdiction over the matter; determine the law applicable to the substance of the protection; assess whether, and subject to what conditions, a non-voluntary measure given by the authorities of one State, or a private mandate entered into pursuant to the law of such State, may be given effect to in another; determine whether, and by which means, the authorities of a State may be called upon to assist the authorities of another State in providing an adult with the protection that they may need (for example, with a view to determining the whereabouts of the adult in question).

2.2. The Lack of Uniformity of Private International Law Rules

It is the task of private international law rules to address the issues raised by the protection of adults whenever a cross-border element is present.

Those rules, however, also lack uniformity.

Some harmonisation has been brought about in this field with the Convention of 13 January 2000 on the International Protection of Adults, adopted in the framework of the Hague Conference on Private International Law ('the Hague Convention'). The Hague Convention lays down a comprehensive body of rules aimed to enhance the protection of adults in cross-border scenarios, including rules on jurisdiction, the applicable law, the recognition and enforcement of judgments and cooperation between Central Authorities.

Considerable efforts have been deployed by the Permanent Bureau of the Conference to promote the ratification of the Hague Convention, especially since December 2018, when it organised, with the European Commission, a Conference on the International Protection of Adults. Despite those efforts, and the efforts of other stakeholders, the Convention is currently in force only for a limited number of States.

Specifically, as far as the European Union is concerned, only nine Member States – Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia and Portugal – are parties to the Convention, accounting in total for one fifth of the whole of the Union's population. Outside the Union, the Convention is only in force for Monaco and Switzerland. The Convention is also in force in the United Kingdom, but, so far, only with respect to Scotland.

2.3. The Shortcomings of the Current State of Affairs

Different reasons have been put forward to explain the limited number of ratifications of, and accessions to, the Hague Convention, including the fact that some States are reviewing their legislation on the protection of adults and will only consider joining the Convention after they have made such review.

Be that as it may, the described state of affairs is unsatisfactory. The lack of uniform rules of private international law is likely to: (a) undermine the effectiveness of the protection provided to adults in cross-border cases; (b) adversely affect the ability of

the adults in question to move, and/or transfer their assets, from one State to another, and the rights of adults to free movement in the internal market, resulting in discrimination; and (c) threaten the security of the transactions entered into by the adults concerned, and/or their representatives, with third parties.

a. The Protection of Adults Lacks the Required Degree of Effectiveness

Absent a uniform body of rules governing the jurisdiction of courts and other authorities, the applicable law, the recognition and enforcement of protection measures and international judicial assistance, a risk exists that the rights of the adults concerned may receive insufficient protection.

The obligation of States, under Article 12(3) of the UNCRPD, to 'take appropriate measures' to provide support as regards the exercise of legal capacity applies to both domestic and to international situations.

Arguably, where a cross-border element is present, taking 'appropriate' measures aimed at protecting an adult requires that the authorities of a State pay due consideration to the fact that the authorities of another State may equally be ready to provide support, or that the matter in question may have already been dealt with under a foreign decision, or be the object of determinations by the adult governed by a foreign law. This involves a need for coordination. The best way to ensure such coordination is through *uniform* rules of private international law, for, under those rules, the situation concerned eventually forms the object of the same, or consistent, decisions no matter the State whose courts or authorities may be seised of it.

Absent such uniformity, the protection of the adult concerned risks being spatially discontinuous, or rest on uncoordinated, if not conflicting, measures. An adult may enjoy protection in one State, but have none in another, thereby being exposed to abuse as soon as their interests happen to be located there.

As regards private mandates, the shortcomings of a lack of uniformity in private international law rules may be even more significant, given that this kind of arrangements are unknown, as such, to some legal systems. In practice, a mandate may be enforceable in accordance with the law specified under the private international law rules in force in one country (say, the country where the mandate was made and where part of the powers arising thereunder were originally meant to be exercised), while it may be null and void, or not fully operative, under the law identified through the private international law rules in force in another country (for instance, the country where the adult in question has decided to settle upon retirement). A discrepancy of this kind is likely to frustrate the ability of the adult in question to effectively plan for his or her incapacity. In situations like those described, the protection actually provided to the adult concerned will not respect, the 'will and preferences' of the latter, as required by Article 12(3) of the UNCRPD.

b. Cross-Border Mobility May Prove Difficult and Expensive for the Adults Concerned

The adults concerned may have difficulty enjoying the advantages of international mobility because of the burdens and insecurity that they may experience, due to the diversity of private international law rules, where the issue of their protection is raised in a cross-border scenario, rather than in a purely internal context.

For example, an adult may wish to leave the country where they used to live and settle in another, eg because the relatives who take care of them decide to move there, or because, once there, they will benefit from the special care that they need, and that is unavailable in the previous country of residence. However, the legal implications of a transfer of this kind may be difficult to assess and to manage, and this may discourage the adult in question from actually taking steps in that direction, or entail extra legal costs (eg for the purpose of assessing whether an existing private mandate would be considered by the courts of the country of purported residence valid and enforceable).

For similar reasons, the adult concerned, or those in charge of their affairs, may be dissuaded from transferring or administering assets abroad due to the complexities that this would entail. Suppose, for instance, that a Romanian who has been living and working in Germany for several years decides to retire and move back to Romania upon witnessing the first signs of dementia. Suppose that soon afterwards a guardian is appointed in Romania to protect their interests. Since Romania is not a party to the Hague Convention (while Germany is one), the guardian may in fact experience practical difficulties in discharging their duties with respect to the adult's assets located in Germany, such as a pension fund, and eventually decide to exit the fund, in spite of the advantages that keeping the fund in place would allow.

The described difficulties result, in fact, in indirect discrimination. The mobility of the adults across borders prove significantly more burdensome than the mobility of those unaffected by a loss of autonomy. By the same token, where a foreign element is present, managing the assets of an adult who is not in a position to protect their interests are usually more expensive, and at the same time less secure, than managing the assets of someone not experiencing that situation.

c. Interested Third Parties are Faced with Insufficient Legal Security

Due to the diversity of the rules of private international law in this area, third parties entering into transactions with the representative of a protected adult on their behalf may become unsure as to the legal effects of such transactions and the enforceability of the rights arising thereunder.

For example, a bank will require to determine whether, and subject to what conditions, immoveable property owned by an adult abroad can be used to repay the money borrowed by the latter. This could involve determining, for instance, whether the borrower's spouse, as the attorney under a private mandate, will be able to dispose of those assets should the need arise, or would rather have to bring proceedings in the foreign country in question either to have the mandate recognised there or to appoint an administrator or a special representative with powers over the sale of the property concerned.

This uncertainty can make third parties reluctant to enter into transactions with adults in need of protection. Overcoming this reluctance may require extra costs (eg for dedicated legal advice) or prove time-consuming.

2.4. The Impact of the Described Shortcomings on the Policies of the Union

In view of the preceding analysis, the harmonisation at the Union's level of the rules of private international law relating to the protection of adults would: (a) be

consistent with the founding values of the Union itself, namely the respect for fundamental rights; (b) contribute to the creation of an area of freedom, security and justice in Europe; (c) enhance the functioning of the internal market; and (d) accord with the principle of subsidiarity.

a. The Union's Commitment to Advancing the Protection of Fundamental Rights

According to Article 3(3) of the Treaty on European Union (TEU), the Union aims, *inter alia*, to 'combat social exclusion and discrimination' and to 'promote social justice and protection' and 'solidarity between generations'. All such aims are relevant to the protection of adults, as understood in this report.

Harmonising the private international law rules regarding the protection of adults would further result in a more complete and more effective realisation of the fundamental rights of the persons concerned, namely as enshrined in the UNCRPD (specifically in Article 12) and in the Charter of Fundamental Rights of the European Union.

As to the Charter, Article 26 states that '[t]he Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. This is consistent with the general obligation undertaken by the Union, as a party to the UNCPRD, to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise', as required by Article 4(e), as well as with the obligation, under Article 12(2), to recognise that persons with disabilities 'enjoy legal capacity on an equal basis with others in all aspects of life'.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, the respect for which is ensured as a matter of Union law under Article 6 of the TEU, does not refer specifically to the protection of adults. However, the European Court of Human Rights has stressed on numerous occasions that safeguarding the personal autonomy and ensuring the social inclusion of adults with disabilities is crucial to the realisation of the fundamental rights that the Convention is meant to protect.[1]

The Committee of Ministers of the Council of Europe endorsed that view in Recommendation 4 of 23 February 1999 on the legal protection of incapable adults and Recommendation 11 of 9 December 2009 on continuing powers of attorney and advance directives for incapacity. The latter text acknowledged, among other things, that 'self-determination is essential in respecting the human rights and dignity of each human being' and recommended that States introduce legislation aimed at promoting autonomy in conformity with the fundamental rights of the person concerned. In reviewing the follow-up action taken by Member States of the Council of Europe to the Recommendation of 2009, the rapporteur appointed by the Committee, Adrian Ward, proposed, on a general note, that 'all Member States should, on an ongoing basis, continue to review and develop provisions and practices to promote self-determination for capable adults in the event of future incapacity by means of continuing powers of attorney and advance directives'.

---

[1] See, among others, the Court's judgments in *Glor* v *Switzerland* of 30 April 2009, *Shtukaturov* v *Russia* of 27 March 2008, *Stanev* v *Bulgaria* of 17 January 2012, and *AN* v *Lithuania* of 31 May 2016.

b. The Union's Efforts Towards the Creation of an Area of Freedom Security and Justice

As stated in Article 3(2) of the TEU, the Union 'offer[s] its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'. Article 21 of the Treaty on the Functioning of the European Union (TFEU) provides that every citizen of the Union has the right to 'move and reside freely within the territory of the Member States' in accordance with the Treaties and the pertinent legislation. Furthermore, according to Article 79 of the TFEU, the Union has the task of framing a common immigration policy as regards third country nationals, including the conditions for their entry and residence in a Member State and their movement from one Member State to another.

As indicated above, harmonising the rules on the protection of adults in cross-border cases would facilitate the free movement of Union's citizens within the Union and would help properly manage the movement of third country nationals towards and across Member States.

The practical importance of the cross-border mobility of persons in Europe does not need to be stressed. Eurostat[2] sets out that among the 512 million persons living in the Union in 2018, 7.8% had a nationality other than their country of residence: 3.4% had a citizenship of another EU Member State and 4.4% of a non-EU Member State. There were some 1.3 million Europeans who lived in one country, but worked in another, while 1.7 million students studied abroad.

Any of those persons may happen to need support to exercise their legal capacity. This is also true of tourists, for instance where the need arises to take urgent medical decisions, eg in the wake of an accident. Here, too, the figures are particularly significant. In 2017, no less than 267 million people in the Union, corresponding to 62% of the total population, went at least on one trip within the Union.

The considerations which prompted the Union to adopt measures aimed at improving the cross-border mobility of couples and their children, such as Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility,[3] also provide a justification for engaging in a similar action as regards adults who are not in a position to protect their interests.

c. The Union's Concern for the Proper Operation of the Internal Market

Legal certainty is crucial to ensure the efficiency of market relationships. Insofar as the protection of adults affects the way in which the persons concerned are to make decisions with respect to their property, the harmonisation of private international law rules would enhance the proper operation of the internal market, as contemplated in Article 26 of the TFEU. The adoption of such harmonised rules would remove, or at least mitigate, the concerns and the practical difficulties that third parties currently experience when dealing with adults in need of protection and those charged with supporting the latter in taking decisions.

---

2 Available at: <http://ec.europa.eu/eurostat>.

3 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, 1–115.

It is difficult to ascertain statistics as to cross-border ownership of assets and, more generally, legal relationships with a foreign element involving family and personal assets. The increasing ease with which those assets can be acquired indicates that numbers and values are most likely to be increasing.

Data on the outflow of workers' remittances suggest that very significant amounts of money are regularly transferred from one State to another. Information collected to inquire into the impact of inheritance tax on the movement of assets also provides some interesting, albeit indirect, indications. According to the European Commission (COM/2011/864 final), cross-border real estate ownership in the Union increased by up to 50% between 2002 and 2010 and there is also a massive growing trend in cross-border portfolio investment. The Commission added that the number of potential cross-border inheritance cases could be conservatively estimated at between 290,000 and 360,000 per year.

d. The Proposed Harmonisation Accords with the Principle of Subsidiarity

The Project Team believes that the above objectives cannot be sufficiently achieved by the Member States acting individually and would be better achieved at Union level.

The challenge – improving the mobility of persons and assets between Member States – is inherently European in scale. The underlying policies, as explained, are also regional (if not universal) in nature.

Keeping the diversity of private international law rules in place would ultimately prevent the Union and its Member States from effectively responding to such a challenge while undermining the realisation of these policies.

II. The ELI Project

1. The Project's Aims

The ELI project on the Protection of Adults in International Situations was launched in 2017. Its aim is to identify a set of measures that the European Union may consider taking in order to enhance the protection of adults in cross-border cases.

Article 81 of the TFEU, concerning judicial cooperation in civil matters, vests the Union with the power to adopt harmonised rules on jurisdiction, the applicable law, the recognition of judgments and cooperation between authorities. Such measures may relate to any matter with cross-border implications within the scope of civil law, including matters of the protection of adults.

The Union, however, has refrained so far from enacting legislation specifically regarding the protection of adults. In the Union's parlance, the subject matter is considered to raise issues relating to the 'status and capacity of natural persons', which in turn rank among the issues that most of the existing instruments, such as

Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[4] explicitly exclude from their scope.

By a resolution of 18 December 2008 (2008/2123(INI)), the European Parliament requested the Commission, 'as soon as sufficient experience of the operation of the Hague Convention has been acquired, to submit to Parliament […] a legislative proposal on strengthening cooperation between Member States and improving the recognition and enforcement of decisions on the protection of adults and incapacity mandates and lasting powers of attorney'.

On 1 June 2017, the European Parliament adopted a new resolution. It noted that no proposals had been submitted further to its resolution of 2008 and again asked the Commission, this time on the basis of Article 225 of the TFEU, to prepare a proposal for a regulation regarding the protection of vulnerable adults (2015/2085(INL)).

In August 2017, in response to the latter call, the Commission took the view that, at this stage, the focus should not be on enacting new legislation but rather on ensuring that the Member States that have not yet done so, ratify, or accede to, the Hague Convention.[5]

However, the subsequent commitment of President Ursula van der Leyen to the right of initiative for parliament is noted[6] and in particular that 'when Parliament, acting by a majority of its members, adopts resolutions requesting that the Commission submit legislative proposals, I commit to responding with a legislative act, in full respect of the proportionality, subsidiarity and better law making principles.'[7]

2. History of the Project

The project was first proposed at the beginning of 2016, prior to the European Parliament's Legal Affairs Committee (JURI) hearing on the Protection of Vulnerable Adults: A Cross Border Perspective on 14 March 2016 in which Domenico Damascelli, Richard Frimston, Philippe Lortie, Jean-Christophe Rega and Anneke Vrenegoor gave evidence.

Pietro Franzina, Richard Frimston, Maja Groff and Renate Schaub met in Ferrara on 7 September 2016 to discuss the composition and workings of the Project Team and, more generally, the guidelines of the project. After the European Parliament's resolution was passed, the project was the subject of a panel at ELI's Annual Conference in Vienna on 8 September 2017 and then approved to commence as an ELI project by the ELI Council. Members of the Project Team then met in Vienna on 28 February 2018 to work through details and the scope of the project.

The Project Team met again in Riga on 6 September 2018 and discussed various aspects of the project. Some of the issues discussed within the Team were then

---

4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32.

5 European Commission, Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults, SP(2017)510.

6 For example, in her mission letter of 10 September to the Vice-President-delegate for Interinstitutional Relations.

7 A Union that strives for more, My Agenda for Europe, available at: <http://ec.europa.eu>.

discussed at a panel, chaired by Bea Verschraegen, in the framework of that year's Annual Conference of the ELI, with the participation of Patrizia de Luca, Pietro Franzina, Richard Frimston and Maja Groff.

Based on a position paper discussed within the Project Team, Pietro Franzina presented some key aspects of the project at the Conference, mentioned above, which was held in Brussels on 5–7 December 2018, organised by the European Commission and the Hague Conference on Private International Law. The Joint Conference was the first time that the operation of the Hague Convention was discussed among representatives of States Parties and States working towards becoming States Parties. More than 130 experts attended the Conference, representing 35 States from all continents.

Having considered the presentations and views expressed at that joint conference, the Project Team organised a seminar in Milan on 22 March 2019. The seminar was opened by a keynote speech by Christiane Wendehorst, the President of ELI. In the first panel, Joëlle Bergeron, Patrizia de Luca and Philippe Lortie discussed political and institutional challenges under the chairmanship of Alain Pilette; Domenico Damascelli, Katja Karjalainen and Claire van Overdijk elaborated on the notion of measure of protection in a panel chaired by Adrian Ward; Elena Bargelli chaired a session where Pietro Franzina, also speaking on behalf of Thalia Kruger, together with Richard Frimston and Renate Schaub illustrated the proposals of the project; finally, Christelle Hilpert, Haldi Koit, Stefan Schlauss and Linda Strazdiņa exchanged views, under the coordination of Roberta Bardelle, on the current practice of Central Authorities under the Hague Convention. Concluding remarks were made by Adrian Ward.

The European Parliamentary elections of May 2019 and resulting changes to the composition of the European Parliament Committees, including JURI, and the European Commission, temporarily halted the progress of the project. Contacts have since been in place between the Project Reporters, on the one hand, and the Secretariat of the JURI Committee, on the other, with a view to illustrate the project and promote further exchanges on the topic at a political and institutional level.

On 5 September 2019, at the ELI Annual Conference and Meetings in Vienna, presentations were given by Pietro Franzina, Richard Frimston, Philippe Lortie and Jan von Hein and on general developments and the outstanding issues for the project in the framework of a panel chaired by Adrian Ward.

3. Scope and Structure of this Report

The present report is the outcome of the work of the Project Team in the framework of the project. Divergent views were expressed within the Team, as well as by some of the observers, regarding the approach espoused by the project and/or the particular solutions proposed. The Reporters have taken the views of all into account in order to produce a consistent approach.

The report addresses the following issues: the bases and scope of the Union's competences as regards the protection of adults in international situations; the strategies that the Union should consider following in order to enhance the protection of adults in the relations between Member States; the further improvements that the Union may promote with respect to the Hague Convention

without making use of its external competence or its legislative powers. Finally, the report sets forth a checklist to encourage the development of private mandates within the ambit of the substantive laws of the Member States.

III. The Bases and Scope of the Union's Competences

1. Lack of a General Competence to Pursue Substantive Harmonisation

The Union does not have a general competence to harmonise the rules of substantive private law. Substantive harmonisation may be pursued on the basis of Article 114 of the TFEU insofar as necessary 'for the achievement of the objectives set out in Article 26', that is, for the creation and proper functioning of the internal market. Article 114 of the TFEU, however, does not appear to provide the Union with a suitable basis for action aimed at enhancing the protection of adults. Indeed, the harmonisation of some substantive rules in this area would result in increased legal security in respect of transactions involving an adult's assets, and would thus benefit the operation of the internal market. However, market efficiency is by no means the core concern underlying the law of adults' protection.

What is at stake here, as observed above, is the autonomy and social inclusion of such adults. The Union's approach should be designed in such a way as to ensure that the fundamental rights of the adult in question enjoy effective protection, and should cover, in principle, all the relevant aspects of protection, including those relating to the personal welfare of the adult in question.

In view of the foregoing, the Project Team believes that the Union should act on the basis of Article 81 of the TFEU and enact harmonised rules of private international law, rather than harmonised rules of substantive law.

The Team considered whether the measures envisaged would fall within the scope of Article 345 of the TFEU, according to which EU law 'shall in no way prejudice the rules in Member States governing the system of property ownership'. It is true that, as stated above, the protection of adults encompasses the protection of the assets of the adults concerned. The elaboration of regional rules aimed at enhancing the protection of adults in international situations, however, does not appear to challenge, as such, the 'system of property ownership' of the Member States. Indeed, no such concerns were raised when the Union legislated on the private international rules on succession and the property regimes of spouses and registered partners, which similarly touch (indirectly) on property issues.

2. The Contemplated Legal Basis: Article 81 of the TFEU

Article 81 of the TFEU tasks the Union with developing judicial cooperation in civil matters among Member States as regards civil matters with cross-border implications. Matters of the protection of adults come plainly with the 'civil matters' to which Article 81 applies.

Specifically, the Union has the power under that provision to adopt measures aimed at ensuring, *inter alia*, the mutual recognition between Member States of judgments

and of decisions in extrajudicial cases, the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction, and the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Existing legislation shows that the Union may bring about some substantive harmonisation on the basis of Article 81 of the TFEU (as occurred under Regulation (EU) No 650/2012 on matters of succession, with the rule on *commorientes* and with the creation of a European Certificate of Succession),[8] insofar as necessary for the proper operation of harmonised private international law rules.

Two important clarifications are needed in assessing the manner in which the Union may exercise its powers under Article 81 of the TFEU: the protection of adults does not belong to 'family law' and accordingly is not subject to the special procedure provided for under Article 81(3) of the TFEU; and, in addition to the 'internal' competence outlined in Article 81, the Union has, pursuant to Article 216 of the TFEU, a parallel 'external' competence, which involves the ability, subject to certain conditions, to conclude international conventions and, more generally, to entertain international relations as regards the protection of adults.

2.1. The Law of Adults' Protection is Not Part of 'Family Law'

The opinion has been voiced, including by the European Commission in its follow up to the European Parliament's Resolution of 1 June 2017, according to which the protection of adults falls within the scope of Article 81(3), on family matters. Measures concerning the protection of adults would thus need to be 'established by the Council, acting in accordance with a special legislative procedure': specifically, the Council would need to act 'unanimously after consulting the European Parliament'. This view is not persuasive.

There are three distinct reasons for considering that the protection of adults does not come *as such* with the purview of Article 81(3).

First, the protection of adults does not relate, by its nature, to family law. In the opinion of the Project Team, the autonomous notion of 'family' referred to in Article 81(3) of the TFEU cannot be construed as broadly as to include the protection of adults who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties. The protection of adults may frequently involve one or more members of the concerned adult's family. However, this circumstance is not enough to characterise the protection of adults as a legal institution belonging to the area of family law, and indeed many of those adults who are most in need of protection have no family at all. What is basically at stake in the protection of adults is the protection of a given individual, and his or her personal and financial interests.

---

[8] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107–134.

Actually, the Union's institutions have refrained from referring to Article 81(3) of the TFEU when dealing with measures similarly concerned with the law of persons. Specifically, Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters[9] was not considered within the area of family law. This Regulation deals with the protection of persons, even if the protection requested is against a family member (such as in the event of domestic violence).

Second, the Union's legislator has up until now interpreted the reference to 'family law' in Article 81(3) in a restrictive manner. In particular, Regulation No 650/2012 matters of succession was not considered to fall under family law, notwithstanding the obvious connections between the law of succession and family law.

Third, the fact that the legislation of some Member States (such as Austria and the Czech Republic) provide for *ex lege* representation of a vulnerable adult is not a reason to consider the protection a family law matter throughout the Union. The concept of *ex lege* representation does not exist in the majority of Member States and, where it does exist, the relevant rules differ from one State to another. Therefore, the fact that spouses and/or other family members might have *ex lege* powers of representation in some Member States should not influence the categorisation of the protection of vulnerable adults as a matter of family law for the purposes of Union law.

2.2. The Union May Act Internationally Based on Its 'Parallel' External Powers

Article 216 of the TFEU sets forth the conditions under which the Union may conclude an international agreement with one or more (third) countries. This means that, where those conditions are met, the Union may, as a matter of principle, contribute to the harmonisation of the rules of private international law on the protection of adults by means of an international convention.

However, it is important to note that, regardless of the scope of its treaty-making power and the conditions for its exercise under the TFEU, the Union cannot itself become a party to the Hague Convention. Articles 53 and 54 of the Convention make it clear that the latter is only open to sovereign States, not to international organisations.

Whenever the Union is willing to conclude an international agreement that is open only to States, the practice consists for the Union in authorising the Member States to conclude the agreement in question 'in the interest of the Union'. This means that, as a matter of international law, the agreement will eventually bind the Member States and operate as a source of rights and obligations for the latter, whereas, as a matter of Union's law, the agreement will form part, in principle, of the *acquis* of the Union.

3. The Relevance of Harmonisation to the Objectives of Article 21 of the TFEU

Article 21(1) of the TFEU ensures that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the

[9] 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, OJ L 181, 29.6.2013, 4–12.

limitations and conditions laid down in the Treaties and by the measures adopted to give them effect and under Article 21(2) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of these rights, if action by the Union should prove necessary to attain this objective.

Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union[10] was adopted on the basis of Article 21 of the TFEU.

Article 21 may, in principle, provide an alternative basis for legislation in matters of adults' protection. However, this would imply distinguishing between adults who are citizens of the Union and adults who are not. This would hardly be consistent with the universal character of the rights enshrined in the UNCRPD and would fail to address the practical needs raised by the mobility of nationals of third countries and their assets towards the Union and within its borders.

The Project Team notes that a Union's measure aimed at enhancing the protection of adults in cross-border situations, based on Article 81 of the TFEU, would ultimately help achieve, insofar as citizens of the Union are concerned, the aims stated in Article 21 of the TFEU.

The suggested harmonisation of the rules of private international law would in fact mitigate the hurdles that the Union's citizens currently face when moving, or transferring their assets, from one Member State to another.

IV. The Union's Possible Strategies: An Overview

1. The Point of Departure: The Hague Convention

Ever since its first exchanges, the Project Team agreed that if the European Union were to adopt measures aimed to enhance the protection of adults in cross-border situations, it should do so in a manner consistent with the Hague Convention on the International Protection of Adults.

The Hague Convention was elaborated against the background of the human rights based paradigm of disability later embodied in the UNCRPD and has proved to work well in practice.

In the view of the Project Team, the Union, when acting in this field, should refer to the same principles underlying the Hague Convention, such as, in particular, the principle whereby, as stated in the preamble of the Hague Convention, the interests of the adult and respect for their dignity and autonomy are to be primary considerations.

[10] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.7.2016, 1–136.

The Union should acknowledge that harmonisation in this area ought to be pursued both on a regional and on a global level, and that a broad ratification of uniform texts of a universal character, such as the Hague Convention, should be promoted.

2. The Hague Convention Should Be in Force for All Member States and Should Be Coupled with Legislation

Based on the foregoing, the Union, in order to enhance the protection of adults in international situations, should consider making use of both internal and external competences.

On the external side, the Union should take such steps as are necessary to have the Hague Convention ratified, or acceded to, by all Member States within a reasonably short period of time, at the same time as contributing, generally, to the promotion of the Hague Convention among third countries.

On the internal side, the Union should enact legislative measures aimed to improve the operation of the Hague Convention in the relations between Member States, consistent with the objectives of the Hague Convention itself and its governing principles. While doing so, care should be taken not to jeopardise the international coherence in the field, taking into account that the adults concerned may move from outside the Union to the Union and vice-versa.

'Member States' refers, here, to such Member States as take part in the adoption of Union's measures regarding judicial cooperation in civil matters and, more generally, the creation of an area of freedom security and justice. This excludes Denmark, owing to the opt-out regime that applies to this country pursuant to Protocol No 22 to the Treaties. Ireland, for its part, would be free to decide whether to join any Union's measure in this area in conformity with the opt-in regime provided for in Protocol No 21.

3. The Added Value of Combining External and Internal Measures

The entry into force of the Hague Convention for all Member States would allow the authorities of the Member States to benefit from the Hague Convention in their relations with third countries equally bound by the Hague Convention.

The adults in need of protection cannot necessarily choose as to whether all of their connections are solely within the Union or both within and outside the Union. A broad ratification of the Hague Convention worldwide would ensure the proper handling of cases connected with both Member States of the Union and third countries, insofar as the latter are parties to the Hague Convention.

Suppose, for instance, that someone living in a Member State enters into a private mandate which conforms with the law of country X, this being the governing law pursuant to the Hague Convention. Having the Hague Convention in force in all Member States and in the broadest possible range of third countries would enable the appointed attorney to rely on the powers granted thereunder in all such States, since the authorities of each of those State will, based on the Hague Convention, consider the mandate to be governed by the law of country X and enforce it accordingly. As a result, the adult concerned may move (or transfer their assets) from

one of those countries to another, without having to fear that their planning may be frustrated.

All in all, both internal and external action is needed to send a clear signal to citizens that, in the words of Ursula von der Leyen, the Union's 'policies […] deliver and make life easier for people',[11] and that this occurs within Europe and, to the extent possible, beyond its borders.

V. The External Strategy in Detail

1. The Hague Convention Should be in Force for All Member States

The political institutions of the Union have, on several occasions, encouraged ratification of the Hague Convention by Member States. The European Parliament already did so in its resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)). In the Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, adopted in 2009, the European Council expressed the wish that the Member States joined the Hague Convention 'as soon as possible'. For its part, the European Commission monitored the ratification process as well as the application of the Hague Convention in the Member States that have become parties to it.

The Project Team believes that the Union should abandon the 'soft' approach followed so far and engage more firmly in this field.

It is true that the rate of ratification has accelerated somewhat over the last few years, as three Member States – Cyprus, Latvia and Portugal – became parties to the Hague Convention in 2018. It is also true that other Member States are actively considering ratification, and that ratification by one Member State in particular – Belgium – appears to be imminent. It is also true that different States have made known, namely in response to a questionnaire circulated by the Permanent Bureau of the Hague Conference on Private International Law in 2019, that they are in fact considering joining the Convention.

Yet, generally speaking, the process remains slow, and it is uncertain whether more Member States will in fact ratify, or accede to, the Hague Convention in the near future. Indeed, as it appears from the replies to a questionnaire circulated by the Commission (doc 13959/2016 and 13959/2016 REV1), some Member States have failed so far to study the implications of ratification in detail and others have made known that they do not consider ratification of the Hague Convention to be a priority.

This state of affairs suggests that an initiative on the part of the Union would be crucial to ensuring that all Member States become parties to the Hague Convention, and do so within a reasonably short period of time.

It has been noticed above that the Union cannot itself become a party to the Hague Convention. Rather, the Union may – and should, in the view of the Project Team –

[11] In her mission letter of 10 September to the Vice-President-delegate for Justice.

authorise the Member States that have not yet done so to ratify, or accede to, the Hague Convention in its interests.

To the extent to which the conclusion of the Hague Convention comes with the scope of the external powers of the Union, a decision granting such an authorisation would entail that the Member States are in fact under an obligation to ratify, or accede to, the Hague Convention.

The Project Team acknowledges that a move of this kind raises politically sensitive issues and that, so far, the implications of a similar course of action have been the object of limited discussion within and among Member States. The Team is also aware that the suggested approach is without obvious precedent. So far, as regards judicial cooperation in civil matters, the Union only engaged in external action in areas that were already covered by legislative measures of the Union.

At the first informal meeting of Justice and Home Affairs Ministers held under the Finnish Presidency of the Union, on 18 and 19 July 2019, a remark was made by the Presidency itself that the Union could consider concluding – insofar as Member States so agree – international agreements 'also in areas where the Union does not yet possess exclusive competence', noting that a possible candidate to explore the feasibility of this approach would be, precisely, the Hague Convention.[12]

In its Conclusions on the Future of Civil Justice Cooperation,[13] adopted on 3 December 2019, the Council of the European Union stated, among other things, that 'a multilateral approach is an essential element of international cooperation also in the field of civil justice'. The Council reiterated its 'support to the key multilateral organisations in the field', including the Hague Conference on Private International Law, and observed that, as regards 'particular cases where multilateral cooperation is not an option', the Commission should 'present effective alternatives to cater for citizens' and companies' needs'.

Although the Conclusions attest that the current focus of the Union is not on legislating in new areas of private international law, unless clear evidence of the added value of new instruments is provided, the latter passage suggests that the Council is not opposed, in principle, to measures aimed at promoting the ratification of the Hague Convention by Member States, and that the Commission – given that the Union cannot itself become a party to the Hague Convention – should explore ways to cater for the needs of the adults concerned.

For its part, the Project Team: submits that the conditions set forth by Article 216 of the TFEU for the Union to act on the international plane appear to be fulfilled in the circumstances; observes that a scheme similar to that described above has been put in place in other contexts in the field of judicial cooperation in civil matters and has proved to work well; and notes that the concerns voiced by some regarding the costs that ratification might entail do not find support in the available evidence.

---

12 *EU Civil Justice and Multilateralism*, available at: <http://eu2019.fi>.

13 Council conclusions on the Future of Civil Justice Cooperation, OJEU C 419, 12.12.2019, 6.

1.1. The Conditions for External Action Appear to Exist in the Circumstances

As mentioned above, Article 216 of the TFEU lays down the conditions subject to which the Union is permitted to conclude an international agreement (or request the Member States to conclude such an agreement in its own interest).

Of those conditions, two are especially important for the present purposes. The Union has the power to conclude an agreement where the conclusion of that agreement: (a) 'is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties'; or (b) 'is likely to affect common rules [resulting from the legislation of the Union] or alter their scope'.

Before analysing the two conditions it is worth recalling that the question whether the Union has the power to conclude an international agreement (through its Member States, as the case may be) is distinct from the question whether that power is exclusive, that is, whether the agreement is one that only the Union, and not its Member States, may conclude, or rather an agreement that the Member States, considered individually, remain free to conclude. While the scope of the Union's external competence is governed by Article 216 of the TFEU, the issue of the exclusive or non-exclusive character of that competence must be decided in accordance to Article 3(2) of the TFEU. This states that the Union's competence is exclusive when the conclusion of the agreement in question 'is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence', or in so far as the conclusion 'may affect common rules or alter their scope'.

a. Concluding the Hague Convention is Necessary to Advance the Objectives of the Union

As shown above, the ratification of the Hague Convention by all Member States would advance some of the objectives of the Union: it would make the protection of the fundamental rights of those concerned more effective, in line with Article 6 of the TFEU; it would foster the free movement of citizens, consistent with Article 3(2) of the TEU; and it would help combating social exclusion and discrimination, as well as, in appropriate circumstances, promoting solidarity between generations, as required by Article 3(3) of the TEU.

In cross-border situations, the realisation of those goals is not effective under rules of private international law that vary from one State to another. Ideally, as explained, those rules should – at least in their key features – be universal in nature. The Hague Convention meets precisely those requirements.

b. The Hague Convention is Likely to Affect the Operation of Existing Union's Legislation

Even though the Union has so far never enacted legislation that specifically addresses the protection of adults, some of the measures enacted by the Union in the field of judicial cooperation in civil matters actually touch upon or can be applied with respect to vulnerable adults.

This is the case, *inter alia*, for Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I).[14] The Regulation, as stated in Article 1(2)(a) does not apply to 'questions involving the status or legal capacity of natural persons'. It does, however, include a rule – Article 11 – which states whether, and subject to which conditions, a party to a contract may invoke his incapacity against the other party. The grounds on which a measure of protection affecting the capacity of a party may be adopted or enforced in a State are thus relevant to the operation of the latter provision.

Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters similarly excludes from its scope 'the status or legal capacity of natural persons.' Litigation regarding private mandates, as may involve issues such as whether the powers exercised by the attorney had been duly conferred, is not excluded as such from the scope of the Regulation. Thus, if a private mandate is given by an adult with the understanding that it be immediately operative and also remains operative notwithstanding some or total loss of autonomy, the issue arises of the coordination of the rules in the Regulation with the rules governing private mandates concluded in contemplation of a loss of autonomy.

In the end, the above legislative measures may well be applicable in situations which involve adults who benefit, or are entitled to benefit, from measures of protection within the meaning of the Hague Convention. It is in this sense that the ratification of the Hague Convention would 'affect' the operation of those measures.

The Project Team acknowledges that the relationship between the Hague Convention and the existing legislation of the Union in the field of private international law could hardly be described as involving mutual exclusion or derogation. For example, Article 11 of the Rome I Regulation is concerned with the issue if capacity is raised in a transaction between an incapacitated adult and a third party, whereas Article 17 of the Hague Convention refers to transactions between a third party and the representative of an adult.

That said, given the ties between the subject matter of the Hague Convention, on the one hand, and the issues covered by existing measures of the Union, on the other, it is contended that introducing uniform rules for the handling of international cases regarding the protection of adults would improve the operation of the Union's measures concerned.

1.2. The Suggested Approach has been Tested in Other Areas

The approach outlined in the previous paragraphs is similar to that followed by the Union, in particular, with respect to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

The case of the Hague Convention of 2000 differs in some respects from that of the Hague Convention of 1996. At the time that the Union mandated Member States to sign and ratify the latter instrument, it had already exercised its competence internally in respect of matters covered by that Convention (by Council Decisions of

[14] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, 6–16.

19 December 2002, 2003/93/EC, and 5 June 2008, 2008/431/EC, respectively). Its conclusion was thus set to have a significant impact on the operation of existing rules of the Union.

This difference, however, does not challenge the above findings. The power of the Union to conclude the Hague Convention (through its Member States) may be asserted on different grounds, as discussed above, and is not contingent on the Union's having already enacted legislation on the subject matter of the Hague Convention.

1.3. Financial Concerns do not Appear to be Justified

Ratifying the Hague Convention, some fear, could create onerous burdens for States. In their replies to the Commission's questionnaire mentioned above, some Member States observed that the issue of costs is likely to have a significant impact on the prospect of ratification of the Hague Convention.

The Project Team, while acknowledging that the implementation of the Hague Convention would inevitably bear some financial implications, in particular as regards the needs of Central Authorities, was not provided with evidence of any particularly significant costs associated with the operation of the Hague Convention based on the experience of Central Authorities of current Contracting States; in fact, the opposite appears to be the case, in that Contracting States experience nominal additional costs, only. At the Milan Seminar, representatives of the Central Authorities of France and Germany, which have the biggest caseloads under the Hague Convention, indicated that they respectively use less than 0,5 FTE per year to handle their respective caseloads.

This finding is consistent with the Conclusions and Recommendations adopted at the joint conference organised in 2018 by the European Commission and the Hague Conference on Private International Law, mentioned above.

1.4. Consulates Would Keep Playing an Active Role in the Protection of Adults

The Project Team learned of the fear expressed in some States that, with the entry into force of the Hague Convention, consular authorities would no longer be able to discharge their functions relating to the protection of nationals whose habitual residence is in a State equally bound by the Hague Convention.

This fear appears to be exaggerated. It is true that the Hague Convention, by using habitual residence as its main connecting factor, limits the ability of the authorities of the State of nationality of the adult concerned to assert their jurisdiction to take measures aimed at the protection of the person and property of that adult. However, this does not imply that the authorities of a State of the adult's nationality are barred from the opportunity to play an active role, including through their consulates, in the protection of their nationals abroad.

Article 7 of the Hague Convention provides that the authorities of a Contracting State have jurisdiction to take measures for the protection of the person or property of an adult possessing the nationality of that State 'if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2'. The work of consulates,

including the information they are in a position to collect locally, may prove crucial to assessing for the above purposes the interests of the adult concerned. Situations may arise where the judicial authorities of the State of nationality only become aware of the need to protect a given national abroad thanks to the local consulates.

Consular authorities may also provide valuable cooperation to other authorities involved in the protection of adults, including the authorities of the State where the adult in question habitually resides and the relevant Central Authorities.

2. The Union Should Contribute to Promoting the Hague Convention Worldwide

The opinion of the Project Team is that the Union has an interest in promoting the Hague Convention among third countries. In particular, the Union is a member of the Hague Conference on Private International and should consider taking steps within the Conference itself and towards the Member States of the latter aimed at increasing the number of contracting parties worldwide.

The conference jointly organised by the European Commission and the Hague Conference in 2018 showed that interest of States and other stakeholders in the Hague Convention is gradually increasing.

The Project Team, too, witnessed the growing interest in the Hague Convention on the part of States outside the European Union on the occasion of meetings held to discuss the project and disseminate the Team's provisional findings.

The work that the Union should envisage in this field would not substantially differ from that carried out by the Union itself in other areas of private international law, such as family maintenance and the civil aspects of child abduction, where synergy between regional legislation and Hague instruments is considered an asset.

VI. The Internal Strategy in Detail

1. The Principle: Improving the Hague Convention Without Disrupting It

In the opinion of both scholars and practitioners, the Hague Convention provides sensible solutions to all of the major issues that may arise in connection with the protection of adults in a cross-border scenario. Evidence collected in the framework of the project, notably through presentations given by officers at Central Authorities, confirm that, generally speaking, the Hague Convention works well.

That said, after 20 years, the Hague Convention is beginning to show its age. The operation of its rules can be improved in some ways.

1.1. A Two-Tier Approach

In the view of the Project Team, improvements could be done by the Union enacting a legislative measure, in the form of a regulation, aimed at complementing the Hague Convention in the relationship between the Member States of the Union,

once the Hague Convention is in force for all of them. In the present report, that measure will be referred to as the Suggested Adults' Protection Regulation.

The Hague Convention would ultimately apply in the Member States as supplemented – or derogated from, as the case may be – by the Regulation.

In practice, the Hague Convention would provide the general rules applicable in the Member States in this field, save that intra-EU cases, meaning cases involving the protection of the person or the property of an adult whose habitual residence is in a Member State of the Union or cases otherwise involving only two or more Member States, the Hague Convention would apply alongside the Suggested Adults' Protection Regulation.

The discussion within the Project Team as well as the exchanges between the Team itself and the observers showed that the need for, and the possible content of, legislation at Union level is difficult to assess. There are different reasons for this. One reason is that, whilst the practical experience of the Hague Convention remains limited overall, there is not always clear evidence of the practical implications associated with what the Project Team regarded as shortcomings of the Hague Convention. Another reason is that some of the gaps left by the Hague Convention, ie the lack of detailed provisions on some issues, may in fact represent an asset, for they allow for a measure of flexibility.

The Team was aware of those difficulties and took note of the different opinions expressed by members and observers as to the desirability of legislation in matters governed by the Hague Convention.

The proposals presented below rest on an assessment of the pros and cons of legislation, and reflect the assumption that legislation is justified where there is evidence of its real added value, and where its implementation does not affect the proper functioning of the Hague Convention.

1.2. The Hague Convention Does Not Rule Out Concurrent Regional Legislation

It is important to note that, subject to the latter qualification, the adoption of the Suggested Adults' Protection Regulation and its application by Member States would not involve a violation by the Member States themselves of the international obligations they undertook (or will have undertaken, by the time the Regulation enters into force) under the Hague Convention.

The Hague Convention does not prevent Contracting States from furthering their cooperation in the field of the protection of adults beyond the provisions of the Hague Convention itself or even departing from its rules in their mutual relations.

The relevant provisions are Article 49(2) and Article 49(3) of the Hague Convention. Both refer to the relationship between the Hague Convention and other agreements or 'international instruments', including, as stated in Article 49(4), 'uniform laws based on special ties of a regional nature'. The latter formula, though initially meant as a reference to cooperation among Nordic States, also applies, it is believed, to legislative measures adopted by the European Union.

According to Article 49(2), the Hague Convention does not affect the possibility for one or more Contracting States to conclude agreements or take part in regional rules which contain, 'in respect of adults habitually resident in any of the States Parties to

such agreements', or in any of the States bound to such regional rules, 'provisions on matters governed by [the Hague] Convention'. Article 49(3) adds that the said agreements or regional rules 'do not affect, in the relationship of such States with other Contracting States, the application of the provisions of [the Hague] Convention'.

In practice, this means that by applying a legislative measure adopted by the Union to deal with issues within the scope of the Hague Convention, the Member States would not be acting in breach of the Hague Convention insofar as the measure in question applies to a person whose habitual residence, at the material time, is in a Member State.

The understanding of the Project Team is that, in addition to that, the Member States would not violate the Hague Convention if they applied a Union regulation, instead of the Hague Convention, to the recognition in a Member State of a measure of protection given in another Member State, or to proceedings for the declaration of enforceability of such a measure.

The same is true, in the view of the Project Team, if the authorities of a Member State declined their jurisdiction in favour of the courts of another Member State pursuant to that regulation, or if they asserted their jurisdiction, based on such a regulation, in a situation where they would normally need to defer, under the Hague Convention, to the jurisdiction of the courts of another Member State.

Actually, in none of the scenarios described would a Member State, by applying a Union's measure rather than the Hague Convention, fail to comply with its obligations thereunder *vis-à-vis* any Contracting State outside the Union.

The Project Team acknowledges that, for particular issues, it may prove difficult to draw a clear and workable distinction between situations that the Union may regulate without hindering the operation of the Hague Convention and situations where the Union's legislation would instead frustrate the functioning of the Hague Convention. This is true, in particular, of the issue of applicable law. For example, if the Union were to enact rules aimed to expand the options granted under the Hague Convention concerning the choice of the law applicable to a private mandate, such an expansion would be enforceable in the Member States but not in the other Contracting States of the Hague Convention. The resulting discrepancy would ultimately undermine the operation of the Hague Convention. The Project Team considers that the Union should refrain from pursuing similar developments through legislation.

1.3. The Hague Convention Ought to be Implemented Uniformly in the Union

The States that are parties to the Hague Convention are domestically required to adopt measures in order to implement the Hague Convention's provisions in their own legislation. Under the Hague Convention, however, each State is free to shape those measures as it deems appropriate, provided that compliance with the obligations arising from the Hague Convention itself is ensured.

The implementation of the Hague Convention in the Member States of the Union should be uniform at least in some regards. The Suggested Adults' Protection Regulation may, in fact, include rules aimed at implementing the Hague Convention, and/or filling the gaps left by the latter's provision.

It is believed that this, too, would eventually improve the operation of the Convention within the Union.

2. The Proposed Improvements: Article-by-Article Analysis

2.1. Note on Methodology

In this section, the contents of the Suggested Adults' Protection Regulation are discussed in detail. The analysis includes the suggested wording of the key provisions of the Regulation. Ancillary provisions are not included. Some of the provisions for which a wording is proposed are themselves incomplete. Where appropriate, indications are provided in the commentary of the relevant provisions regarding the possible content of omitted parts.

2.2. Recitals

a. The Principle

The Suggested Adults' Protection Regulation should state in its preamble that it takes the Hague Convention as its point of departure and that it aims to complement, in the relations between Member States, the functioning of the Hague Convention.

b. Suggested Wording

Recital A – The Hague Convention of 13 January 2000 on the International Protection of Adults applies, in all the Member States, to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

Recital B – Adults who are not in a position to protect their interests should enjoy in the Union the highest possible degree of protection, consistent with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006. In addition, they should benefit from the freedoms of movement enshrined in the Treaties on an equal basis with others.

Recital C – To achieve the above goals, the Union should enhance the functioning of the Hague Convention on the International Protection of Adults in the relations between the Member States by laying down rules aimed to make cooperation under the Hague Convention more effective and further advance its goals.

Recital D – The substantive scope and the provisions of this Regulation should be consistent with the Hague Convention.

2.3. Article A – Scope of Application

a. The Principle

As stated above, the purpose of the Suggested Adults' Protection Regulation is to enhance the operation of the Hague Convention in the Member States of the Union. The scope of the Regulation should accordingly, in principle, be aligned with the scope of the Hague Convention (see Recital D). Specifically, the Regulation should

make clear that its rules are meant to apply whenever the Hague Convention applies, and, conversely, do not claim application in situations where the Hague Convention itself is not applicable.

b. Suggested Wording

Article A – Scope of application

1. This regulation shall apply in civil and commercial matters to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

2. Unless provided otherwise, this Regulation shall apply only in situations to which the Hague Convention of 13 January 2000 on the International Protection of Adults (hereinafter 'the 2000 Hague Convention', or 'the Convention') applies.

d. Commentary

Save for minor changes, Article A(1) reproduces Article 1(1) of the Hague Convention ('This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests'). The expression 'in civil and commercial matters' is a common feature of legislative texts enacted on the basis of Article 81 TFEU. Unlike Article 1(1) of the Convention, the Regulation makes no reference to the international character of the situations governed by the Regulation. This omission is consistent with the recent legislative practice of the Union. Regulation No 650/2012 on matters of succession, for example, fails to specify that it applies only in cross-border situations. The same holds true for Regulation 2016/1103 on matrimonial property regimes,[15] Regulation 2016/1104 on the property consequences of registered partnerships,[16] and Regulation 2019/1111 on matrimonial matters and matters of parental responsibility. However, since the legal basis of the named texts is Article 81 TFEU, on 'judicial cooperation in civil matters *having cross-border implications*', it is clear that the operation of the said texts is limited to international, as opposed to purely domestic, situations. The Suggested Adults' Protection Regulation should likewise be understood as being merely concerned with the protection of adults in international situations.

The words 'Unless provided otherwise' reflect the fact that the scope of one provision in the Regulation, namely Article B on choice of court, is narrower than the scope of the corresponding provisions in the Hague Convention: Article B only applies, as stated therein, to the protection of adults who, at the time the authority is seised, are habitually resident in a Member State.

e. Further Related Provisions Not Reproduced Here

Article A is not concerned with the temporal scope of application of the Regulation. Further provisions should be introduced to deal with that matter. These could be

[15] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, 1–29.

[16] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, 30–56.

modelled on existing provisions, such as Article 69 of Regulation 2016/1103 and Article 69 of Regulation 2016/1104, with the necessary adaptations. They would state that the Regulation applies only to proceedings instituted after a specified date and lay down the necessary transitional rules.

2.4. Article B – Choice of Court

a. The Principle

The Suggested Adults' Protection Regulation should include a provision enabling the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when they are capable, the Member State whose courts are to have jurisdiction over their protection; this should include the power to supervise guardians, persons appointed by a court or by the adult concerned (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs.

b. The Added Value of the Provision

Under the Hague Convention, a choice of court by the adult concerned does not, as such, confer jurisdiction on the chosen court. Article 8 of the Hague Convention provides that the authorities of a State having jurisdiction under Articles 5 or 6, 'if they consider that such is in the interests of the adult', may request the authorities of another Contracting State 'to take measures for the protection of the person or property of the adult', with respect to all or some aspects of such protection. The Contracting States whose authorities may be addressed for that purpose are, among others, those of 'the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection'.

A transfer of jurisdiction under Article 8 of the Hague Convention is by definition outside the control of the adult in question. In fact, a choice of court made by an adult in contemplation of a loss of autonomy cannot, based on the Hague Convention, be enforced as such. Rather, it is for the court possessing jurisdiction based on the relevant objective grounds to assess in its discretion whether to uphold the choice, or not. Should the court consider that jurisdiction ought in fact to be transferred to the chosen court, the transfer will only become effective, as it arises from Article 8(3), with the consent of the chosen court. All in all, where the transfer occurs, it may take time for the adult concerned to have his or her matter dealt with by the court selected.

This state of affairs, it is submitted, is not satisfactory. The Hague Convention, upon a proper reading of Article 8, does not prevent the chosen court itself to take the initiative and apply for the case to be transferred to it. In this scenario, however, as considered above, the choice made by the adult is not regarded by the Hague Convention as enough a reason for the chosen court to possess jurisdiction. Other conditions must be met, and those conditions must be assessed by other courts.

There does not seem to be any valid policy reason why an adult's choice of court should not be enforced as such.

From a human rights perspective, it is hard to see why self-determination should enjoy only indirect recognition when it comes to an adult's protection, while self-

determination is fully (or more fully) recognised in other areas, such as in matters of succession or as regards maintenance obligations.

Providing the adult concerned with the right to make choices relevant to his or her interests translates the principle according to which people with disabilities ought to be empowered to enjoy their rights on an equal basis with others. This is a key objective of the UNCRPD and the main focus of the European Disability Strategy 2010–2020, adopted by the European Commission (COM(2010) 636 final).

Furthermore, as regards the financial interests of the adults concerned, one should consider that, whilst a succession upon death or family support are subject to the interests of various parties that may conflict, it is, generally, solely the interests of the adult concerned that are paramount in dealing with their affairs.

The Project Team believes that, in order to comply with UNCRPD the adult should, subject to suitable safeguards, enjoy a significant amount of autonomy and be able to nominate the most suitable court.

The Team acknowledges that party autonomy in this field should be subject to limitations, notably in order to prevent abuse. A choice of court should be admitted in situations where it would clearly advance the fundamental rights of the adult concerned.

This occurs, in particular, where, by virtue of the choice, jurisdiction over the protection of the adult is conferred on the authorities of the State whose law is applicable to a private mandate made by the adult.

Convergence between *forum* and *ius* has a two-fold advantage. To begin with, it enhances legal certainty, for the will of the adult, as expressed in a private mandate, will be enforced by authorities which are, by definition, familiar with the law governing the substance of the mandate itself, and are, as such, particularly well placed to realise, in due course, precisely the same effects that the adult concerned had envisaged. Secondly, where a private mandate is administered and enforced by the courts of the State whose rules govern the substance of the mandate itself, the chances are high that those courts will discharge their duties rapidly and efficiently, thereby enhancing the effectiveness of the protection provided to the adult.

The above advantage would not be achieved, at least not systematically, absent a provision such as the one suggested. Under the combined operation of Article 5 and 15 of the Hague Convention, a private mandate governed by the law of country X may end up being dealt with by the authorities of country Y. In fact, Article 5 confers jurisdiction on the courts of the Contracting State where the adult concerned is habitually resident at the time where his or her protection is at issue, whereas Article 15 provides that the powers granted under a private mandate are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the following laws has been designated: a State of which the adult is a national; the State of a former habitual residence of the adult; a State in which property of the adult is located, with respect to that property.

Thus, if the adult in question entered into a private mandate when he or she was habitually resident in country X, but the issue of his or her protection under the mandate arises at a time when he or she is habitually resident in country Y, only the authorities of the latter country will be entitled, pursuant to the Hague Convention, to take measures for the protection of the adult in question, including – according

to the preferred view – such measures as may be necessary to bring the mandate into effect through registration or confirmation, or to adapt the powers granted by the adult to any supervening need or circumstance.

c. Suggested Wording

Article B – Choice of Court

1. Where powers of representation have been granted by an adult to be exercised when such adult is not in a position to protect his or her interests, the authorities of the Member State whose law is applicable pursuant to Article 15 of the Hague Convention shall have jurisdiction to take measures directed to the protection of the adult's person or property on the ground that such courts have been designated to that effect by the adult concerned.

2. The designation referred to in paragraph 1 shall be made expressly in writing and shall be dated and signed by the adult.

3. The authorities having jurisdiction on the ground of a designation under paragraph 1 shall be entitled to avail themselves of Article 8 of the Hague Convention. The State whose authorities may be addressed under such a request include the State in which the adult is habitually resident.

4. This Article applies to the protection of adults who, at the time the authority is seised, are habitually resident in a Member State.

d. Commentary

The provision applies whenever the protection of the adult concerned rests on a private mandate entered into by the latter. The aim of the provision is to enable the adult to determine that jurisdiction shall lie with the courts of the Member State whose law is to govern the substance of the mandate pursuant to Article 15 of the Hague Convention, no matter whether that law was chosen by the adult or rather applies to the case objectively.

For the provision to apply, the adult concerned must have his or her habitual residence in a Member State of the Union at the time the court is seised. The limitation is meant to ensure that the application of the Suggested Adults' Protection Regulation does not entail a violation of the obligations arising from the Hague Convention. As noted above, Article 49(2) of the Hague Convention provides for a regional organisation to adopt uniform rules deviating from those of the Hague Convention, provided that they apply to adults habitually resident in any of the States bound by the rules themselves.

The formal requirements of a choice of court are the same as those of a choice of law under Article 15(1) of the Hague Convention. In addition, the provision requires that the designation be dated and signed. Other legislative measures, such as Article 7 of Regulation 2016/1103, similarly require that a choice of court be dated and signed, in addition to being expressed in writing. The Project Team considers that it is neither necessary nor advisable to require that the choice comply with such additional formal requirements as may be provided for under the domestic legislation of particular Member States. Admittedly, some legislative texts of the Union make room for such additional requirements for choice of law and other agreements (see, for instance, Article 23 of Regulation 2016/1103, on choice of law

in matters of matrimonial property regimes). The Team, however, was not persuaded that the latter approach would bring real added value in the present context. Rather, the Team considered that the uniform operation of the Regulation in the Member States ought to be preserved, and that formal requirements prescribed by the domestic law of individual Member States should, as a rule, have no role to play.

Jurisdiction conferred under Article B is not exclusive in nature. Authorities having jurisdiction under Article B will still be in a position to rely on Article 8 of the Hague Convention to request the authorities of another State to take measures for the protection of the person or property of the adult.

Such a request may, pursuant to Article B of the Suggested Adults' Protection Regulation, be addressed to the authorities of the Member State where the adult is habitually resident. The latter option is not among those listed in Article 8 of the Hague Convention, since, under the Hague Convention, the courts of the latter State generally have jurisdiction. In fact, the courts of the State where the adult habitually resides may decide – including upon the application of the courts of any other Contracting State – that a case be transferred to the courts of another Contracting State; however, on the face of Article 8(2), a transfer of jurisdiction cannot be addressed to the courts of the State of the (current) habitual residence of the adult, for example if the habitual residence of the adult has changed. The Suggested Adults' Protection Regulation should make clear, for the avoidance of doubt, that this option, too, is also available. Otherwise stated, the Regulation should acknowledge that, although a choice of court may well confer jurisdiction on the authorities of a State other than the State of habitual residence of the adult, the chosen court should still be able to transfer the matter, if this is in the interests of the adult, to the courts of the State where the adult has their current habitual residence.

Indeed, consistent with the principle whereby the interests of the adult should be paramount in dealing with their affairs, situations may arise where the chosen court is not, or is no longer, the most appropriate venue to take measures aimed at the protection of the person or property of the adult in question.

More generally, Article B of the Suggested Adults' Protection Regulation should be without prejudice to Article 8 of the Hague Convention. This implies that a choice of court other than a choice pursuant to Article B of the Regulation (namely a choice unrelated to a private mandate) may still result in a transfer of jurisdiction to the authorities of the State chosen by the adult, if that is in the interest of the adult themselves, in accordance with Article 8 of the Hague Convention.

2.5. Article C – Recognition of Measures Taken in a Member State

a. The Principle

The Hague Convention aims, *inter alia*, to facilitate the circulation of measures directed at the protection of an adult's person or property among Contracting States.

Where the effects of a measure of protection taken in a Member State of the Union are relied upon in another Member State, the process could and should be further facilitated based on the high degree of mutual trust between those States and in

light of their shared commitment to promoting the effective realisation of the fundamental rights of the adults concerned.

To this end, the Suggested Adults' Protection Regulation should exclude the operation, between Member States, of Article 22(2)(a) of the Hague Convention, according to which a measure of protection may be denied recognition 'if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II'.

b. The Added Value of the Provision

By excluding the operation of the ground for non-recognition set forth in Article 22(2)(a) of the Hague Convention, the Suggested Adults' Protection Regulation would reduce, by definition, the chances that a measure of protection given in a Member State might be denied recognition in another. This would enhance the cross-border continuity of the relevant measures of protection and simplify the legal landscape.

The value of the provision further rests on the fact that it complements Article B on choice of court. In fact, it allows for the recognition of measures taken by the authorities of the Member State designated by the adult pursuant to the latter provision. If Article 22(2)(a) applied as it stands to the recognition of those measures, recognition would likely be denied, since a choice of court does not rank as such (ie, outside the case of a transfer of jurisdiction pursuant to Article 8) among the grounds of jurisdiction of Chapter II of the Hague Convention.

c. Suggested Wording

Article C – Recognition of measures taken in a Member State

Article 22(2)(a) of the Hague Convention shall not apply to the recognition of measures directed at the protection of an adult's person or property taken in a Member State.

d. Commentary

None of the legislative measures enacted so far by the Union to deal with the recognition of judgments in civil and commercial matters makes recognition contingent on an assessment by the authorities of the Member State requested that the judgment originates in the Member State whose authorities have jurisdiction under the relevant uniform rules. The proposed provision brings the recognition of measures of protection between Member States in line with that trend.

The recognition of a measure of protection originating in a Member State could still be challenged on the remaining grounds provided for by the Hague Convention, namely: that the measure was taken without the adult having been provided the opportunity to be heard in violation of fundamental principles of procedure of the requested State; that recognition is manifestly contrary to the public policy of the requested State, or conflicts with an overriding mandatory provision of the law of that State; that the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State; that the procedure provided in the Hague Convention as regards the placement of the

adult in an establishment in a Contracting State other than the State of origin has not been complied with.

e. Further Related Provisions Not Reproduced Here

The circulation of measures of protection in the European Judicial Area could be further facilitated by the adoption of uniform provisions regarding the procedure to obtain a declaration of enforceability and the creation of a standard attestation form to be issued in the Member State of origin to accompany a measure of protection. These rules, too, could be modelled on existing provisions, such as Articles 43–57 and 66–67 of Regulation 2016/1103, with the necessary adaptations.

2.6. Article D – Enforceability

a. The Principle

The Suggested Adults' Protection Regulation should lay down a uniform *exequatur* procedure to apply to measures of protection taken in a Member State.

b. The Added Value of the Provision

Article 25 of the Hague Convention provides that if measures taken in a Contracting State require enforcement in another, 'they shall […] be declared enforceable […] in that other State according to the procedure provided in the law of the latter State'. It is thus for each Contracting State to set forth the rules governing *exequatur*. This means that if all Member States were bound by the Hague Convention, each of them would still be free to rely on its own domestic procedural rules to regulate *exequatur* (and any connected proceedings) as regards measures taken in another Member State.

Admittedly, the number of measures of protection which require *exequatur* is limited. Still, procedural harmonisation would facilitate the cross-border movement of such measures within the European Judicial Area, and appears to be a goal worth pursuing.

Actually, should the need arise to enforce a measure in two or more Member States other than the Member State where that measure was taken, the same rules would apply in all such States as regards the *exequatur* proceedings. This would ultimately increase the effectiveness of the measures concerned, bring more certainty and limiting the costs associated with the enforcement procedure.

c. Suggested Wording

Article D – Enforceability

Measures given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in this Regulation.

d. Commentary

Most of the legislative measures enacted by the Union to deal with the recognition and enforcement of decisions come with provisions on *exequatur* proceedings. The

Suggested Adults' Protection Regulation should feature similar provisions to the same effect.

This part of the Suggested Regulation merely amounts to an implementation of the Hague Convention. As noted above, the Hague Convention leaves to Contracting States the task of laying down the rules concerning *exequatur*. The suggested provision aims to fill that gap by introducing a uniform procedure applicable throughout the Union.

The proposed uniform procedure is meant to apply to the *exequatur* of measures originating in a Member State. The domestic rules of Member States would continue to apply, instead, to the *exequatur* of measures given in third States, including States that are parties to the Hague Convention.

e. Further Related Provisions Not Reproduced Here

Recent legislative measures of the Union, such as Regulation No 650/2012 on matters of succession and Regulation 2016/1103 on matrimonial property regimes, show that several questions may need to be addressed for the purposes of regulating *exequatur* proceedings. These include, for instance, the delay by which the interested party should lodge an appeal against a declaration of enforceability.

Articles 43–58 of Regulation No 650/2012 and Articles 42–57 of Regulation 2016/1103 may serve as models to lay down a comprehensive set of rules on the *exequatur* of measures of protection. The provisions featured in other instruments may need to be adapted to the characteristics of measures of protection, which are not just about property but also about the person of an adult. The needs of the adult and those in charge of their protection ought, likewise, to be taken into account when drawing inspiration from legislative measures such as those named above, which underlie, in fact, different policies.

Harmonisation would, in any case, remain incomplete. Consistent with the principle of proportionality, the rules introduced with the Suggested Adults' Protection Regulation would, like those in Regulation No 650/2012 and in Regulation 2016/1103, leave some room for the procedural rules of the Member State concerned.

In addition, as with the above Regulations, standard forms would need to be established, eg to attest the content and the enforceability of a measure.

2.7. Article E – Authentic Instruments

a. The Principle

The Suggested Adults' Protection Regulation should provide for the acceptance and, where appropriate, the enforceability, of such authentic instruments as are established in a Member State for the purposes of protecting an adult.

b. The Added Value of the Provision

Authentic instruments bring about, as such, special evidentiary effects. The claims stated in an authentic instrument may, in appropriate circumstances, be enforceable under the law of the State where the instrument itself was established.

Private mandates are often established in the form of authentic instruments.

The Hague Convention fails to include provisions that make it possible to claim, in one Contracting State, the effects of an authentic instrument originating in another, ie the particular effects that arise from those instruments by virtue of their authentic character (the substantive effects of those instruments may, instead, already be covered by the Convention: thus, Article 15 of the Convention applies to powers of representation granted in contemplation of a loss of autonomy regardless of whether those powers are granted under an authentic instrument or otherwise).

Various legislative measures have been adopted by the Union to deal with the cross-border acceptance of authentic instruments and their enforceability. These include Regulation No 650/2012 on matters of succession and Regulations 2016/1103 and 2016/1104 on matrimonial property regimes and the property consequences of registered partnerships. However, none of these measures applies to private mandates.

The Suggested Adults' Protection Regulation should fill this gap by introducing rules on the acceptance and enforceability of authentic instruments, modelled on the existing measures of the Union.

As a result, those wishing to rely on the effects of an authentic instrument in a Member State other than the Member State in which the instrument was established would do so based on uniform rules, aimed at facilitating the cross-border movement of such instruments.

c. Suggested Wording

Article E – Acceptance and enforceability of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned […].

2. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party […].

d. Commentary

The suggested provision is modelled on Articles 59 and 60 of Regulation No 650/2012 and Articles 58 and 59 of Regulations 2016/1103 and 2016/1104. The Suggested Adults' Protection Regulation should replicate those provisions, with the necessary adaptations.

Acceptance and enforceability are dealt with here under one provision only for ease of reference.

Admittedly, the practical relevance of the suggested provision is likely to be smaller than that of the corresponding provisions in the above Regulations, at least as regards the enforceability of authentic instruments.

Whilst authentic instruments play an important role in respect of transactions that create enforceable claims, the protection of adults does not frequently entail the creation of such claims.

Rather, authentic instruments may be useful, because of their evidentiary value, when the need arises to give qualified evidence of a person's status or entitlements, including, for example, under a private mandate.

The Suggested Regulation should create, according to Article F below, a European Certificate of Powers of Representation. The main purpose of the Certificate would be to facilitate giving evidence of the existence and scope of such powers. Where the powers in question have been conferred under an authentic instrument established in a Member State, evidence of such powers may be given through the acceptance of the authentic instrument or through the presentation of a Certificate. Both options could be available.

The effects would not be the same. Authentic instruments bring about, based on their acceptance, the same evidentiary effects as they have in the Member State of origin. European Certificates have, instead, the effects provided for in Article G below.

e. Further Related Provisions Not Reproduced Here

The Suggested Regulation should come with a definition of authentic instrument. Such a definition may be taken from existing legislation, specifically from Article 3(1)(i) of Regulation No 650/2012, Article 3(1)(c) of Regulation 2016/1103 and Article 3(1)(d) of Regulation 2016/1104.

In addition, as with the above Regulations, standard forms would need to be established, eg to describe the evidentiary effects of an instrument.

In drafting the above provisions, regard should be had to the fact that in some Member States authentic instruments are often drawn up by notaries.

2.8. Article F – European Certificate of Powers of Representation

a. The Principle

The Suggested Adults' Protection Regulation should make it easy for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed. This may be done by creating a European Certificate of Powers of Representation (ECPR), taking into account the experience developed with the European Certificate of Succession.

b. The Added Value of the Provision

The cross-border transportability of measures of protection and the way in which the powers conferred under a private mandate may be evidenced and exercised in a State other than the State where the powers were granted (or confirmed) represent one of the main concerns surrounding the operation of the Hague Convention. This is confirmed, *inter alia*, by the responses of States to the questionnaire prepared by the Permanent Bureau in preparation for the Special Commission of 2022, mentioned above.

Whilst certificates under Article 38 of the Hague Convention may be available, their utility is somewhat restricted. The State with jurisdiction is under no obligation to

produce such a certificate. Actually, practice shows that certificates under Article 38 are very seldom issued and invoked. Furthermore, the latter certificates produce a presumption of the validity of the limited matters stated, but no further binding effects. Article 38 Certificates are not in multilingual format and there is considerable doubt as to whether they can validly be produced unless a private mandate has been subject to a form of judicial confirmation.

The manifest advantages of the European Certificate of Succession in the Union and the manner in which they have made easier the administration of cross border estates, clearly demonstrate the value that the existence of an ECPR would bring to reducing cross-border discrimination against vulnerable adults in the Union. In addition, the use of an ECPR can ensure the protection of third parties who rely on it.

c. Suggested Wording

Article F – European Certificate of Powers of Representation

1. This Regulation creates a European Certificate of Representation (hereinafter, 'the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article G.

2. The use of the Certificate shall not be mandatory.

3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article G in the Member State whose authorities issued it in accordance with this Regulation.

d. Commentary

The concept of the ECPR is modelled on the European Certificate of Succession created under Regulation No 650/2012 on matters of succession.

The use of the ECPR would not be mandatory but it could also be used in the country where it was issued and abroad to show who the attorneys under a private mandate are and the extent of their powers.

The ECPR would not take the place of national certificates (if any) which may still be issued in the Member States. If a national certificate is available, an attorney may prefer to use such a certificate in certain cases such as if it has a broader range of effects than the ECPR, for example concerning the protection of third parties who may be more willing to cooperate on the basis of that national document than on the basis of an ECPR.

Although the ECPR would be created for international adult protection cases, the ECPR would also be valid in the State where it was issued. In that State it could also be used to produce the effects mentioned in Article G. In practice it will probably depend for example on the effects of a national certificate and the costs involved, as to which certificate would be applied for, the ECPR or the national certificate.

If the ECPR, issued after the confirmation of the mandate, allows the attorney to demonstrate his powers in cross-border situations, difficulties remain in the absence of public registration of the private mandate from its inception.

Member states, such as Austria, have developed mechanisms for publicising the private mandate, both before and after its confirmation. In order to guarantee

respect for self-determination of the persons concerned, registration and publicity measures could be considered.

e. Further Related Provisions Not Reproduced Here

The Suggested Adults' Protection Regulation should include provisions modelled on Articles 63–68 of Regulation No 650/2012, with the necessary adaptations, regarding the purpose of the Certificate, the competence to issue, the application for a Certificate, the examination of such applications, the issue of the Certificate and the contents thereof.

The Regulation should likewise include provisions similar to those in Articles 70–73 of Regulation No 650/2012, to deal with certified copies of the Certificate, the rectification, modification or withdrawal of the Certificate, redress procedures and the suspension of the effects of the Certificate. The Regulation should also state that the validity of the ECPR could be time limited.

2.9. Article G – Effects of the Certificate

a. The Principle

The Suggested Adults' Protection Regulation should seek to extend the protection of third parties beyond the scope of Article 17 of the Hague Convention to the content of the applicable law, and possibly also to lack of capacity, or clarify that the latter question is covered by Article 13(1) of Regulation No 593/2008 on the law applicable to contractual obligations.

b. The Added Value of the Provision

One of the most usual problems experienced in relation to the affairs of vulnerable adults across borders, relates to transactions with banks and other financial institutions. Financial institutions naturally are concerned to protect their own position and not inadvertently to become liable to their customers. The protection afforded by Article 17 of the Hague Convention is limited in the extreme.

Firstly, it is available only if both parties are present in the same State. In cross-border cases this is quite unlikely.

Secondly, it is only available on the sole ground that the attorney was not entitled to act and then not if the third party should have known that the question of capacity was governed by the relevant law.

Improving the protection for third parties is likely to be the single most important step in improving the practical ability of citizens to utilise private mandates between Member States.

c. Suggested Wording

Article G – Effects of the Certificate

1. The Certificate shall produce its effects in all Member States, without any special procedure being required.

2. The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the protection or under any other law applicable to specific elements. The person mentioned in the Certificate as the

representative of the adult shall be presumed to have the powers mentioned in the Certificate, with no conditions and/or restrictions being attached to those powers other than those stated in the Certificate.

3. Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

d. Commentary

The limited protection afforded to third parties by Article 17 of the Convention would be addressed by the creation of an ECPR, as detailed below, which could then give third parties adequate reassurance as to the authority of the attorney under a private mandate to accept payment or property, unless the third party knows that the contents of the ECPR are not accurate or is unaware of such inaccuracy but due to gross negligence.

Article D of the Suggested Adults' Protection Regulation is modelled on Article 69 of Regulation No 650/2012 and concerns the situation in which, for example, the private mandate attorney is accepting payment of a claim on behalf of the granter. It also relates to the attorney accepting the transfer of property on behalf of the granter. In both cases the other party may assume that they have been discharged from payment when the attorney is stated in the ECPR as being authorised to accept the payment. If it turns out later that this was not the case, the third party would not be obliged to make a further payment to the correct person.

2.10. Article H – Direct Communications

a. The Principle

The Suggested Adults' Protection Regulation should provide for the use of direct judicial communications between Member States in matters relating to the protection of adults, subject to appropriate safeguards, including as regards data protection. This requires setting forth communication protocols to be used among Member States' authorities for the purposes, in particular, of communications under Articles 7, 10 and 11 of the Hague Convention and requests under Article 8.

b. The Added Value of the Provision

The Hague Convention provides for cooperation to be mostly channelled through the Central Authorities designated by the Contracting States. The Convention only suggests, in Article 32, that the authorities of one State 'may' get in touch with the authorities of another State for the purpose of discharging some of their duties under the Convention. Cooperation would be more effective, it is contended, if the potential of direct communications were fully exploited.

Central Authorities, for their part, should concentrate on providing assistance to peripheral authorities and addressing special difficulties, where these arise. At any rate, it would be useful to specify the tasks of peripheral and central authorities in

light of the experience developed under other instruments. As with other instruments it is crucial that authorities, both central and peripheral, are provided appropriate resources in terms of staff, technology, etc.

c. Suggested Wording

Article H – Direct Communications

1. For the purposes of the Convention and this Regulation, the authorities of Member States may cooperate and communicate directly with, or request information directly from, each other provided that such communication respects the rights of the parties and the confidentiality of information, in particular as required under Regulation (EU) 2016/679 of 27 April 2016 (General Data Protection Regulation).

2. Communications pursuant to Articles 7, 10 and 11 of the 2000 Hague Convention and requests under Article 8 shall, as a rule, be transmitted by the authorities of a Member State directly to the competent authorities of another Member State.

3. The Central Authorities appointed by each Member State for the purposes of the 2000 Hague Convention shall be responsible, among other things, for:

(a) supplying information to the authorities;

(b) seeking solutions to any difficulties which may arise in respect of a request or a communication; and

(c) forwarding, in exceptional cases, at the request of an authority, a request or a communication to the competent authority.

d. Commentary

The provision is modelled on Article 86 of Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, and Article 2 of Regulation No 1206/2001 on the taking of evidence abroad.[17]

Safeguards are required to ensure that data transmitted between the authorities of one Member State and those of another enjoy appropriate protection. However, there appears to be no need of adopting special provisions for these purposes to complement the existing legislation, including the General Data Protection Regulation.

VII. Further Possible Improvements of the Hague Convention

1. Introduction

Apart from the improvements discussed so far, the European Union can help improve the operation of the Hague Convention by fostering discussion among Contracting States in the framework of the Hague Conference on Private

[17] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in OJ L 174, 27.6.2001, 1–24.

International Law, and by promoting the adoption of measures of an organisational and practical nature aimed at supporting the authorities of Member States in discharging their duties regarding the protection of adults.

2. Improvements Through Discussion Within the Hague Conference

Various issues arise, or are likely to arise, in the application of the Hague Convention which would benefit from clarification in the form of interpretive guidance. The Project Team believes that any improvement with respect to these issues should be pursued by the Contracting States (and the States interested in joining the Convention) generally, not by a group of Contracting States.

This could occur, in particular, at the Special Commission that the Hague Conference on Private International Law plans to convene in 2022 to discuss the operation of the Hague Convention.

The above issues are largely inter-related. Some of them are briefly addressed below.

2.1. The Habitual Residence of an Adult

The notion of habitual residence is used in Hague Conventions and legislative measures of the Union covering a broad range of matters. It is sometimes argued that, in assessing the habitual residence of a person, different standards might need to be used depending on the nature of the situation concerned, that is, depending on whether the matter is one relating, eg to divorce rather than succession. As regards the habitual residence of an adult whose protection is at issue, clarification would be useful to determine, among other things, how to deal with the situation where the adult concerned is not free to leave the place where he or she is cared for, or the situation where the adult in question did not choose voluntarily to settle in the particular place where he or she lives.

Evidence collected in the course of the project indicates, more generally, that practitioners would appreciate being provided with clarification, eg through case studies or through a collection of relevant decisions by authorities of Contracting States, of the findings based on which courts and other authorities should determine an adult's habitual residence for the purposes of the Convention.

It may be thought that recitals in the Suggested Adults' Protection Regulation similar to recitals 23 and 24 in the Succession Regulation 650/2012 may be helpful. However, it is clear that the definition of the term in both the proposed regulation and the Hague Convention must remain identical.

2.2. The Notion of 'Measure of Protection'

It appears that it would be useful to clarify, in light of the evolving practice, the meaning and scope of the expression 'measures of protection' for the purposes of the Hague Convention. Two issues, in particular, would deserve attention: subject to which conditions should the decisions given in a State with respect to a private mandate (eg for the purposes of its confirmation) be regarded as a measure of

protection; what measures relating to the health and personal welfare of the adult concerned should be characterised as measures of protection.

Generally speaking, recent developments in domestic legislations and the practice of State courts indicate that protection may, and is in fact, provided in very different forms, and that State authorities may be involved in the organisation and/or supervision of protection in different ways. A better understanding of what constitutes a measure of protection within the meaning of the Hague Convention would thus prove extremely useful.

2.3. *Ex Lege* Powers of Representation

The legislation of some States make provision for powers of representation to arise by operation of law for the purposes of protecting an adult, eg between spouses in case of a severe illness of one of them. The Hague Convention does not appear to address the issue of which law applies to the creation, manner of exercise and supervision of such powers. It would be useful to determine whether, and in which terms, the Hague Convention ought to be interpreted as outlining, implicitly, at least the guiding principles under which the above issue should be decided, or whether, instead, the question should be considered to fall plainly outside the scope of the Hague Convention.

2.4. The Notion of Powers of Representation Granted by an Adult

Article 15 of the Hague Convention concerns the 'powers of representation' granted by an adult in contemplation of a loss of autonomy. Recent trends in legislation and practice indicate that the adults concerned may want to enter into private mandates which rather include provisions for support and provisions for co-decision-making in the event of such a loss. It would be useful to determine whether, and to what extent, the Hague Convention covers those provisions as well.

2.5. Choice of the Law Applicable to Private Mandates

Several issues are likely to arise in connection with the identification of the law governing a private mandate which the Hague Convention fails to address explicitly. The operation of the Hague Convention would arguably be improved if interpretive guidance were provided in respect of those issues.

Article 15 of the Hague Convention fails to state whether a choice of law may be made only at the time when a private mandate is made or also after that time, and whether, in the latter case, special safeguards are needed (eg as regards the formal validity of the mandate).

Whether a choice of law may be made in respect of only some of the powers granted by the adult is, similarly, unclear.

Article 15 also fails to clarify how the issue of the existence and the issue of material validity of a choice of law ought to be addressed.

It would also be useful to examine the practical implications of a private mandate being submitted to the law of a State whose legislation makes no provision for such mandates. Specifically, the question could be discussed of whether it would not be appropriate to consider that, if the law in question is the law chosen by the adult, a

'fall-back' rule ought to apply which would result in the application of the law that would govern the mandate under Article 15(1) of the Hague Convention if no choice had been made. It is unclear, in fact, whether the existence of such a fall-back rule may be argued for on the basis of a proper interpretation of the Hague Convention based on the principle whereby self-determination by the adult should be enforced to the maximum possible extent.

Article 15(3) of the Hague Convention provides that the manner of exercise of the powers of representation granted by an adult in contemplation of a loss of autonomy is governed by the law of the State in which they are exercised. It might be useful to clarify whether the principle stated in the second sentence of Article 16 (whereby the 'the law referred to in Article 15 should be taken into consideration to the extent possible') also applies to the manner of exercise of the above powers.

2.6. Adaptation

It would be beneficial to clarify whether, and subject to which conditions, a measure of protection given in one State may, and actually should, undergo adaptation in another where it is relied upon in another State, namely when it comes to measures that are unknown to the law of the latter State. The question arises of whether the Hague Convention may be interpreted, in light of Article 14, as embedding a rule on adaptation similar to that in Article 54 of Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters could.

2.7. Priority

The issue of priority as between the powers granted by private mandates and those under non-voluntary measures of protection, would also deserve to be clarified. It is unclear whether any general rule applies to the issue or whether such matters should be left to the applicable law. Some general guidance on the question, in particular, the weight that should be given to the wishes of the adult and the preference that should be given to a private mandate, might be helpful.

3. Improvements Through Non-Legislative Measures of the Union

On the organisational and practical side, the Union should consider adopting non-legislative measures (eg the funding of projects) with a view, among others, to promoting the creation of national registers of private mandates and ensuring their interconnection. The registration in electronic registries of private mandates would in fact assist third parties, such as financial, insurance and medical institutions, with the verification of the authenticity and integrity of private mandates as well as, in certain cases, their coming into effect. The work carried out at European level by the Association of the European Network of Registers of Wills (ARERT/ENRWA) regarding the interconnection of national registers of wills, currently extended to European succession certificates, should be taken as a reference.

In addition, the Union should adopt measures aimed at facilitating and encouraging the use of mediation or conciliation as regards the protection of adults.

VIII. The ELI Private Mandate Checklist

1. Background

The 2010 Draft Common Frame of Reference (DCFR) was suggested for the purposes either as a toolbox or as an optional instrument. Book V of the DCFR proposed model rules for the benevolent intervention in another's affairs and Part D of Book IV dealt with mandate contracts. However, questions as to the capacity of the principal to contract or as to the position of vulnerable adults were not considered. The DCFR did, however, demonstrate the difficulties of proposing suitable model forms in the Union in the field of contract law.

The diverse ways in which Member States deal with the protection of adults vary greatly. They are also subject to ongoing adjustment, amendment and improvement. In the same way that harmonisation of substantive rules would not respect this rich cultural diversity, attempts to draft a Union wide form of private mandate face the same criticisms and concerns.

For these reasons, the Project Team suggests a form of Checklist to encourage the development of private mandates within the ambit of the substantive laws of the Member States.

2. ELI Private Mandate Checklist

When drafting a private mandate to grant powers of representation which the attorney may need to exercise in an international situation, the information listed below should be considered, and – where appropriate – included in the text of the mandate itself:

(a) details concerning the granter: surname (if applicable, surname at birth and any other forms of name used by the granter to hold assets: for example, Germanic versions of Polish names, under which a Polish citizen may hold assets in Germany), given name(s), current sex, date and place of birth, civil status, nationality, identification number (if applicable) and current and (particularly if the granter is now in hospital or a care home) immediately previous residential address in the State of current habitual residence and the most recent previous address in a State of former habitual residence if the law of that State is to be nominated;

(b) details of the spouse or partner of the granter: surname (if applicable, surname at birth), given name(s), current sex, date and place of birth, civil status, nationality, identification number (if applicable) and address, and, if applicable, details of any current matrimonial or registered partnership property regime and any limitations that it may place upon the granter's existing powers of disposal, etc;

(c) an indication of whether the granter had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage, and an indication regarding the location of the original, and whether the appointed attorney may be authorised to have sight of it;

(d) details concerning the attorney(s): surname (if applicable, surname at birth), given name(s), current sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the granter, if any;

(e) details concerning the powers granted to the attorney(s), whether they are to be exercised jointly with the granter, jointly between the attorneys or can be exercised individually by one of the attorneys, in all or in specific circumstances, and whether the powers may be exercised immediately or only upon the granter becoming an adult by virtue of not being in a position to protect their own interests;

(f) whether the powers are limited either by the applicable law or expressly by the granter, either in relation to particular property (and thus excluding power over other property), or in relation to particular acts such as the sale or mortgage of the family home or the granter's business, if any; also, whether, in respect of some or all decisions, the attorney(s) is to provide support or to be involved in co-decision, rather than merely acting as a representative of the granter;

(g) whether the attorney(s), either under the applicable law or specifically under the mandate, are under specific duties, for example to consult with particular family members or a family council;

(h) whether the granter has made a disposition of property upon death, the location of the original and whether the attorney(s) may be authorised to have sight of it;

(i) details of the law applicable by default or specifically chosen by the granter and the connecting factor entitling the granter to choose such law;

(j) details as to the requirements as to form under the law applicable for the valid creation of the private mandate and confirmation as to the compliance with such requirements;

(k) whether the granter also wishes to choose the courts of the State whose law has been chosen as the applicable law as the courts to have jurisdiction over matters relating to the private mandate and the adult;

(l) details concerning the person, professional or official overseeing the creation of the private mandate: surname (if applicable, surname at birth), given name(s), current sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the granter, if any;

(m) the contact details of the court or other competent authority which will deal with the registration and/or confirmation of the private mandate;

(n) the proposed location of the original private mandate and the circumstances in which the attorneys may be authorised to have sight of it and, if necessary, receive the original or certified copies; and

(o) any other information which the granter deems useful.

3. Commentary

The diverse ways in which Member States deal with the creation of private mandates vary greatly. They can be authentic notarial acts or created by the granter without the intervention of any authority; they may be registered with a national notarial

chamber, a court or central or other authority, immediately after creation or only upon the granter becoming unable to protect their own interests; the mandate may be granted to one or several attorneys and they may be specifically limited in many different ways; the applicable law will almost certainly automatically limit the scope of the powers that can be exercised by the attorneys, for example, excluding the ability to consent to marriage or other personal matters, or the ability to make gratuitous transfer. The attorneys may be under obligations whether contractual or as a trustee to take actions in the granter's best interests or under some other doctrine. The property and matters to which the powers granted by the private mandate may apply will also be limited by the applicable law and specifically; matters of health and welfare may be included. Which is to be the relevant applicable law may not be immediately apparent and it is always helpful to make this explicit; if a choice as to the courts of jurisdiction were also to be available, this should also be explicit.

In some States, the attorneys will require the original private mandate to be delivered to them, if the granter becomes no longer able to protect their own interests; making it explicit as to the circumstances in which the original or copies of the private mandate may be handed over together, as appropriate, with copies of any testamentary disposition, or matrimonial or inheritance contract, would ensure clear authority has been given.

IX. A Possible Follow-Up to the Project

The Project Team considers that further work on the protection of adults in international situations is needed, and recommends that, subject to available resources, the reflection on the topic be resumed as soon as practical in the framework of the activities of ELI.

The Team also considers that efforts should be devoted, among other things, to increasing the comparative knowledge of domestic legislations relating to the protection of adults. Recent reforms in various countries have made the legal landscape in this field more complex and diverse.

A better knowledge of the existing national rules, their differences and similarities, is crucial to shaping workable private international law solutions. Ensuring the accessibility of detailed information on those rules would of course be beneficial to those interested in planning for any future loss of autonomy and their advisors. Cooperation should be sought with other institutions active in this field, including Society of Trust and Estate Practitioners (STEP),[18] the Council of Bars and Law Societies of Europe (CCBE),[19] the Council of the Notariats of the European Union (CNUE)[20] and Family Law in Europe – Academic Network (FL-EUR),[21] whose efforts towards making such information accessible, eg in Quick Scans, have already been considerable.

---

18 See: <https://www.step.org/>.

19 See: <https://www.ccbe.eu/>.

20 See: <http://www.notaries-of-europe.eu/>.

21 See: <https://fl-eur.eu/working_fields/>.

The Team believes that a new project on the protection of adults in international situations should seek financial support to collect further evidence of the practical difficulties experienced by the adults concerned and their consultants, and to create a database of the (rapidly growing) case law of domestic courts dealing with cross-border cases in this field.

Annex I – Documents Referred to in the Report

1. International Conventions

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, available at: <http://hcch.net>.

Convention of 13 January 2000 on the International Protection of Adults, available at: <http://hcch.net>

United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities, available at: <http://un.org>.

2. Documents Adopted by Organisations Other than the EU

Council of Europe Committee of Ministers, Recommendation (99)4 on principles concerning the legal protection of incapable adults.

Council of Europe Committee of Ministers, Recommendation (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity.

Council of Europe Committee of Ministers, Recommendation (2014)2 on the promotion of human rights of older persons.

United Nations Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No 1, Equal Recognition before the Law*, 11 April 2014, UN Doc CRPD/C/GC/1.

Conclusions and Recommendations of the EC-HCCH Joint Conference on the Cross-border Protection of Vulnerable Adults, Brussels, 5–7 December 2018.

HCCH Contracting States Responses to the Questionnaire to assess the need to convene a possible meeting of the Special Commission in 2022 to review the practical operation of the Convention of 13 January 2000 on the International Protection of Adults, 17 December 2019.

3. EU Primary Law

Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p 391–407.

Consolidated Version of the Treaty on European Union, OJ C 326, 26.10.2012, p 13–45.

Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p 47–390.

Protocol (No 22) on the position of Denmark, OJ C 326, 26.10.2012, p 299–303.

Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ C 202, 7.6.2016, p 295–297.

4. EU Legislation

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in OJ L 174, 27.6.2001, 1–24.

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, 6–16.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32.

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107–134.

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, OJ L 181, 29.6.2013, 4–12.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, 1–88.

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, 1–29.

Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, 30–56.

Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, OJ L 200, 26.7.2016, 1–136.

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, 1–115.

5. Resolutions and Other Documents Adopted by EU Institutions

Cross-border implications of the legal protection of adults European Parliament resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)), OJ C 45E, 23.2.2010, 71–74.

European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, 1–38.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe (COM(2010) 636 final of 15.11.2010).

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee tackling cross-border inheritance tax obstacles within the EU, 15.12.2011, COM/2011/0864 final.

European Commission, Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults, SP(2017)510.

European Parliament Resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)), OJ C 307, 30.8.2018, 154–160.

Council conclusions on the Future of Civil Justice Cooperation, OJEU C 419, 12.12.2019, 6.

6. Case law

European Court of Human Rights, *Shtukaturov v Russia* (App No 44009/05), judgment of 27 March 2008, available at: <http://hudoc.echr.coe.int>.

European Court of Human Rights, *Glor v Switzerland* (App No 13444/04), judgment of 30 April 2009, available at: <http://hudoc.echr.coe.int>.

European Court of Human Rights, *Stanev v Bulgaria* (App No 36760/06), judgment of 17 January 2012, available at: <http://hudoc.echr.coe.int>.

European Court of Human Rights, *AN v Lithuania* (App No 17280/08), judgment of 31 May 2016, available at:<http://hudoc.echr.coe.int>.

Annex II – Bibliography

Adroher Biosca, S (2019) 'La protección de adultos en el Derecho internacional privado español: novedades y retos', 71 *Revista española de derecho internacional*, 163–185.

Bucher, A (2000) 'La Convention de La Haye sur la protection internationale des adultes', 10 *Revue suisse de droit international et européen*, 37–74.

Campiglio, C, Mosconi, F (2008) 'La Convenzione dell'Aja del 2000 sulla protezione degli adulti: qualche riflessione', in *Studi in onore di Umberto Leanza*, vol 2, Napoli: Editoriale Scientifica Italiana, 868–884.

Clive, E (2000) 'The New Hague Convention on the Protection of Adults', 2 *Yearbook of Private International Law*, 1–23.

Doron, I (2002) 'Elder Guardianship Kaleidoscope – A Comparative Perspective', 16 *International Journal of Law, Policy and the Family*, 368–398.

Durán Ayago, A (2004) 'Nuevos escenarios en la protección internacional de adultos', in Alonso Pérez, M, Martínez Gallego, EM, Reguero Celada, H (eds), *Protección jurídica de los mayores*, Madrid: La Ley, 443–470.

Dutoit, B (1967) 'La protection des incapables majeurs en droit international privé', 20 *Revue critique de droit international privé*, 465–503.

Fagan, A R (2002) 'An Analysis of the Convention on the International Protection of Adults', 10 *Elder Law Journal*, 329–359.

Fossier, T, Vallas-lenerz, E, Bauer, M (2014), *Les tutelles. Accompagnement et protection juridique des majeurs*, Nogent-le-Rotrou: ESF éditeur.

Franzina, P (2012) *La protezione degli adulti nel diritto internazionale privato*, Padova: Cedam.

Franzina, P (2015) 'La Convenzione dell'Aja sulla protezione internazionale degli adulti nella prospettiva della ratifica italiana', 98 *Rivista di diritto internazionale*, 748–814.

Franzina, P (2016) 'La protección internacional de adultos vulnerables: un llamamiento a la acción a nivel de la Unión europea', 16 *Anuario Español de Derecho Internacional Privado*, 127–145.

Franzina, P (2017) 'Note in merito ai profili internazionalprivatistici dei mandati in previsione di incapacità' in Pretelli, I, Romano, G P, Rossi, T (eds), *Tui Memores – La dimension culturelle du droit international privé – Actes de la Journée en l'honneur de Tito Ballarino du 13 juin 2014 à Lausanne et Essais recueillis par ses amis et élèves*, Geneva: Schulthess, 173–186.

Franzina, P (2019) 'The Relevance of Private International Law to the Effective Realisation of the Fundamental Rights of Vulnerable Adults in Cross-Border Situations', in Díaz Pardo, G, Núñez Núñez, M, Pereña Vicente, M (eds), *La voluntad de la persona en la protección jurídica de adultos – Oportunidades, riesgos y salvaguardias*, Madrid: Dykinson, 53–61.

Frimston, R (2012) *Cross-border Implications of the Legal Protection of Adults*, Brussels: European Parliament.

Frimston, R, Ruck Keene, A, van Overdijk, C, Ward, A (eds) (2015) *The International Protection of Adults*, Oxford: Oxford University Press.

Füllemann, D (2008) *Das internationale Privat- und Zivilprozessrecht des Erwachsenenschutzes*, Zürich: Dike Verlag.

Gallus, N (ed) (2014) *La protection des incapables majeurs et le droit du mandat*, Limal: Anthemis.

González Beilfuss, C (2000) 'La protección de adultos en derecho internacional privado', in Calvo Caravaca, AL, Iriarte Ángel, JL (eds), *Estatudo personal y multiculturalidad de la familia*, Madrid: Colex, 85–102.

Groff, M (2018) 'The Hague Conventions: Giving Effect to Human Rights through Instruments of Private International Law', in Handmaker, J, Arts, K (eds), Mobilising International Law for 'Global Justice', Cambridge: Cambridge University Press, 89–118.

Guillaume, F (2013) 'Convention sur la protection internationale des adultes', in Leuba, A, Stettler, M, Büchler, A, Häfeli, C (eds), *Commentaire du droit de la famille – Protection de l'adulte*, Berne: Stämpfli.

Guttenberger, T (2004) *Das Haager Übereinkommen über den internationalen Schutz von Erwachsenen*, Bielefeld: Gieseking.

Hague Conference on Private International Law - Permanent Bureau (2013), *Direct Judicial Communications*, The Hague: Hague Conference on Private International Law.

Harpur, P (2012) 'Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities', 27 *Disability & Society*, 1–14.

Herring, J (2016), *Vulnerable Adults and the Law*, Oxford: Oxford University Press.

Helms, T (2008) 'Reform des internationalen Betreuungsrechts durch das Haager Erwachsenenschutzabkommen', 21 *Zeitschrift für das gesamte Familienrecht*, 1995–2002.

Hill, D (2009) 'The Hague Convention on the International Protection of Adults', 58 *International and Comparative Law Quarterly*, 469–476.

International Guardianship Network (2009) *Table of Nations, Types of Adult Guardianship, Power of Attorney, 'Who can be a guardian?', Guardianship procedure*, available at: <http://www.international-guardianship.com>.

Iriarte Angel, J L (2012) 'La protección de adultos en derecho internacional privado', in Borrás, A, Garriga, G (eds), *Adaptación de la legislación interna a la normativa de la Unión Europea en materia de cooperación civil – Homenaje al Prof Dr Ramón Viñas Farré*, Madrid: Marcial Pons, 203–218.

Jayme, E (2010) 'Die Patientenverfügung: Erwachsenenschutz und internationales Privatrecht', in *Festschrift für Ulrich Spellenberg*, München: Sellier, 203–210.

Karjalainen, K (2019) 'Fragility of Cross-Border Adult Protection – The Difficult Interplay of Private International Law with Substantive Law', 20 *Yearbook of Private International Law*, 439–465.

Kayess, R, French, P (2008) 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8 *Human Rights Law Review*, 1–34.

Lagarde, P (1999) *Convention of 13 January 2000 on the International Protection of Adults – Explanatory Report*, available at: <http://hcch.net>.

Lagarde, P (2000) 'La convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes', 53 *Revue critique de droit international privé*, 159–179.

Lequette, Y (1976) *Protection familiale et protection étatique des incapables*, Paris: Dalloz.

Lipp, V (2013) 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK', in Aichele, V (ed), *Das Menschenrecht auf gleiche Anerkennung vor dem Recht*, Baden-Baden: Nomos, 329–354.

Löhning, M et al (eds) (2011) *Vorsorgevollmacht und Erwachsenenschutz in Europa*, Bielefeld: Gieseking.

Long, J (2013) 'Rethinking Vulnerable Adults' Protection in the light of the 2000 Hague Convention', 27 *International Journal of Law, Policy and the Family*, 51–73.

Lortie, P, Groff M (2012), *The Hague Convention of the 13 January 2000 on the International Protection of Adults*, Brussels: European Parliament.

Ministère de la Justice - France, (2007) *Mieux protéger les personnes vulnérables à l'échelle internationale* [video], available at: <http://www.justice.gouv.fr/justice-civile-11861/tutelles-12182>.

Muñoz Fernández, A (2009) *La protección del adulto en el derecho internacional privado*, Cizur Menor: Thomson-Aranzadi.

Ramser, C (2010) *Grenzüberschreitende Vorsorgevollmachten in Europa im Licht des Haager Übereinkommens über den internationalen Schutz von Erwachsenen vom 13. Januar 2000*, Frankfurt am Main: Peter Lang.

Revillard, M (2005) 'La Convention de la Haye sur la protection international des adultes et la pratique du mandate d'inaptitude', in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris: Dalloz, 724–735.

Rocha Ribeiro, G (2011) 'A Convenção de Haia de 2000 relativa à protecção dos incapazes adultos', 125 *Revista do Ministério Público*, 11–85.

Röthel, A (2012) 'Guardianship of Adults', in *Max Planck Encyclopaedia of European Private Law*, Oxford: Oxford University Press.

Röthel, A (2010) 'Das ESÜ-Ausführungsgesetz: effiziente Kooperation im internationalen Erwachsenenschutz', 30 *Praxis des Internationalen Privat und Verfahrensrecht*, 409–413.

Röthel, A, Woitge, E (2010), 'Das Kollisionsrecht der Vorsorgevollmacht', in 30 *Praxis des Internationalen Privat- und Verfahrensrechts*, 494–500.

Salm, C (2016) *Protection of Vulnerable Adults – European Added Value Assessment*, Brussels (European Parliamentary Research Service).

Seatzu, F (2000) 'L'interesse del maggiorenne incapace nella nuova Convenzione dell'Aja (13 gennaio 2000) sulla protezione degli adulti', 26 *Il diritto di famiglia e delle persone*, 1223–1236.

Swiss Institute of Comparative Law (2008), *Comparative study on the legal systems of the protection of adults lacking legal capacity National rules of private law, of private international law and a possible legislative initiative of the European Union – United Kingdom, France, Germany, Sweden, Czech Republic, Romania*, Brussels: European Parliament.

Tarrade, J, et al (2014) *Mobilité et protection des personnes vulnérables en Europe*, Paris: Société de Législation Comparée.

von Hein, J (2017) 'Adults, protection of' in Basedow, J, Ferrari, F, de Miguel Asensio, P, Rühl, G (eds), *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar, 21–28.

von Hein, J (2019) Art 24 EGBGB, in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin: Sellier–de Gruyter, 361–622.

Ubertazzi, B (2006), *La capacità delle persone fisiche nel diritto internazionale privato*, Padova: Cedam.

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

ELI
EUROPEAN
LAW
INSTITUTE

ISBN: 978-3-9504549-2-5