

POSITION PAPER

The Protection of Adults in International Situations^{*}

3 December 2018

The undersigned, members of the team charged by the European Law Institute to carry out the project on the 'Protection of Adults in International Situations' (hereinafter, the Team),

Having regard to the Hague Convention of 13 January 2000 on the International Protection of Adults, which is currently in force for ten Member States (Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia, Portugal and the United Kingdom, albeit only with respect to Scotland) and has been signed by an additional seven (Belgium, Greece, Italy, Ireland, Luxembourg, the Netherlands and Poland),

Having regard to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)),

Having regard to the document adopted by the European Commission titled 'Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults',

Having regard to the UN Convention on the Rights of Persons with Disabilities (CRPD), which is in force for the European Union as well as for all of its Member States,

Having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in particular its Articles 5 (Right to liberty and security), and 8 (Right to respect for private and family life), as interpreted by the European Court of Human Rights,

Having regard to the relevant instruments of the Committee of Ministers of the Council of Europe, such as CM/Rec(2009)11 on Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity, in light of the Report prepared by Mr Adrian D. Ward on behalf of the European Committee on Legal Co-operation (CDCJ), titled 'Enabling Citizens to Plan for Incapacity - A review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity',

Having regard to the Charter of Fundamental Rights of the European Union, in particular its Articles 1 (Human dignity), 6 (Right to liberty and security), 7 (Respect for private and family life), 21 (Non-discrimination), 25 (The rights of the elderly) and 26 (Integration of persons with disabilities),

Taking into account the mission of the European Law Institute to improve the quality of European law, to make recommendations, to provide practical guidance in the field of European legal development, and to support the quest for the enhancement of European legal integration,

Express the following views:

1. Evidence shows that, in cross-border situations, the protection of persons aged 18 or more who are not in a position to protect their interests due to an impairment or insufficiency of their

^{*} This Position Paper was authored by the Protection of Adults in International Situations project team of the European Law Institute (ELI). The statements and recommendations contained in this paper have not been approved or endorsed by any statutory body of the ELI and thus should not be taken to represent an official Statement, Instrument or position of the ELI.

personal faculties is best ensured where the States with which the situation is connected are bound by uniform rules that (a) govern the jurisdiction of State authorities to issue, modify or terminate measures of protection, (b) provide for the recognition and enforcement of such measures abroad, (c) identify the law applicable to the protection of adults, including by means of private mandates, (d) allow for efficient communication and cooperation between the authorities of different States involved in the protection of the adult concerned and (e) make it easy for the interested individuals, in one State, to obtain and produce evidence of the powers of representation granted in another State, or under the law of another State, for purposes relating to the protection of an adult.

2. The above uniform rules must be designed and applied in such a way as to preserve and promote the fundamental rights of the adult concerned, as enshrined, in particular, in the CRPD and the ECHR.
3. The Hague Convention of 2000 on the International Protection of Adults lays down a comprehensive set of rules serving the purposes mentioned above. The picture, however, remains globally unsatisfactory. The main reason for this is that the number of States for which the Convention is in force remains limited.
4. The European Parliament, in its Resolution of 1 June 2017, ‘encourage[d] those Member States which have not yet signed or ratified it to do so as quickly as possible’ and ‘call[ed] on the Commission to exert political pressure on the Council and the Member States with a view to increasing the number of ratifications’. The Team welcomes the recent wave of ratifications by Member States – namely Latvia, Portugal and Cyprus – that occurred after the Parliament’s resolution.
5. The Team is of the opinion that the European Union is entitled to take action with a view to enhancing the protection of adults in international situations, and believes that the Commission and the Council have good reasons to devote further efforts towards this goal. Such reasons include the increase in the number of vulnerable persons in the Union (as witnessed, among others, in the Report of Joëlle Bergeron MEP accompanying the European Parliament’s Resolution mentioned above), the free movement of persons, including elderly citizens, within the Union, the free movement of assets in the EU, which makes it easy for well-meaning but unfortunately also for persons in bad faith to move the assets of vulnerable persons.
6. The Team’s view is that the legal basis for Union’s action in this field is to be found in Article 81 of the Treaty on the Functioning of the European Union (TFEU). The Team, however, disagrees with the opinion voiced by the Commission in its ‘Follow up’ to the Parliament’s Resolution, according to which the protection of adults falls specifically within the scope of Article 81(3), on family matters.

There are three distinct reasons for this view. First, the Union’s legislator has up until now interpreted the reference to ‘family law’ in Article 81(3) in a restrictive manner: Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations and 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 were not considered to fall under family law.

Second, the protection of adults does not relate, by its nature, to family law. In the opinion of the Team, the word ‘family’, as used 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 person, and his or her personal and financial interests. 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 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters 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).

Third, the fact that many legal systems provide for *ex lege* representation of a vulnerable adult (such as Austrian and Czech law) is not a reason to consider the protection a family law matter throughout the EU. The rules on *ex lege* representation differ from one State to another and moreover, the Court of Justice of the EU has insisted on the autonomous and independent interpretation of concepts in Union law (see, for instance, regarding various concepts in the field of private international law: judgment of 27 September 1988, Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co., Case 189/87, ECLI:EU:C:1988:459; judgment of 2 April 2009, A., Case C-523/07, ECLI:EU:C:2009:225; judgment of 4 October 2018, Feniks Sp. z o.o. v Azteca Products & Services SL, Case C-337/17, ECLI:EU:C:2018:805). Therefore, the fact that spouses and/or other family members might have *ex lege* power of representation in some Member States may not influence the categorisation of the protection of vulnerable adults as a matter of family law for the purposes of Union's law.

It is worth noting, in any case, that another possible legal basis of action in this domain is Article 21(2) of the TFEU, which provides the Union with the power to take actions which are necessary to attain the objective of free movement of citizens. This legal basis has been used in 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.

7. The Team believes that, in order to enhance the protection of adults in international situations, the European Union should consider making use of its competences both externally and internally.
8. On the external side, the Union should consider taking such steps as are necessary to have the Hague Convention of 2000 ratified, or acceded to, by all Member States within a reasonably short period of time. The approach to be adopted should be 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 Co-operation 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.

However, the Team considers the issue to fall within the scope of Article 216 of the TFEU for two reasons.

First, Article 216 of the TFEU allows external action when the international agreement 'is likely to affect common rules or alter their scope'. 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. These include:

- Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I): this Regulation determines the law applicable to contractual relations; it does not apply to ‘questions involving the status or legal capacity of natural persons’ (Art. 1(2)a)), but granting a power of attorney to someone before incapacity (and possibly lasting after the granter has become incapacitated) is not expressly excluded from the scope of the Regulation.
- Regulation (EU) 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: similarly, this Regulation excludes ‘the status or legal capacity of natural persons,’ but not the fact of granting a power of attorney.
- Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations: vulnerable adults could be entitled to maintenance under national law due to a particular family relationship.
- 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: protective measures might be granted under this Regulation for persons who are frail or vulnerable and suffer from abuse (financial, physical, emotional or other) by another.

Thus, even though these Regulations were not particularly designed for vulnerable adults, they might be applicable in situations which involve such adults. Therefore, the Hague Convention of 2000 may interact with EU legislation, or ‘affect’ its operation. The Court of Justice has had the opportunity to explain this provision and has interpreted it broadly, in particular in Opinion 1/13.

Second, the Team is persuaded that Article 216(1)’s permission of external action ‘where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’ also applies here. This provision, upon a proper interpretation, consistent with the case law of the Court of Justice, allows the EU to conclude an international convention in this field, as it is necessary to achieve Union objectives. These objectives include ensuring free movement of citizens (Art. 3(2) TEU), combating social exclusion and discrimination (Art. 3(3) TEU), and promoting solidarity between generations (Art. 3(3) TEU).

Therefore, the Union has the power to act internationally in the area of the international protection of adults. It could in fact do so by requiring such Member States that have not yet done so to ratify, or accede to, the Hague Convention of 2000 ‘in the interest of the Union’, as was done for the Hague Convention of 1996. The Union cannot sign and ratify the Convention in its own name, as the Convention is only open to ratification and accession by States.

9. Internally, relying on the legal bases described above, the Union should consider enacting legislation aimed at enhancing the operation of the Hague Convention of 2000 in the Member States, in situations connected with two or more of such States. Various improvements, in the Team’s view, could be pursued. These include:
 - (a) enabling the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when he or she is capable, the Member State whose courts should have jurisdiction over his or her protection: this should include the power to supervise guardians, persons appointed by court or by the adult (by way of a power of attorney), or having power *ex lege* to take care of the adult’s affairs;
 - (b) enlarging the scope of the adult’s choice of law, so that he or she can also choose at least the law of the present or a future habitual residence, in addition to the choices currently permitted under Article 15 of the Hague Convention of 2000;

- (c) providing for the adaptation of measures of protection to be exercised in a State other than the State where they were created, following the example of Article 54 of Regulation No 1215/2012 and extending Article 14 of the Hague Convention of 2000 to the implementation in other States than Member States, possibly with a clarification as to the prerequisites for Article 14 to be applied;
- (d) outlining the relationship between the rules in the Hague Convention of 2000 and the rules of private international law that apply in neighbouring areas of law (such as the law of contract, maintenance, capacity, succession, protection against violence, property law, agency); coordination may be needed, in particular, as regards acts that do not only relate to the protection of adults, such as powers of attorney that are meant to already bring about their effects at the time when the grantor is capable and to remain effective when the latter is no longer in a position to protect his or her interests due to an impairment or insufficiency of personal faculties;
- (e) specifying the requirements of formal and material validity of the choice of the law applicable to a private mandate, including the creation and exercise (and supervision by the courts) of such mandates;
- (f) addressing the practical implications of a private mandate being submitted (by virtue of a choice of law, as the case may be) to the law of a State whose legislation fails to include provisions on the creation or supervision on such mandates, e.g. by creating a “fall-back” rule in cases of choice of the “wrong” law, which does not cover the matters addressed (or at least applying Article 15(1) of the Hague Convention of 2000);
- (g) addressing the practical implications if the law applicable to the supervision contains much less stringent rules than the law applicable to the creation of the private mandate;
- (h) enhancing the availability of information regarding the Hague Convention of 2000 (e.g., through on-line ‘Country Profiles’ and/or cooperation with the e-Justice Portal run by the European Commission and the CNUE information database);
- (i) extending the protection of third parties beyond the scope of Article 17 of the Hague Convention of 2000 to the content of the applicable law, and possibly also to lack of capacity (or clarifying that the latter question is covered by Article 13(1) or the Rome I Regulation);
- (j) improving cooperation among Central Authorities instituted for the purposes of the Hague Convention of 2000, for instance by clarifying cooperation procedures for placements under Article 33 of the Convention and by setting protocols or otherwise providing guidance with respect to cooperation under Article 34 and Article 30(b), as may be required, inter alia, in case of ‘elder abduction’;
- (k) promoting the use of direct judicial communications in matters relating to the protection of adults;
- (l) setting forth communication protocols to be used among Member States’ authorities for the purposes, in particular, of transfers of jurisdiction under Article 8 of the Convention and communication with the authorities of the State of primary jurisdiction under Articles 5 to 9 when the authorities of another State take urgent or provisional measures pursuant to Articles 10 and 11;
- (m) making it easier 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, by creating a European Certificate of Powers of Representation of an Adult (taking into account the experience developed with the European Certificate of Succession);
- (n) clarifying and making more complete the obligations and procedures under Articles 22, 23 and 25 of the Convention in order to ensure ‘simple and rapid procedures’ for the

- recognition and enforcement of foreign measures; further reflection is needed to determine whether, and subject to which safeguards, the suppression of exequatur would be useful and appropriate for measures of protection issued in a Member State;
- (o) if exequatur is retained, providing a list of the courts where enforcement should be sought;
 - (p) facilitating and encouraging the use of mediation or conciliation.
10. Meanwhile, it would be useful to provide an analysis that courts and practitioners may use when addressing some interpretive issues surrounding the Hague Convention of 2000 (and possibly the suggested Union's measure, as this would need to be consistent with the Convention), such as:
- (a) the exact scope of the notion of measure of protection when it comes to matters of a personal, as opposed to financial, nature (e.g., whether and to what extent these cover decisions taken by medical practitioners, and whether a decision by a relevant administrative/judicial body that life-sustaining treatment should either not be provided to or continued can constitute a measure of protection);
 - (b) whether 'measures of protection' include private mandates and whether the character of protective measure is determined by the manner the measure is created or the manner in which it is supervised during its existence;
 - (c) the meaning of the 'State in which [powers of representation] are exercised' in cross-border situations: whether this refers to the law of the place of the property (even if movable) or the habitual residence of the grantor or grantee of the powers of representation;
 - (d) the way in which the habitual residence of an adult should be assessed for the purposes of the Convention and the suggested Union's measure (a similar need for clarification arose in respect of cross-border successions, and was partly addressed in the preamble of Regulation (EU) No 650/2012 on successions);
 - (e) whether jurisdiction to adopt measures of protection implies the power to confirm a private mandate.
11. Guidance on the above issues might in principle be provided in a variety of forms, including by means of conclusions and recommendations elaborated at a hypothetical special commission that the Hague Conference might convene to discuss the practical difficulties experienced in the application of the Convention, or academically.
12. The team is committed to advancing its reflection on the topic together with its observers, and in cooperation with the Advisory Committee set up for this purpose by the Institute's Council and with the Members' Consultative Committee.

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