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# Protection of Vulnerable Adults

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European Added Value  
Assessment

Accompanying the  
European Parliament's  
Legislative Initiative Report  
(Rapporteur: Joëlle Bergeron)

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STUDY

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EPRS | European Parliamentary Research Service

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**European Added Value Unit**

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# **The European added value of EU legislative action on the protection of vulnerable adults**

## **Study**

In accordance with Article 225 of the Treaty on the Functioning of the European Union, the European Parliament has a right to request the European Commission to take legislative action. On 23 April 2015, the Conference of Presidents of the European Parliament authorised its Committee on Legal Affairs (JURI) to draft a legislative initiative report on the protection of vulnerable adults.

All European Parliament legislative initiative reports must automatically be accompanied by a detailed **European Added Value Assessment** (EAVA). Accordingly, the JURI Committee requested the Directorate-General for Parliamentary Research Services (EPRS) to prepare an EAVA to support the legislative initiative report on the **Protection of Vulnerable Adults**, 2015/2085 (INL), to be prepared by Joëlle Bergeron (EFDD, France).

The purpose of a European Added Value Assessment is to support a legislative initiative of the European Parliament by providing an objective evaluation and assessment of the potential added value of taking legislative action at EU level. In accordance with Article 10 of the 2016 Interinstitutional Agreement on Better Law-Making, the European Commission should respond to a request for proposals for Union acts made by the European Parliament by adopting a specific communication. If the Commission decides not to submit a proposal, it should inform the European Parliament of the detailed reasons, including a response to the analysis of the potential European added value of the requested measure.

This analysis has been drawn up by the European Added Value Unit within DG EPRS. It builds on expert research carried out for the purpose at its request by Dr Ian Curry-Sumner of the Voorts Juridische Diensten (Dordrecht, the Netherlands), Dr Joëlle Long of the Department of Law of the University of Turin (Italy) and Professor Pietro Franzina of the Department of Law at the University of Ferrara (Italy). The expert research papers are presented in full in Annexes I and II.

The assessment presents a qualitative analysis of shortcomings in the existing legal framework, possible legislative measures to be taken, as well as estimates of the potential additional value of taking legislative action at EU level with regard to the protection of vulnerable adults.

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by Professor Pietro Franzina, Department of Law at the University of Ferrara, Italy and Dr Joëlle Long, Department of Law at the University of Turin, Italy

## Executive summary

Vulnerable adults, who are persons lacking the personal capacity to protect their interests, are in particular need of a reliable legal framework. There is, however, no uniform legal framework allowing for a proper protection of vulnerable adults in cross-border situations across the European Union (EU). In fact, all EU Member States have their own legal framework, with differing tools for the protection of vulnerable adults. This undoubtedly creates legal uncertainties when it comes to cross-border situations. Given a rapidly increasing life expectancy, and consequently a growing number of vulnerable adults as a result of often age-related illnesses such as Alzheimer's and other forms of dementia, it is a matter of urgency that this legal uncertainty be tackled at the EU level. Filling the legal gap would enable affected adults to benefit from the EU's principle of free movement and residence instead of facing potential difficulties in protecting their interests abroad.

Internationally, the Hague Adult Protection Convention (HAPC) of 13 January 2000 (negotiated under the auspices of the World Organisation for Cross-border Co-operation in Civil and Commercial Matters), is designed to properly protect vulnerable adults when in cross-border situations. By providing rules on jurisdiction, applicable law and international recognition and enforcement of protective measures, the HAPC addresses questions such as which law applies and who may represent a vulnerable adult, and with what power. However, only seven EU Member States are currently Contracting States. Moreover, as this European Added Value Assessment (EAVA) identifies, the HAPC presents several weaknesses such as, for example, poor cooperation and communication among the authorities of the Contracting States, difficulties in carrying out foreign protective measures, and weaknesses with regard to the ways in which evidence of the powers granted to a representative of a vulnerable adult are to be provided.

Against this background, this EAVA outlines potential legal measures to be taken at the EU level in order to contribute to resolving the legal uncertainties linked with the protection of vulnerable adults in cross-border situations. These proposed legal measures are the following:

- (i) enhancing cooperation and communication among authorities of EU Member States ;
- (ii) abolishing the requirement of the *exequatur* for measures of protection taken in EU Member States;
- (iii) creating a European certificate of powers granted for the protection of an adult;

- (iv) enabling the adult to choose the EU Member States whose courts should be deemed to possess jurisdiction to take measures concerning his or her protection;
- (v) providing for the continuing jurisdiction of the courts of the EU Member State of the former habitual residence.

All five legal measures could be adopted on the basis of Article 81 of the Treaty on the Functioning of the European Union (TFEU) (81(1), 81(2)(a), (c), (e), (f)).

The EAVA argues that, together with the ratification of the HAPC by all EU Member States, the five EU legal measures mentioned above would create a more reliable legal framework for the protection of vulnerable adults in cross-border situations than is currently the case. A more reliable legal framework would constitute an added value in itself, but would also contribute to reducing legal and emotional costs for vulnerable adults when facing issues in a cross-border situation.

## Introduction

Established by the Treaty of Maastricht in 1992, the principle of freedom of movement and residence for persons legally residing in the European Union (EU) is one of the cornerstones of Union citizenship. Thus, in today's mobile EU society, questions related to the protection of a vulnerable adult in cross-border situations, including important issues such as medical care in case of serious illness, or the correct handling of property, are expected to become numerous in the not too distant future.

Due to an ageing European population, with about 37% of people over 60 years old and 10% over 80 years old by 2050, numbers on age-related illnesses typical for vulnerable adults, such as Alzheimer's and other forms of [dementia](#), will rise. As a result, situations requiring guardianship, as in the following scenario, will tend to increase. For example, a French man living and working for the last eight years in Spain is the victim of an accident that leaves him in a coma. The Spanish doctors inform the close relatives in France that the man would significantly benefit from a certain medical treatment, which is, however, rather risky. Some of the relatives ask a French court to appoint a guardian for the man, charged with deciding on behalf of the latter whether or not to consent to the treatment. However, the question then arises whether the guardianship authorised in France will be recognised in Spain.

In such cross-border situations, the guardianship afforded by national authorities may not necessarily be recognised in other EU Member States, there being several distinct protection measures and schemes in place across the EU. For example, in Germany the main tool for the protection of vulnerable adults is the *Vorsorgevollmacht*. In the Netherlands the *levenstestament* (living will) and in France the *Mandat de protection future* constitute the main tools. Although all three include continuing powers of attorney, in a cross-border situation the question of the recognition of the Dutch *levenstestament* in France or Germany may arise, for example. Consequently, the lack of uniformity across the EU Member States may result in cases of inadequate protection of vulnerable adults in cross-border situations.

In general, legal systems consider that an adult is in need of protection if he or she is not in a position to protect his or her interests. The adult is thus dependent on others for decisions relating to their personal or economic interests, such as the decision to undergo a certain medical treatment as in the scenario described above. One means often used to protect a vulnerable adult is the appointment of an attorney, charged with making decisions on his or her behalf during the time in



which the individual concerned will not be in a position to effectively protect his or her interests.

Situations involving a private dimension and a cross-border element are dealt with under private international law. As the protection of vulnerable persons is regarded today as a human rights concern, it is important to identify the ways in which human rights considerations are relevant to private international law. This is the case in two respects:

- (i) The availability of a properly designed set of rules of private international law in this area is essential for ensuring the effective protection of vulnerable adults. By determining the way in which a national legal order should deal with matters that other legal orders might also want to regulate, these rules actually reduce the risk of fragmentation and lack of spatial continuity in protection.
- (ii) The design of the rules of private international law relating to the protection of vulnerable adults must be such as to ensure the respect for the human rights of adults lacking capacity, including the right to self-determination, and to facilitate their realisation in cross-border situations.

In the realm of private international law, there are various international and European instruments currently applicable with respect to the cross-border aspects of the protection of vulnerable adults. At the international level, there are three conventions for dealing with cross-border issues in the protection of vulnerable adults:

- [Convention](#) du 17 juillet 1905 concernant l'interdiction et les mesures de protection analogues
- [Convention](#) of 14 March 1978 on the Law Applicable to Agency
- Hague Convention of 13 January 2000 on the International Protection of Adults ([HAPC](#))

On the European level, several instruments exist that deserve particular attention in the context of the protection of vulnerable adults:

- 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) (hereinafter [Rome 1 Regulation](#))
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement in civil and commercial matters (recast) (hereinafter [Brussels I Recast](#))

- 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 (hereinafter [Protection Regulation](#))
- Regulation (EU) No 650/2013 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance of authentic instruments in matters of succession and on the creation of an European Certificate of Succession (hereinafter [Succession Regulation](#)).

However, these instruments do not *specifically* relate to the problems and issues that arise in connection with the protection of vulnerable adults.

The most important instrument for the protection of vulnerable adults in cross-border situation is the Hague Adult Protection Convention (HAPC) of 13 January 2000. Having entered into force in January 2009, the HAPC addresses questions such as which law applies and who may represent a vulnerable adult, and with what power. The HAPC provides rules on jurisdiction, applicable law and international recognition and enforcement of protective measures. Furthermore, the convention establishes mechanisms for cooperation between the authorities of Contracting States. However, there are currently only seven EU Member States that are Contracting States to the Convention.<sup>1</sup> Seven other EU Member States have signed the HAPC, but have not yet ratified it.<sup>2</sup>

Against this background, this European Added Value Assessment follows a four-fold strategy. Firstly, it will describe the general purpose and character of the HAPC. Secondly, it will outline weaknesses of the HAPC. Thirdly, it will describe possible EU legislative action complementing the HAPC and, fourthly, it will assess the added value of an EU legal act.

## **1. Objectives, measures, rules and main features of the Hague Adult Protection Convention (HAPC)**

In order to react to an increase in international mobility and to an ageing population with a growing number of age-related illnesses, such as Alzheimer's and other forms of dementia, the HAPC was drawn up under the auspices of the [Hague Conference on International Private Law](#). By providing rules on jurisdiction, applicable law and international recognition and enforcement of protective measures, the HAPC aims to address questions such as the applicable law, the representation of an adult and the powers to be given to such a person

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<sup>1</sup> Austria, Czech Republic, Estonia, Finland, France, Germany, and the United Kingdom with respect to Scotland only.

<sup>2</sup> Cyprus, Greece, Ireland, Italy, Luxembourg, Poland and the Netherlands.

when it comes to a cross-border situation concerning a vulnerable adult. As stated in the HAPC 2000 document, it applies to the 'protection in international situations of adults, who, by reason of an impairment or insufficiency of their personal faculties, are not to protect their interests'. Concretely, the HAPC's objectives are the following:

- (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the persons or property of the adult;
- (b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- (c) to determine the law applicable to the representation of the adult;
- (d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- (e) to establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purpose of the Convention.

The measures related to these objectives deal in particular with:

- (a) the determination of incapacity and the institution of a protective regime;
- (b) the placing of the adult under the protection of a judicial or administrative authority;
- (c) the guardianship, curatorship and analogous institutions;
- (d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult;
- (e) the placement of the adult in an establishment or other place where protection can be provided;
- (f) the administration, conservation or disposal of the adult's property;
- (g) the authorisation of a specific intervention for the protection of the person or property of the adult.

Crucially, the measures of protection under the HAPC directed towards the persons or property taken in one Contracting State will be legally recognised in all other Contracting States.

An [outline](#) of the HAPC notes that the Convention provides three options of uniform rules determining which country's authorities are competent to take the

necessary measures for the protection of vulnerable adults. These three options for jurisdiction are the following:

- (i) the HAPC attributes jurisdiction primarily to the authorities of the adult's habitual residence, but also recognises the concurrent, albeit subsidiary, jurisdiction of the authorities of the State of which the adult is a national;
- (ii) the HAPC also accepts the jurisdiction of the authorities of the State where the adult's property is situated to take measures of protection concerning that property, and the jurisdiction of the State in whose territory the adult, or property belonging to the adult, are present to take emergency or temporary measures with limited territorial effect for the protection of the person;
- (iii) the HAPC provides further flexibility by allowing the authorities with primary jurisdiction to request the authorities of other Contracting States to take measures of protection, where this is in the interests of the adult.

Moreover, the outline of the HAPC sets out that, in principle, in exercising jurisdiction under the Convention, authorities in Contracting States shall apply their own law. There is, however, an exception to the general rule on applicable law relating to the powers of representation. An adult making advance arrangements for his or her care and/or representation in a new country of residence has three options concerning the designated law to be applied to the existence, extent, modification and extinction of the powers exercised by a person representing the adult. These three law options are:

- (a) a State of which the adult is a national;
- (b) the State of former habitual residence;
- (c) a State where the adult's property is located.

According to the outline of the HAPC, the Convention thus enables powers of attorney – or similar institutions – to be recognised in Contracting States without analogous institutions, and ensures that previous arrangements concerning the protection of vulnerable adults will be respected in other Contracting States.

Finally, as stated by the HAPC outline, the Convention entails provisions concerning the cooperation between States designated to enhance the protection of vulnerable adults. At the core of this system of cooperation are information exchange, the facilitation of agreed solutions in contested cases, the location of

missing adults as well as the promotion of effective communication and mutual assistance by designated central authorities of the Contracting States.

In a [Resolution](#) of 18 December 2008 on cross-border implications of the legal protection of adults, the European Parliament encouraged those EU Member States which had not until then signed and ratified the HAPC to do so. Nevertheless, as already mentioned above, amongst the EU Member States there are currently only seven Contracting States.

## **2. Weaknesses of the Hague Adult Protection Convention (HAPC)**

Drawing on the two external research papers by Dr Ian Curry-Sumner (Annex I) and Dr Joëlle Long and Professor Franzina (Annex II), this study identifies seven weaknesses of the HAPC:

- (i) the limited geographical scope, especially with a view to recognition and enforcement;
- (ii) the absence of a supranational court for solving disputes arising from different interpretations of the HAPC;
- (iii) the poor cooperation and communication among the authorities of Contracting States;
- (iv) the difficulty in enforcing foreign protective measures;
- (v) the weak means by which evidence of the powers granted to a representative of a vulnerable adult are to be provided abroad;
- (vi) the absence of any possibility for an adult to choose in advance the State whose authorities should have jurisdiction over his or her protection; and
- (vii) the lack of rules providing for the 'continuing jurisdiction' of the authorities of the State of former habitual residence of the adult.

The first weakness, limited geographical scope, results from the simple fact that only nine States have signed and accessed the HAPC so far.<sup>3</sup> Based on the principle of reciprocity, the HAPC provides for recognition and enforcement of measures taken in Contracting States only. By contrast, in Non-Contracting States, the HAPC

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<sup>3</sup> The seven EU Contracting States (see footnote 1), plus Monaco and Switzerland.

cannot apply to the mutual recognition and enforcement of measures for the protection of vulnerable adults in cross-border situations. Thus, the HAPC's limited geographical scope with regard to recognition and enforcement creates uncertain and unjustifiable consequences. Furthermore, the lack of provisions ensuring mutual recognition of foreign powers of attorney is one of the most important deficiencies of the current international framework, with the HAPC at its core for the protection of vulnerable adults.

The second weakness, the absence of a supranational court, is an inherent disadvantage of the HAPC as interpretation issues cannot be solved consistently. The current system, with supreme judicial bodies in each Contracting State competent to issue rulings on the interpretation of HAPC provisions, leads to differing results across the Contracting States. In other words, different substantive results are achieved in similar cross-border cases from one Contracting State to another. As a consequence, this leads to a decrease in legal certainty and a possible increase in obstacles to the EU principle of freedom of movement.

Concerning the third weakness, poor cooperation and communication among the authorities of Contracting States, the relevant HAPC rules are not always designed and applied in an entirely satisfactory way. Providing for cooperation mostly channelled through central authorities designated by the Contracting States, the HAPC makes only a timid suggestion that authorities 'may' get in touch for the purpose of discharging duties under the HAPC.

The fourth weakness, the difficult enforcement of foreign protective measures, is linked with the fact that, despite automatic recognition, measures for the protection of a vulnerable adult adopted in one Contracting State must first be declared enforceable as a prerequisite for their actual enforcement in another Contracting State. Moreover, the procedural rules for actual enforcement of measures vary from country to country, affecting the protection of vulnerable adults. In particular, the person charged with representing and assisting the adult in question may be prevented from exercising some of their powers in a timely and effective manner, pending the proceedings aimed at obtaining the *exequatur*<sup>4</sup> of the foreign measures.

The fifth shortcoming relates to the weak means by which evidence of the powers granted to a representative of a vulnerable adult are to be provided abroad. Indeed, the relevant HAPC provision establishes a certificate designed to allow the charged representative of a vulnerable adult to prove their capacity as a

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<sup>4</sup> *Exequatur* is a concept specific to private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad.

representative in a State other than the State in which the power of attorney or the judicial measure has been adopted. According to the HAPC, the individual Contracting States are to determine the procedural rules under which a certificate is to be delivered. However, in practice, certificates are very rarely issued, contributing to the legal uncertainty in the representation of a vulnerable adult.

The sixth weakness relates to the absence of any possibility for an adult to choose in advance the State whose authorities should have jurisdiction over his or her protection. This is due to the limited importance that the HAPC attaches to the will and preferences of adults as far as jurisdiction is concerned. An adult may choose the authorities to take protective measures in the event of his or her capacity. However, the adult would not be able to claim jurisdiction merely on the grounds of that choice. In fact, according to the HAPC, authorities chosen by an adult are only included in the list of authorities to which a request may be addressed if a transfer of the vulnerable adult's case is required. In other words, an adult is prevented from determining the Contracting State whose authority should have jurisdiction for taking measures such as to complement, modify or replace the instructions given by an adult to a representative. Thus, in cross-border situations, the authority with jurisdiction for the protection of a vulnerable adult may not be the same country whose law would be applicable to the granted powers of representation.

Finally, the seventh weakness, the lack of rules providing for the 'continuing jurisdiction' of the authorities of the State of former habitual residence of the adult, results from potential temporary gaps in certain situations, notably when an adult is changing his or her habitual residence. Normally, according to the HAPC, a change of an adult's habitual residence from one Contracting State to another involves that the jurisdiction for the protection of the adult immediately shifts to the authorities of the State of the new habitual residence. However, in a situation where an adult retains a good degree of autonomy and freely chooses to move to another country, the guardian of an adult could become aware of the change only at a later point. Consequently, the measures for protection adopted in the country of former habitual residence would still be effective, but they would nevertheless need to be modified as a precaution due to the change. The guardian would indeed be prevented from seeking the intervention of the country of former habitual residence. The time needed to take an informed decision in such a situation might prevent a timely protection of a vulnerable adult.

### 3. Possible EU legislative action

In order to ensure that the HAPC can apply in all EU Member States, ratification by those countries that have not yet done so would be a crucial preliminary step. These countries should follow the European Parliament's [Resolution](#) of December 2008 on cross-border implications of the legal protection of adults, which encourages those EU Member States which have not ratified the HAPC to date, to proceed with ratification.

As a further step, legislative action at EU level aimed at improving the protection of vulnerable adults in cross-border situations (beyond the HAPC) has a suitable legal basis with [Article 81](#) of the Treaty on the Functioning of the European Union (TFEU). The provisions of Article 81 enable the EU to 'develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases'. Measures based upon these provisions would seek to ensure:

'the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases' (Article 81(2)(a));

'the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction' (Article 81(2)(c));

'cooperation in the taking of evidence' (Article 81(2)(d));

'effective access to justice' (Article 81(2)(e)); 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' (Article 81(2)(f)).

In order to address weaknesses (iii) to (vii) listed above, a set of five uniform rules could be developed on the basis of Article 81, and in accordance with the principle of subsidiarity. Drawing upon the findings of the expert papers, the five legislative measures recommended in this field would aim at:

(i) enhancing cooperation and communication among authorities of EU Member States;

(ii) abolishing the *exequatur* requirement for measures of protection taken in an EU Member State;

(iii) creating a European certificate of powers granted for the protection of an adult;



- (iv) enabling the adult to choose the EU Member State whose courts should be deemed to possess jurisdiction to take measures directed at his or her protection;
- (v) providing for the continuing jurisdiction of the courts of the EU Member State of the former habitual residence.

The first EU legislative measure, enhancing cooperation and communication among authorities of EU Member States, should ensure frequent and systematic direct communication among the EU Member States' authorities. Authorities would be obliged to supply requested information within a clearly stated and reasonable time period. Prompt availability of information on issues such as the personal condition of a person is likely to enhance the protection of vulnerable adults.

Concerning the second legislative measure, for example the abolition of the *exequatur* requirement for measures of protection taken in an EU Member State, a liberal regime could be developed with appropriate safeguards for the protection of vulnerable adults. Based on mutual trust among EU Member States, such a legislative measure would enhance the effectiveness of protection measures undertaken in EU Member States.

The third legislative measure proposed is the creation of a European certificate of powers granted for the protection of an adult. Such a European document would compensate for the weakness of the certificate under the HAPC, which fails to provide a comprehensive legal framework for relevant procedures. Inspiration for such a legislative measure could be taken from the European Certificate of Succession established by the [European Succession Regulation](#).

As regards the fourth legislative measure suggested, this aims at enabling the adult to choose the EU Member State whose courts should be deemed to possess jurisdiction to take measures directed at his or her protection. Such a measure would strengthen the autonomy of the adults concerned and enhance legal security by ensuring convergence of jurisdiction and applicable law with regard to lasting powers of attorney. Instructions by an adult would be valid and enforceable under the law chosen, pursuant to the HAPC, and could no longer be (possibly) disregarded by the authorities seized with the protection of a vulnerable adult in a cross-border situation.

The fifth and final legislative measure would provide for the continuing jurisdiction of the courts of the EU Member State of the former habitual residence. It would allow the authorities of the State of an adult's former habitual residence - assuming that the representative of an adult is still in that former State - to retain

jurisdiction for some time following the habitual residence change and to modify the existing measures.

## **4. European Added Value**

A study on a [European Code on Private International Law](#), conducted in 2013 by Parliament's European Added Value Unit, has estimated that costs linked with legal uncertainty – and thus legal fees arising in cross-border transactions – and related emotional costs, amount to €11 million per annum for vulnerable adults. These costs could be greatly reduced if relevant measures were enacted at EU level in accordance with the proposals for legislative measures outlined above.

Experts agree that both the ratification of the HAPC by all EU Member States and additional legislative measures by the EU in the area of judicial cooperation in civil matters, especially in the area of mutual recognition, would contribute to creating more legal certainty for vulnerable adults in a cross-border situation compared to the situation to date. In other words, a legislative act at EU level would present considerable added value in effectively completing the existing international and European legal framework for the protection of vulnerable adults. More concretely, such legal measures would allow for a quicker, more effective, more efficient and, finally, more complete legal protection of vulnerable adults.

Furthermore, according to experts in the field, EU legal measures, supplementing the HAPC, would allow for a simplification of the relevant field within international private law for the protection of vulnerable adults. As outlined above, there are different instruments, and often overlapping legal regimes, leading to a high a high degree of legal uncertainty.

Legal measures in the form of an EU instrument would enhance legal certainty, ending the huge diversity of measures and instruments existing across the EU Member States. As a positive consequence, for example, practitioners would only have to refer to two legal tools – a future EU instrument and the HAPC ratified by all EU Member States – when applying private international law in order to protect a vulnerable adult in a cross-border situation. Finally, by simplifying the legal framework and making it more transparent, EU legal action would contribute to reducing legal and emotional costs, and thus generate European added value.

### **Recommendation**

Based on Article 81 TFEU (81(1), 81(2)(a), (c), (d) (e), (f)), the EU could adopt legislative measures to address the problems faced by vulnerable adults in cross-border situations and supplement the framework provided by the Hague Adult Protection Convention, which does not allow all cases of protection to be dealt with in the best interest of the adult concerned.

## **Annex I**

### **Vulnerable Adults in Europe**

#### **European added value of an EU legal instrument on the protection of vulnerable adults**

**by Ian Curry-Sumner**

#### **Abstract**

The world's population is ageing as life expectancy is increasing rapidly. As a result, the number and extent of age-related illnesses, such as Alzheimer's and dementia, are also on the rise. Due to increased mobility, cross-border issues related to the protection of vulnerable adults are also on the rise. The Hague Adult Protection Convention 2000 was adopted in order to attempt to solve many of these problems. Currently, this instrument has only been ratified by a limited number of EU Member States. This report examines the possible added value of EU action in this field.

#### **AUTHOR**

This study has been written by **Dr Ian Curry-Sumner** of the Voorts Juridische Diensten (Dordrecht, the Netherlands) at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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## Executive summary

### Policy context

The world's population is ageing and living longer. Estimates have been made that by 2050, people over the age of 60 should constitute 37% of the population of Europe, with 10% of them being 80 or over.<sup>1</sup> This demographic shift has major economic, social, health and budgetary impacts and is the subject of numerous European-level studies. Life expectancy is increasing rapidly, as too are the number and extent of age-related illnesses, such as Alzheimer's and dementia. Based on demographic and lifestyle changes, medical development,<sup>2</sup> as well as a higher interest in human rights, the issue of protecting internationally vulnerable adults becomes more and more significant.<sup>3</sup> Furthermore, the world's population is becoming increasingly mobile, thus ensuring that problems once the virtually exclusive domain of national legal systems are quickly becoming international problems raising complex private international law questions.<sup>4</sup> The number of northern Europeans wishing to retire in warmer southern European climates is a clear example of such combined trends.<sup>5</sup> Issues arise, however, when adults become incapacitated and require the assistance of third parties, either at their own request or at the order of a court. Alongside this trend, other groups of vulnerable adults also require protection in cross-border settings. Young adults with mental disabilities or those incapable of making decisions for themselves due to injury, for example, are also in need of protection in cross-border situations. Situations in which such assistance is required are everyday tasks such as the entry into contractual obligations such as the conclusion of a contract for the mobile phone. Accordingly, the focus of this report is on all categories of adult persons who need to be afforded protection in international situations.

### Objectives of the report

In cross-border situations the protection afforded by national authorities may not necessarily be recognised in other Member States. The lack of uniformity in dealing with the cross-border situations leads to uncertainty and lack of predictability. In turn this can lead to obstacles to free movement being created, thus preventing citizens from moving around the European Union freely. These issues have led to the need being recognised within the European Union for attention to be paid to these issues.

Given the social need to deal with the problems faced by vulnerable adults in need of protection, this report describes the current legislative framework, whilst at the same time

<sup>1</sup> European Commission, *Demography, active ageing and pensions*, Social Europe Guide, Volume 3, DG for Employment, Social Affairs and Inclusion, 2012, p. 9, figure 1.4

<sup>2</sup> A.R. Fagan, "An analysis of the Convention on the International Protection of Adults", p. 333-334

<sup>3</sup> See also P. Mostermans, "A New Hague Convention on the international protection of adults" *International Law FORUM du droit international*, 2000, p. 10

<sup>4</sup> Lagarde Explanatory Report, §3; See also A.R. Fagan, "An analysis of the Convention on the International Protection of Adults", p. 332-333

<sup>5</sup> *Ibid.*; See also P. Lagarde. "La Convention de la Haye du 13 janvier 2000 sur la protection internationale des adultes", p. 162-163; P. Lortie, "La Convention de la Haye du 2 octobre 1999 sur la protection internationale des adultes", *International Law FORUM du droit international*, 2000, p.14; Borrás, "Una nueva etapa en la protección internacional de adultos", *Revista Electrónica de Geriatria*, 2000, p. 10-11

identifying the problems experienced within this system. Following an analysis of the current legislative framework applicable in cross-border situations, a number of gaps and issues have been identified in the current, existing legislative framework. On the basis of these conclusions, the report continues to identify whether it is possible, and if so how, the European Union could provide added value to the solution of these problems.

## **Content**

The report focuses on the current framework applicable to the cross-border protection of vulnerable adults. In doing so, the report analyses the current patchwork framework of international, European and national instruments dealing with these issues (Chapter 2). Special attention is devoted to the Hague Adult Protection Convention 2000 (Chapter 3). Although this instrument provides for a uniform approach to many of the issues faced by vulnerable adults, only a limited number of EU Member States have as yet ratified this instrument. This in-depth analysis of the Hague Adult Protection Convention 2000 illustrates that a number of issues remain so long as all Member States have not ratified this instrument (so-called *temporary issues*). However, Chapter 3 also identifies a number of issues that will not be solved by ratification of this Convention by all Member States of the EU (nor to that end by the European Union itself).

Accordingly, the report continues to investigate alternative solutions to solving the issues identified (Chapter 4). In doing so, a variety of supranational organisations have been identified and examined. In closing, the conclusion is drawn that the European Union is best suited to deal with the cross-border issues faced by vulnerable adults across Europe. In having identified the authority best suited to enact legislative instruments, a number of specific issues have been addressed relating to the legal basis for such a future instrument, the type of instrument to be adopted, as well as the enactment method best suited to such a proposal.

## **Key recommendations**

On the basis of the information provided in this report, it is clear that the area currently under discussion deals with a field of law that falls within the shared competence of the European Union and the Member States (Article 4 TFEU). Having ensured that the principles of subsidiarity and proportionality are satisfied (which will be discussed further in section 4 of this report), the European Union would be competent and best suited to adopt legislative instruments to tackle the problems identified in this report. In doing so, the option of a Regulation would be preferable and could be based on Article 81(2)(a), (c), (e) and (f) TFEU.

# 1 Introduction

## 1.1 Setting the scene

In today's mobile society, people move from one country to another with increasing ease and frequency. Holidays, visiting friends and family, employment, relationships all form some of the many reasons for temporary or permanent emigration abroad. A pursuit once confined to the wealthy has become increasingly accessible to broader sections of society. This has also been true for the older sections of society too. The elderly have increasingly become a significant proportion of the population in many countries around the globe. Advances in medical technology have ensured that mankind is living longer than ever, allowing people to enjoy more of their retirement wherever and however they desire. As a result, emigration has become an increasingly frequent phenomenon amongst the retired.

It is within this group of society that problems have begun to emerge with respect to the cross-border recognition of legal documents. Imagine for example the following. Agnes is a retired nurse living in Edinburgh. She has worked all of her life and built up a reasonable state and private pension. She has decided to emigrate to the south of France to enjoy her retirement in a warmer climate. One of the things she does prior to her departure is ensure that her legal and medical affairs are in order. If anything would happen to her mental or physical health, she wishes to have her son, Bernard, to take over the responsibility. She drafts a "power of attorney" in his favour and departs for France. A number of years go by and Agnes becomes increasingly forgetful. Eventually she is diagnosed with dementia and within a year has been admitted to a local retirement home. The question arises who is responsible for her medical, administrative and legal affairs in France. If the Scottish power of attorney is recognised, then Bernard should be able to act on her behalf. If the power of attorney is not recognised, he will not be entitled to act on her behalf without the intervention of a French competent authority.

The question whether, and if so how, this Scottish power of attorney will be recognised in France provides an example of those issues that form the basis of this report. This example provides one illustration of a complex array of similar scenarios faced by vulnerable adults across the European Union. This study will focus on the current framework in place across the European Union with regard to the recognition of such power of attorneys. This study will, however, also address other private international law issues including international rules of jurisdiction, choice of law rules and the co-operation between administrative authorities. Furthermore, the report will address these issues in relation to other forms of protection measures outside of power of attorneys.

This study will illustrate that the answer to the question whether Agnes's power of attorney will be recognised is dependent upon the country in which it was drafted and the country in which it is to be recognised. The current legal framework within the EU applicable in this field of law is namely highly fragmented and disparate. In doing so, this report will not focus on the various national solutions available to provide protection to Agnes, but will instead focus on the issues raised when Agnes wishes to have the protection measures she has in one jurisdiction recognised in another.

## 1.2 Study objectives

The purpose of this report is to assess the potential added value of an EU legal instrument in promoting mutual recognition of statuses and decisions related to the protection of vulnerable adults. Such measures include, but are not limited to, decisions on the protection of adults, incapacity mandates, lasting or simple powers of attorney. This variety of instruments deals with the various actors involved in affording protection to vulnerable adults. When a vulnerable adult is no longer able to manage his or her finances, or perform routine personal affairs, court involvement may be necessary to appoint an agent to deal with these matters on behalf of the adult concerned. As a result, a judicial decision will be issued in which these matters will be dealt with. To avoid the expense and delay of court action, an individual may also draft and execute a power of attorney to deal with these matters, when he or she is no longer able to do so. The variety of domestic solutions in this field is great (as is described in §3.2.3) and therefore in attempting to achieve the goals of this study, it is necessary to first briefly outline the current array of legal instruments available in this field of law, pointing out the extent to which these instruments are applicable in various Member States. Once the overall legal arena has been set, it will be necessary to closely examine the major legal instrument in this field, namely the Hague Adult Protection Convention 2000 (hereinafter HAPC 2000) in detail.

The HAPC 2000 was drafted under the auspices of the Hague Conference for Private International Law. The Convention was drafted with the ageing population in mind; States around the world increasingly have to come to terms with a growing percentage of the population over the age of 65 requiring the support of a dwindling working group of people. This instrument is, however, the only specific instrument in this field of law, and thus requires particular attention. Once this overview has been provided, it will be necessary to address the current gaps and issues with this current framework, before being able to address whether these issues and gaps could be dealt with through European action. If European action is indeed desirable, it is subsequently necessary to determine what type of action is required. To achieve these aims, this report is based on the available literature and sources, as well as the relevant international and European instruments. Interviews with stakeholders have also been conducted in order to ascertain the practical impact of the various instruments in this field. The choice of stakeholders and the methods applied to the stakeholder interviews is explained in Section 1.5. The interviews were conducted with the following persons:

- R. Frimston (England & Wales, UK), *Partner, Russell-Cooke, London, UK*
- C. Montana (Italy), *Attorney, Gardenal & Associati, Conegliano, Italy*
- A. Ward (Scotland, UK), *Partner, Consultant, TC Young Solicitors, Glasgow, UK*
- A. Vrengenoor (the Netherlands), *Notary, Vrengenoor Estate Planning, the Netherlands*
- P. Delas (France), *Senior Associate and Avocat, Russell-Cooke, London, UK*
- German Central Authority<sup>6</sup>
- French Central Authority<sup>7</sup> (written answers)

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<sup>6</sup> Bundesamt für Justiz.

<sup>7</sup> Direction des Affaires Civiles et du Sceau, Ministère de la Justice.

This report will focus, *inter alia*, on the HAPC 2000, as this instrument forms the most important piece of regulation in this field. The Convention itself was designed to address the major private international law issues related to the topic of vulnerable adults. This Convention therefore deals with issues of jurisdiction, applicable law, recognition and enforcement of judgments, as well as providing a system of administrative cooperation in the form of a system of central authorities. This Convention will be described briefly in Section 2.2.3, and in detail in Section 3.

### 1.3 Scope of the problem

Alongside the example of Agnes, other scenarios may assist in capturing the types of issues that could arise in this field of law.

An Irishman has been living in Greece for the vast majority of his adult life. However, he owns property in Ireland and wishes to have one of his relatives deal with the property, as he is now becoming too old to be able to manage it. The man provides his son with a lasting power of attorney drafted in Greece to be exercised in the event of any incapacitating illness. The man begins to suffer from early-onset Alzheimer's and now wishes for the property to be sold. The problem arises whether the lasting power of attorney issued by the Irishman can be recognised in Ireland.

Another problem can arise in the following situation,

A man with Hungarian nationality dies in Spain. He is survived by a 50 year-old daughter who is living in France, and born with both Hungarian and French nationality. She suffers from a serious mental disorder, which has resulted in her being placed under a protective regime in France. The question arises whether the protective measures issued by the French court (i.e. the country of her habitual residence), would be recognised in Spain (i.e. the country in which her father died). In deciding whether the daughter is able to accept the inheritance, it will need to be determined who is able to authorise such a transaction.

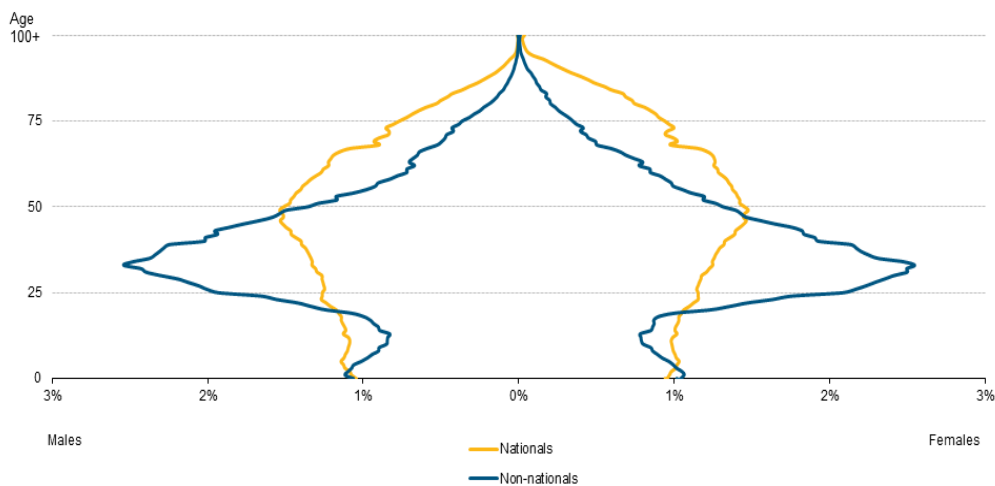
Although there are no figures available on exactly how many vulnerable adults there currently are in the European Union, one can use other statistics to appreciate the scale of the problem. As was stated earlier, the origins of the discussions in this field of law are to be found in coping with an ageing population. Therefore, it is interesting to note that in 2014 there were 1,303,033 persons over the age of 65 living in another Member State than their own national state.<sup>8</sup> With respect to all of these persons, questions falling under the ambit of this report could easily arise.

Although the origins of the negotiations can be traced back to the problems faced by elderly citizens, the scope of the HAPC 2000 is broader. Nonetheless, although the convention is not restricted to elderly persons, it is restricted to cross-border situations. It is, therefore, of interest that approximately 14 million EU citizens do not live in their home state. These mobile citizens are exactly the category of persons that encounter difficulties when attempting to have their power of attorney or advanced medical directions from one

<sup>8</sup> <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

Member State recognised in another Member State.<sup>9</sup> Obviously the cross border element may not even exist at the time of the drafting of the power of attorney, but may occur later when a person is on holiday or decides to emigrate. The following diagrams illustrate the age spread based on nationality and place of birth. These diagrams illustrate well that a large percentage of the resident population is over the age of 65 and in possession of a non-domestic nationality.

**Figure 1: Population age structure of nationals and non-nationals (EU and other), EU-28, 2014<sup>10</sup>**

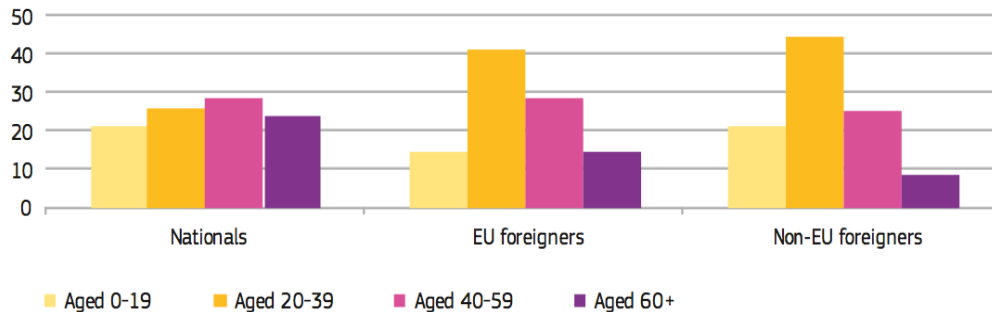


Source: Eurostat (online data code: migr\_pop2ctz)

<sup>9</sup> European Commission Press release, “European Commission upholds free movement of people” available at <[http://europa.eu/rapid/press-release\\_MEMO-14-9\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-9_en.htm)> last accessed 28th October 2015

<sup>10</sup> See: [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Age\\_structure\\_of\\_the\\_national\\_and\\_non-national\\_populations,\\_EU-28,\\_1\\_January\\_2014\\_\(%25\)\\_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Age_structure_of_the_national_and_non-national_populations,_EU-28,_1_January_2014_(%25)_YB15.png).

**Figure 2: Age distribution of nationals and non-nationals (EU and other), EU-27, 2010 (%)**

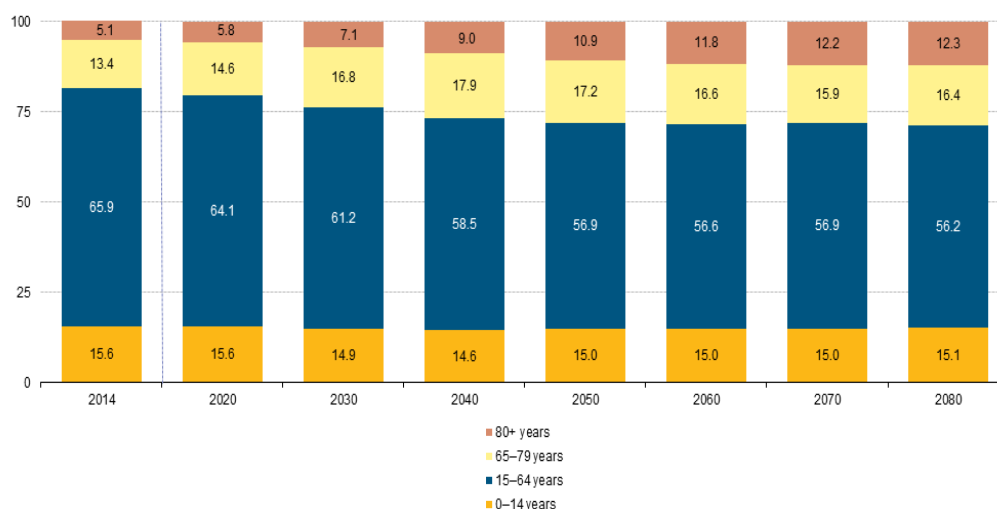


Source: Eurostat (online data code: migr\_pop1ctz).

Add to this the number of national power of attorneys being registered in the various Member States (as illustrated in section 3.2 *infra*), and it quickly becomes clear that the potential for dispute and uncertainty is high and only likely to increase due to the ageing population. This is also supported by the prognosis on the division of the population by age group. In a recent Commission's report it was stated that,

"over the next 30 years or so the population of working age is expected to shrink at the rate of 1 and 1.5 million each year. In parallel, the number of people aged 60 and over is expected to increase at the rate of about 2 million each year. This will transform the balance of the population between older and younger people to an extent that is without precedent."<sup>11</sup>

<sup>11</sup> European Commission, *Demography, active ageing and pensions*, Social Europe Guide, Volume 3, DG for Employment, Social Affairs and Inclusion, 2012, p. 9

**Figure 3: EU-28 Population by age group, 2014<sup>12</sup>**

(\*) 2020–80: projections (EUROPOP2013).  
 Source: Eurostat (online data codes: demo\_gind and proj\_13npms)

Furthermore, according to an impact assessment with respect to vulnerable adults in the criminal sphere, it is estimated that there were approximately 719,000 vulnerable adults in contact with the police in 2008.<sup>13</sup> Considering that these figures relate to criminal activity, which by its very nature only deals with a small section of society, the scale of the actual problem (i.e. including the non-criminal figures) is great.

Unfortunately, despite widespread research recently conducted in this field,<sup>14</sup> there are no quantitative statistics available on the number of vulnerable adults living in the EU in a Member State different to that of their nationality. A number of different reasons could be given for the lack of such data, including the fact that most countries do not maintain statistics related to the number of power of attorneys that are issued within their Member State. Also even if statistics are available on the number of power of attorneys issued or the number of judicial protection measures, these figures are not subsequently divided into cases dealing with nationals and non-nationals.

## 1.4 List of existing instruments

Alongside the HAPC 2000, there are a number of instruments that also are of importance in the context of this subject matter.

- a. International framework
  - i. Hague Deprivation of Civil Rights Convention 1905

<sup>12</sup> See [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population\\_structure\\_by\\_major\\_age\\_groups\\_EU-28\\_2014-80\\_\(1\)\\_\(%25\\_of\\_total\\_population\)\\_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Population_structure_by_major_age_groups_EU-28_2014-80_(1)_(%25_of_total_population)_YB15.png)

<sup>13</sup> Commission Working Document, Impact Assessment Accompanying the document Proposal for a directive of the European Parliament and the European Council, Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, SWD (2013) 480 final, p. 105.

<sup>14</sup> R. Frimston *et al*, *The International Protection of Adults*, Oxford: OUP 2015.



- ii. Hague Agency Convention 1978
  - iii. UN Convention on the Rights of Persons with Disabilities 2006
- b. European framework
  - i. Brussels I Recast (No. 1215/2012)
  - ii. Rome I Regulation (No. 593/2008)
  - iii. Succession Regulation (No. 650/2012)
  - iv. Protection Regulation (No. 606/2013)
- c. Taking of evidence
  - i. Hague Evidence Convention 1970
  - ii. EU Service Regulation (No. 1206/2001)

These instruments will all be discussed in brief in the context of this report to the extent that they are relevant for the issues at hand. However, the main thrust of this report will be focussed on the scope and content of the HAPC 2000.

## 1.5 Stakeholders concerned

In order to assess the effect of the HAPC 2000 in the field of the cross-border protection of adults, it is important to identify different stakeholders. Firstly, it is important to have contact with the relevant central authorities. These organisations will be able to provide information on the content of the legal system, or finding a legal professional to assist in the case. However, after contact with the German Central Authority, it was quickly ascertained that the majority of practical issues do not reach the central authority, but are instead dealt with by practitioners. Accordingly, it was also essential to gain information from front-line actors. In doing so, a range of persons actually involved in the field - mainly solicitors and civil law notaries - some of whom also wrote a chapter in the recently published book of Frimston *et al*<sup>15</sup>, were contacted. All interviews took place in October 2015 enabling the results to be integrated fully into this research.

## 1.6 Methodology

This research is divided into three main components. The first component provides an analysis of the current situation and identifies the gaps in the existing legal framework. Having done this, possible solutions to these issues are presented, leading to a conclusion related to the possible added value of a European instrument in this field. The first part of this research - a description of the current framework - has been conducted on the basis of a literature review. Analysing the literature on the HAPC 2000 has formed the primary focus of this section of the report. The starting point was, therefore, the resources available on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)). These publications were used to conduct a further broader search on useful research material on these issues specific to this field. By identifying the main issues and problems of the HAPC 2000, the possible advantages of EU action in this field could be identified.

Although empirical evidence was difficult to acquire given the strict time constraints imposed on this research, telephone interviews were arranged with a number of different stakeholders. The interviews therefore aimed at trying to gain practical information

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<sup>15</sup> R. Frimston *et al*, *The International Protection of Adults*, Oxford: OUP 2015.

regarding the practical operation of the HAPC 2000. In order to fully assess the current framework, it was essential to gain information from a variety of different groups of countries. As all EU Member States have not ratified the HAPC 2000, it was important to gain information from stakeholders in countries where the HAPC 2000 is currently in force, as well as countries where the HAPC 2000 is not in force. It was also necessary to subdivide the latter group of countries into those where the HAPC 2000 has been signed, and those where it has not even been signed. This was due to the fact that some countries have already anticipated the entry into force of the Convention despite it not yet being in force. As a result, this selection of jurisdictions ensured that representatives were reached from three different categories of jurisdictions: (a) experts from States that have signed and ratified the HAPC 2000 (i.e., Scotland, Germany and France), (b) experts from States that have signed, but not yet ratified the HAPC 2000 (i.e., the Netherlands and Italy), as well as (c) states that have neither signed nor ratified the HAPC 2000 (i.e., England & Wales).

In terms of the stakeholders themselves, firstly, the Central Authorities currently assigned with the task of implementing and enforcing the HAPC 2000 were contacted. Oral and written answers were received from the French and German Central Authorities. Furthermore, telephone interviews were conducted with legal professionals from the Netherlands, Scotland, France, England and Italy. This selection ensured a representative selection of various legal systems (i.e., common law, Romanistic, Germanic, etc.), as well as a representative division both with respect to geographical location, as well as country and population size. These semi-structured interviews took place on the basis of a mixture of topic list questions, as well as open questions. In this way, the fullest possible breadth of answers was ascertained relating to the problems and possible solutions in this field.

These stakeholder interviews were used to ascertain where the gaps in the current legislative framework are, in order to fully appreciate the practical working of the regulatory instruments in force at this moment in time.

In attempting to reach possible conclusions with respect to a future European instrument, reference was also made to areas of family law, as well as other areas of law in which the Europeanization of private international law has taken place (e.g., with respect to civil and commercial matters in the context of the Brussels I (recast) Regulation). At this stage it is important to note that the issues at hand fall rather uncomfortably between a number of different areas of law. Many of the measures taken with respect to the situations discussed in this report, will be regarded as falling within the realm of the law of persons or family law;<sup>16</sup> a situation already acknowledged in 1968 with the creation of the Brussels Convention,

“The wording used, ‘status or legal capacity of natural persons, differs slightly from that adopted in the Hague Convention, which excludes from its scope judgments concerning ‘the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses’ (Article 1 (1)). The reason for this is twofold.

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<sup>16</sup> See also, Directorate-General for Internal Policies, *Which legal basis for family law? The way forward*, European Parliament: Brussels, 2012, p. 9.

Firstly, family law in the six Member States of the Community is not a concept distinct from questions of status or capacity ..."<sup>17</sup>

Including references to other areas of law has therefore ensured optimal use of the current best practices in other areas of private international law. Take for example the possibility of creating a single transferable power of representation in a similar fashion to the European Declaration of Succession that has been created under the European Succession Regulation. In this way, as the same rules of jurisdiction and applicable law would be applicable across the EU, Member States would be more inclined to recognise a standardised power of representation. This would also aid in translation problems, as a standardised form would ensure standardised translations. In this way, possible recommendations have been able to be made based on actual experience in other fields of law in relation to other European and international instruments.

### **1.7 Structure of the report**

The report is divided into four main sections, after this introductory section. The first section outlines the present legislative framework applicable with respect to the international protection of adults (Section 2). The main thrust of the report will be focused on the discussion of the current application of the HAPC 2000, as well as the current gaps and limitations of this framework (Section 3). On the basis of the identification of the current problems and issues in this field, the report will turn to the conceivable added value of a European instrument and the possible solutions that could be proposed (Sections 4). Attention in Section 4 will also be paid to the possible options open to the European legislature in attempting to solve these issues, referring to the various solutions already in use in other areas of European private international law. This report will subsequently be finalised with a brief overall conclusion (Section 5).

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<sup>17</sup> Jenard Report, *Explanatory Report to Brussels Convention 1968*, 1979, OJ C-59/10.

## 2 Existing legal framework

### 2.1 Introduction

In this section, attention will be devoted to the various international and European instruments currently applicable with respect to the cross border aspects of the protection of vulnerable adults. Alongside the HAPC 2000, the existing legal framework is extremely patchwork and highly dispersed. A variety of international instruments are applicable, but not all EU Member States have ratified these instruments. The resulting framework is a complex collage of intertwined international, European and domestic instruments. Naturally, the advent of the HAPC 2000 has ensured that a certain level of uniformity will be achieved within the context of those states that sign and ratify that Convention. This HAPC 2000 will be discussed in brief in this section (§2.2.3) and in detail in Section 3.

### 2.2 International framework

On the international level, within the European context, there are three conventions that deserve particular attention in the framework of the protection of vulnerable adults, namely:

- *Convention du 17 juillet 1905 concernant l'interdiction et les mesures de protection analogues* (hereinafter Hague Deprivation of Civil Rights Convention 1905)
- Convention of 14 March 1978 on the Law Applicable to Agency (hereinafter Hague Agency Convention 1978)
- Convention of 13 January 2000 on the International Protection of Adults (hereinafter Hague Adult Protection Convention 2000)

Alongside these private international law instruments developed by the Hague Conference, the United Nations has also developed a Convention in 2006 dealing with the rights of persons with disabilities. How this Convention interacts with the applicable private international instruments will be discussed in §2.2.4.

#### 2.2.1 Hague Deprivation of Civil Rights Convention 1905

Already in 1905 one of the initial Conventions to be agreed upon by the international community was the *Convention concernant l'interdiction et les mesures de protection analogue* (hereinafter Hague Civil Rights Convention 1905). As this was one of the first international instruments in the field of private international law, it bridged the gap between those countries that wished to utilise domicile as a connecting factor and those that wished to use nationality. In the end, no compromise could be found and instead domicile was simply used as the main jurisdiction ground in such cases. Accordingly, the Convention was not particularly successful, ultimately only being ratified by nine countries, of which five have since renounced the Convention.<sup>18</sup> Accordingly, the convention is currently regarded as old-fashioned and in need of replacement.<sup>19</sup>

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<sup>18</sup> Italy, Poland, Portugal and Romania have all ratified the Convention and it is still applicable in these countries. France, Germany, Hungary, the Netherlands and Sweden all ratified the Convention, but have since renounced the Convention. Austria signed the Convention, but never ratified.

<sup>19</sup> E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, p. 2

### 2.2.2 Hague Agency Convention 1978

The Hague Agency Convention 1978 has only been ratified by a handful of states, namely Argentina, France, the Netherlands and Portugal. It is, therefore, in the current context of this report, not really an instrument that fosters uniformity across the EU. Nonetheless, most Member States allow for an adult to grant another person authority with respect to particular acts. This is normally achieved by means of a power of representation in which the principal grants an agent the power to act on his or her behalf. Although differences arise between the methods employed in civil and common law jurisdictions in achieving this result, both traditions have historically utilised the law on agency to achieve this result, which in turn forms part of the law of contract. In this context, such agency relationships are known as 'private mandates',<sup>20</sup> and are different than a normal power of attorney, which is normally revoked as soon as the principal becomes incapacitated. The exact nature of private mandates and their nature within the private international law context is a hotly debated issue, and certainly one that needs further attention within the context of the analysis of the HAPC 2000 and the possibility for any future EU instrument.

In private international law terms, the situation with respect to power of attorneys, mandates and agency is extremely difficult. In general, distinct issues need to be distinguished from one another:

- a) the internal relationship between the adult who grants the power (the granter) and the agent (the grantee), or
- b) the external relationship between the granter/grantee and a third party.

With respect to the first question, the situation is oftentimes regarded as a pure contractual matter that falls to be governed (within Europe at least) by the Rome I Regulation<sup>21</sup> or the Rome Convention 1980<sup>22</sup>. These two instruments both provide for uniform, choice of law rules in the field of contractual obligations, the Rome Convention being the predecessor to the Rome I Regulation (the Rome I Regulation being the current instrument applicable in this field is discussed in greater detail in section 2.3.2). However, this issue is actually also one of agency. On an international level, the Hague Agency Convention 1978 regulates the issues surrounding contractual agency. As only three EU Member States have ratified this Convention, the impact and usefulness of this Convention with the European context is extremely limited. However, three Member States are bound by this convention, thus ensuring that some Member States are bound by uniform supranational rules, whilst others are not. A system of institutional disparity is, therefore, created between persons subject to the jurisdiction of authorities in which the Hague Agency Convention 1978 applies, and those in countries where it does not apply.

With respect to the second question, the issues are even more diffuse. As explained by Frimston *et al*,

<sup>20</sup> R. Frimston *et al*, *The International Protection of Adults*, Oxford: OUP 2015, p. 54.

<sup>21</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

<sup>22</sup> Convention on the law applicable to contractual obligations.

“If the grantee enters into a contract with the third party then the law applicable will be the law applicable to that particular contract under the Rome I Regulation or Rome Convention. That law will govern whether the grantor or the grantee may be bound in the event of existence of the agency being undisclosed. Other legal categories will each be governed by different connecting factors. Other non-contractual obligations may be governed by the law of the residence (habitual residence – ICS) of the defendant. Property rights such as the assignment of assets may be governed by the law of the *situs*; trusts by the law applicable to the trust.”<sup>23</sup>

This issue raises particular problems within the context of the application of the HAPC 2000, and will, therefore, be discussed in Section 3.

### **2.2.3 Hague Adult Protection Convention 2000**

The two-week session of the Special Commission of a Diplomatic Character on the protection of adults convened at The Hague on 20<sup>th</sup> September 1999. During these negotiations, 30 Member States, 6 observer states and 2 non-governmental organisations drafted the final text of the Convention on the International Protection of Adults, which was ultimately adopted by unanimous vote.<sup>24</sup> The HAPC 2000 came into force on the 1<sup>st</sup> January 2009 after having been ratified by the United Kingdom (albeit only applicable in Scotland), Germany and France. As at the time of writing (24<sup>th</sup> November 2015) there are currently 8 contracting states (Austria, Czech Republic, Estonia, Finland, France, Germany, Switzerland and Scotland, United Kingdom). Furthermore, 7 other jurisdictions have also signed the convention, although not yet ratified the instrument (Cyprus (1<sup>st</sup> April 2009), Greece (18<sup>th</sup> September 2008), Ireland (18<sup>th</sup> September 2008), Italy (31<sup>st</sup> October 2008), Luxembourg (18<sup>th</sup> September 2008), the Netherlands (13<sup>th</sup> January 2000) and Poland (18<sup>th</sup> September 2009)). Furthermore, the European Parliament has already recommended that the European Union should ratify this Convention.<sup>25</sup> As 14 EU Member States have currently signed this Convention, this instrument is by far the most important instrument governing this field of law within the European Union. It is, therefore, the discussion of this instrument that will form the backbone of this report in Section 3 to this report.

On the basis of the research conducted in the production of the report, it has been impossible to ascertain exact reasons as to the significant lack of ratifications of the Convention. It has been stated that, for example, Italy will sign the Convention, but that Italy is well-known for taking a long time to ratify international instruments, as was the case with the Hague Child Protection Convention 1996.<sup>26</sup> With respect to England & Wales, it can be noted that the Public Guardian holds the policy for extending ratification of the convention in relation to England & Wales, and it has already begun a scoping exercise in 2009. Nonetheless, it is presently not known when the UK will ratify with respect to the

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<sup>23</sup> R. Frimston *et al*, *The International Protection of Adults*, Oxford: OUP 2015, p. 35.

<sup>24</sup> Policy Department C: Citizens Rights and Constitutional Affairs, *The Hague Convention of 13<sup>th</sup> January on the international protection of adults*, PE 462.496, 2012, p. 5.

<sup>25</sup> 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).

<sup>26</sup> Interview with C. Montana.

remaining parts of the UK (i.e. England & Wales and Northern Ireland).<sup>27</sup> The urgency to sign and ratify the Convention has been somewhat lacking, especially now that English domestic legislation is already aligned with the content of the Convention. In Ireland, the introduction of national legislation has also preceded the ratification process.<sup>28</sup>

#### **2.2.4 2006 UN Convention on the Rights of Persons with Disabilities**

The UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”) endeavours to elaborate in detail the rights of persons with disabilities and set out a code of implementation. The CRPD has 126 state parties and 154 signatories; all EU member states are states parties to the CRPD, as is the European Union itself.<sup>29</sup> By ratifying the Convention, Contracting States commit to developing and executing policies, laws and administrative measures for securing the rights recognised in the Convention and abolish laws, regulations, customs and practices that constitute discrimination (Article 4). On the basis of Article 10, Contracting States are to guarantee that persons with disabilities enjoy their inherent right to life on an equal basis with others, as well to ensure the equal rights and advancement of women and girls with disabilities (Article 6) and protect children with disabilities (Article 7). Furthermore, on the basis of Article 5, Contracting States are to recognise that all persons are equal before the law, to prohibit discrimination on the basis of disability and guarantee equal legal protection. Moreover, the HAPC 2000 supports a number of articles provided under the CRPD, such as article 3 (autonomy of disabled adults), article 12 (legal recognition before the law), article 13 (access to justice), article 18 (liberty of movement and nationality), article 25 (health) and article 32 (international cooperation).<sup>30</sup>

Countries are to ensure the equal right to own and inherit property, to control financial affairs and to have equal access to bank loans, credit and mortgages (Article 12). They are to ensure access to justice on an equal basis with others (Article 13), and make sure that persons with disabilities enjoy the right to liberty and security and are not deprived of their liberty unlawfully or arbitrarily (Article 14). Other articles go on to provide a list of various rights and benefits that disabled persons are entitled to have. Although the majority of the rights listed, and equally the obligations imposed on the States involved, involve substantive law issues, the private international law dimension cannot be overlooked.

The CRPD is a comprehensive international human rights instrument, which aims at ensuring national legal systems provide for substantive human rights entitlements for persons with disabilities. Although the HAPC 2000 does not aim to achieve substantive law harmonisation, these two instruments interact with each other in that the HAPC 2000 ensures that persons with disabilities who have availed themselves of the opportunities provided for under national law (and in accordance with the provisions of the 2006 UN

<sup>27</sup> Interview with R. Frimston.

<sup>28</sup> In Ireland, the *Assisted Decision-Making (Capacity) Bill no 83*, which will bring Irish capacity law into line with the Convention was last amended on 21<sup>st</sup> October 2015: <http://www.oireachtas.ie/viewdoc.asp?DocID=24147&&CatID=59>

<sup>29</sup> See also DG for Internal Policies “The Hague Convention of 13 January 2000 on the International Protection of Adults”, p. 14

<sup>30</sup> See also DG for Internal Policies “The Hague Convention of 13 January 2000 on the International Protection of Adults”, p. 15

Convention), will be assured that if they move from one HAPC 2000 contracting state to another, that their power of attorney or judicial/administrative decision will be recognised in the new state.<sup>31</sup>

## 2.2.5 Overview

The following table provides an overview of the current status with respect to the ratification of the four major international instruments in this field.

*Table 1: Signatories to international conventions*

	Hague 1905	Hague 1978	Hague 2000	UN 2006
European Union				Ratified
Austria	Signed		Ratified	Ratified
Belgium				Ratified
Bulgaria				Ratified
Croatia				Ratified
Cyprus			Signed	Ratified
Czech Republic			Ratified	Ratified
Denmark				Ratified
Estonia			Ratified	Ratified
Finland			Ratified	Ratified
France	Renounced	Ratified	Ratified	Ratified
Germany	Renounced		Ratified	Ratified
Greece			Signed	Ratified
Hungary	Renounced			Ratified
Ireland			Signed	Ratified
Italy	Ratified		Signed	Ratified
Latvia				Ratified

<sup>31</sup> Alongside the main Convention, the UN has also drafted an optional protocol. This Protocol establishes an individual complaints procedure similar to those operational with other conventions such as Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol is currently in force in 88 States, with another four having signed but not yet ratified the Protocol.



Lithuania				Ratified
Luxembourg			Signed	Ratified
Malta				Ratified
The Netherlands	Renounced	Ratified	Signed	Ratified
Poland	Ratified		Signed	Ratified
Portugal	Ratified	Ratified		Ratified
Romania	Ratified			Ratified
Slovenia				Ratified
Slovakia				Ratified
Spain				Ratified
Sweden	Renounced			Ratified
United Kingdom			Ratified (Scotland)	Ratified
<i>Ratifications (signatories)</i>	4 (1)	3 (0)	7 (7)	28 (0)

## 2.3 European framework

Within the European Union, instruments already exist to deal with cross-border issues in the protection of vulnerable adults. These instruments are, however, not specifically related to the protection of adults and do not deal, therefore, with the particular problems and issues that arise within the context of the protection of vulnerable adults.

### 2.3.1 Brussels Regime (Brussels I-bis<sup>32</sup> and Lugano Convention 2007<sup>33</sup>)

One of the most significant developments in the field of European private international law is the creation of a dual system for uniform rules of jurisdiction, as well as uniform rules of recognition and enforcement. This system, in force in the European framework since 1968 is known as the Brussels Regime, after the founding instrument, the Brussels Convention 1968<sup>34</sup>. The original treaty, signed in 1968 by the original founding six members of the European Communities, forms the foundation stone of the highly

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<sup>32</sup> Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>33</sup> Convention of 16 September 1988 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>34</sup> Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters

successful regime.<sup>35</sup> The founding treaty has been amended several times and was virtually completely replaced by the Brussels I Regulation in 2001. In 2005, Denmark signed an international agreement with the European Community to apply the provisions of the 2001 Regulation between the EU and Denmark. It also provides a procedure by which amendments to the regulation are to be implemented by Denmark.<sup>36</sup> Today the convention only applies between the 15 pre-2004 members of the European Union and certain territories of EU member states that are outside the Union: these being Aruba, the French overseas territories and Mayotte.

In 2012, the EU institutions adopted a recast Brussels I Regulation, which replaces the Brussels I Regulation as of 10<sup>th</sup> January 2015.<sup>37</sup> The Recast Regulation now also applies to jurisdiction regarding non-EU residents, it abolishes formalities for enforcement of judgments and simplifies the procedure for a court chosen by the parties to commence proceedings (even if proceedings have started in another member state already). In December 2012 Denmark notified the Commission of its decision to implement the contents of 2012 regulation.<sup>38</sup> Therefore, as of the 10<sup>th</sup> January 2015, the Brussels I (recast) (also known as Brussels I-bis) Regulation applies throughout the European Union, with the Brussels Convention 1968 still applying in a limited number of cases with certain overseas territories.

Alongside the Brussels regime, a similar system has been created to apply in the European Free Trade Association (EFTA). In 1988, the then 12 member states of the European Communities signed a treaty with those countries in EFTA (Austria, Finland, Iceland, Norway, Sweden and Switzerland), which served to basically extend the application of the Brussels Convention to these countries.<sup>39</sup> This treaty became known as the Lugano Convention 1988. In 2007, the European Community signed a treaty with Iceland, Switzerland, Norway and Denmark, the Lugano Convention 2007.<sup>40</sup> The aim of this treaty was twofold. Firstly it as aimed at replacing the Lugano Convention 1988. Secondly it was aimed at replacing the Brussels Convention 1968, thus ensuring one treaty would apply outside of the scope of the Brussels Regulation. While the former purpose was achieved in 2010 with the ratification by all EFTA member states (bar Liechtenstein which never signed the 1988 Convention), no EU member has yet acceded to the convention on behalf of its extra-EU territories.

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<sup>35</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, (<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1968001>).

<sup>36</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 299, 16.11.2005, p. 62), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22005A1116%2801%29:EN:NOT>.

<sup>37</sup> Article 81(2) 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 (recast) OJ L 351, 20.12.2012.

<sup>38</sup> European Treaties Office Database, *Lugano Convention Summary*.

<sup>39</sup> Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale (PDF). Federal Department of Foreign Affairs of Switzerland. ([https://www.eda.admin.ch/content/dam/eda/fr/documents/mt\\_070629\\_lugpartf.pdf](https://www.eda.admin.ch/content/dam/eda/fr/documents/mt_070629_lugpartf.pdf))

<sup>40</sup> Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters". Council of the European Union.

All five legal instruments (i.e., Brussels Convention 1968, Brussels I Regulation, Brussels I (recast) Regulation, Lugano Convention 1988 and Lugano Convention 2007) are broadly similar in content and application, with differences in their territory of application. However, when dealing with powers of attorney, powers of representation and measures related to the protection of vulnerable adults, such measures are deemed to affect the “status or legal capacity of a natural person”. The framers of the original Brussels Convention 1968 intended to exclude all family law matters from the scope of the Convention, apart from maintenance issues.<sup>41</sup>

As a result, such matters are excluded from the scope of the Brussels and Lugano regime, see Article 1(2)(a) Brussels I Regulation, Article 1(2)(a) Brussels I (recast) Regulation, Article 1(2)(a) Lugano Convention 2007, and Article 1(2)(a) Lugano Convention 1988.<sup>42</sup> The changes made to the Brussels I Regulation when enacting the Brussels I (recast) Regulation did not have any impact on the exclusion of these matters from the scope of the Brussels international procedural law regime. Therefore, despite the fact that these instruments have a huge impact in civil and commercial matters across Europe, they do not apply to the current issues at hand and therefore cannot be used in this context. Nonetheless, they can be used to provide inspiration as to how best to deal with the issues raised in cross-border protection issues as the rules have been in force for more than half a century and served the basis for multiple corollary instruments in both Europe and beyond.<sup>43</sup>

### 2.3.2 Rome I Regulation

Regulation No. 593/2008 of 17<sup>th</sup> June 2008 on the law applicable to contractual obligations has been in force since 17 December 2009. In principle Rome I Regulation – as the Rome Convention – does not apply to the status and legal capacity of natural persons, with the exception foreseen in Article 13 Rome I.<sup>44</sup> This rule is aimed at protecting a party who in good faith believed to be making a contract with a person of full capacity and who, after the contract has been entered into, is confronted with the incapacity of the other contracting party.<sup>45</sup> As a result Article 13 states that if a contract is concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country only if the other party was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence. In the context of the current topic this can arise frequently. Imagine:

Emily is an elderly woman who gifts her TV to her care worker. Emily suffers from Alzheimer's, but is subject to a protective measure issued by the courts of State B. The question arises whether Emily was contractually competent to gift her TV to the care

<sup>41</sup> P. Rogerson, in: U. Magnus and P. Mankowski (eds.), *Brussels I Regulation*, Sellier European Publishers: Munich, 2012, p. 61.

<sup>42</sup> F. Ibili, “Personenrecht – minderjarigheid, handelingsbekwaamheid, meerderjarigenbescherming en namenrecht”, in: T. De Boer *et al*, *Nederlands internationaal personen- en familierecht. Wegwijzer voor de rechtspraak*, Kluwer: Deventer 2012, p. 53.

<sup>43</sup> A. Bradford, “The Brussels Effect”, (2012) *Northwestern University School of Law* 107, p. 1-64.

<sup>44</sup> Article 1(2)(a) Rome I Regulation.

<sup>45</sup> Giuliano-Lagarde Report, *Explanatory Report Rome Convention*, Article 11

worker. In order to determine the validity of the gift between Emily and her care worker reference can be made to the protective measure issued by the courts in State B. This specific issue will fall within the context of Article 13 Rome I Regulation.

Outside of Article 13, the Rome I Regulation does not provide for any other specific private international law solutions in this field. In particular, agency is excluded from the scope of the Regulation, despite the fact that Article 7 of the EU's original proposal included such a provision. No consensus could be reached with respect to the rules relating to agency or powers of attorney in general, and hence the Rome I Regulation does not provide for any regulation of these issues.

### 2.3.3 Succession Regulation

The Succession Regulation has been in force since the 17<sup>th</sup> August 2015, and is currently applicable in all EU Member States (including Croatia), with the exception of Denmark, Ireland and the United Kingdom. Article 1(2)(a) Succession Regulation once again - akin to Brussels I (recast) Regulation - specifically excludes the status or legal capacity of a natural person from the scope of its application. However, this is without prejudice to Article 23(2)(c) Succession Regulation, which deals with capacity to inherit and Article 26 Succession Regulation, which deals with the question of a testator's capacity to draft a will or agreement as to succession. As will be dealt with reference to the scope of the HAPC 2000, difficult issues involving the interaction of the Succession Regulation and the HAPC 2000 will arise with respect to characterisation, i.e., which instrument is to apply with regard to specific questions relating to validity of wills and capacity to testate.<sup>46</sup> Issues arise for example in the following cases,

Francis is living in England & Wales and suffers a car accident, as a result of which she is no longer able to function properly. A statutory will is executed on her behalf by the local court (according to the powers granted to it under the section 18(1)(i) Mental Capacity Act 2005. Francis also has property in France, and the issue arises whether the power of representation granted to her son by virtue of the statutory will can be exercised in France. The question arises whether this statutory will is to be regarded as a matter of succession law, and thus regulated by the Succession Regulation or is a matter to be governed by the applicable rules on vulnerable adults.

### 2.3.4 Protection Regulation No. 606/2013

In 2013, a new European Regulation was enacted which ensured that protective measures would be entitled to cross-border recognition within the EU. The Regulation makes it clear that "protection measures" are to be widely defined. Recital 3 states that they must concern individuals whilst preamble 6 states:

"this Regulation should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence,

<sup>46</sup> See also R. Frimston *et al*, *ibid*, p. 105.

harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion. It is important to underline that this Regulation applies to all victims, regardless of whether they are victims of gender based violence.”

Article 3 defines protection measures, which include:

- “(a) a prohibition or regulation on entering the place where the protected person resides, works or regularly visits or stays
- (b) a prohibition or regulation of contact in any form with the protected person including by telephone, electronic or ordinary mail, fax or any other means
- (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.”

Clearly, the types of measures envisaged in this Regulation are not the measures which are covered by the scope of this report. Although the title of the regulation could be slightly misleading, Regulation No. 605/2013 deals with measures such as injunctive relief and prohibited steps orders. Recital 9 makes it clear that the Regulation applies only to protection measures, which itself has to be interpreted autonomously (recital 10), ordered in civil matters and that protection measures ordered in criminal matters are covered by Directive 2011/99/EU.

### 2.3.5 Summary

Although it is clear that the EU has enacted multiple instruments in associated fields to the one at hand (i.e. Protection Regulation, Succession Regulation etc.), there is no single instrument that currently deals with the issues dealt with in this report. The majority of instruments explicitly exclude matters related to the capacity and status of natural persons, thus excluding the scope of the current topic. Those that do not exclude the topic completely, only regulate an extremely small portion of the issues at hand, thus leaving the majority of issues to national law (or in those states that have ratified certain international instruments, to international law).

## 2.4 Taking of evidence

### 2.4.1 Hague Evidence Convention 1970

Currently 25 Member States are parties to the Hague Evidence Convention 1970, i.e. all Member States apart from Austria, Belgium and Ireland.<sup>47</sup> However, the Hague Evidence Convention 1970 is also applicable in states outside the EU, as it is currently in force in a total of 58 States.<sup>48</sup> The Hague Evidence Convention applies with respect to this field of law insofar as the question may arise whether a document produced in one Member State

<sup>47</sup> Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters “Status table” available at < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82)> last accessed 28 October 2015

<sup>48</sup> Albania, Argentina, Armenia, Australia, Barbados, Belarus, Bosnia and Herzegovina, Brazil, China, Colombia, Iceland, India, Israel, South Korea, Kuwait, Liechtenstein, Mexico, Monaco, Montenegro, Norway, Russian Federation, Serbia, Singapore, South Africa, Sri Lanka, Switzerland, Seychelles, FYR Macedonia, Turkey, Ukraine, USA and Venezuela.

can be used as evidence in another Member State. It is also likely that evidence will often be required to be taken from outside the forum jurisdiction.

Although the HAPC 2000 states that all documents forwarded or delivered under the HAPC 2000 are exempt from legalisation or any analogous formality, the Explanatory Report to the HAPC 2000 concludes that this refers to “all written information furnished, all judicial and administrative decisions, as well as certificates delivered in accordance with Article 38”.<sup>49 50</sup> This does not necessarily ensure that individual powers of representation will also be exempt from legalisation. Furthermore, the exemption from legalisation or other analogous formality does not apply to such documents that originate from non-Contracting States. For example

A Belgian national resident in the Netherlands wishes to draft a power of attorney in accordance with Belgian law. Even if such a power of attorney were to be recognised in the Netherlands (which in and of itself is highly unlikely!), would need to be legalised before it could be used in the Netherlands. As both the Netherlands and Belgium are parties to the Hague Apostille Convention 1961, the power of attorney would be exempt from legalisation and could thus be provided with an apostille in order to be regarded as “authentic”. This does not, however, mean that the document would necessarily be recognised.

#### **2.4.2 EU Evidence Regulation No. 1206/2001**

Council Regulation No 1206/2001 of 28th May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters entered into force in the EU on 1st January 2004. In relation to intra-EU cases, the Evidence Regulation supersedes the application of the Hague Evidence Convention 1970 (see Article 21(1) Evidence Regulation). One of the main innovations of the Evidence Regulation, compared to the Hague Convention, is that it bypasses the system of Central Authorities as a general mechanism for the taking and practice of evidence, creating a direct communication system between requesting and requested jurisdictional authorities. The direct communication system aims to simplify and also accelerate the taking of evidence between Member States.

### **2.5 Summary**

It is evident on the basis of this short overview, that this field of law is characterised by an enormous diversity of sources that can apply in any given case. The breadth of sources is

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<sup>49</sup> P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HcCH, 2000, p. 70

<sup>50</sup> The text of Article 38 reads:

- (1) The authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.
- (2) The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary.
- (3) Each Contracting State shall designate the authorities competent to draw up the certificate.

furthermore exacerbated by the variety in the origins of these sources; some are from within the EU framework, whilst others originate from other international or regional organisations. Add to this the fact that this overview provides no information on the domestic private international law rules that could be applied in any given case, and one begins to appreciate the task imposed on citizens across Europe, as well as legal practitioners in this field. Legal certainty and legal predictability are two of the fundamental key concepts in any just and fair legal order. At present, vulnerable adults are entirely at the bequest of the states involved, not only because not all Member States have ratified the various applicable instruments in this field (see especially the information provided in Table 1), but also because there is no supranational court that can provide binding international decisions to the issues raised. Furthermore, the diversity of these instruments leads to added complexity for those involved.

## 3 The current framework: HAPC 2000

### 3.1 Introduction

As was explained in the introduction to this report, and in Section 2, the current framework for the protection of adults is not coherent. The various instruments applicable are not applicable in all Member States (e.g. the Hague Agency Convention 1978), and those instruments that are applicable in all Member States do not include the protection of vulnerable adults within their scope (e.g. Brussels I (recast) Regulation and the Lugano Convention 2007). Accordingly, the only possible instrument that could provide for improved protection of vulnerable adults is the HAPC 2000. This convention covers the substantive scope of the issues at hand, and the European Parliament has proposed that all Member States ratify this convention to ensure adequate protection of vulnerable adults.

This section will discuss each of the sections of the HAPC 2000 separately dealing with the current framework, as well as identifying the current problems, gaps and issues in this framework. In doing so, the problems will be categorised into two distinct groups. Firstly, those problems that would eventually disappear if all European Union Member States ratified the HAPC 2000. These problems have been labelled *temporary issues*, because they would seemingly disappear if all Member States were to apply the same set of private international law rules. The second set of problems would remain regardless of the ratification of the HAPC 2000, as these problems are inherent to the HAPC 2000 itself, rather than the number of ratifications. These problems have been labelled as *permanent issues*, as they are independent from ratification.

### 3.2 Definitions

The topic at hand deals with the protection of vulnerable adults. Despite the impossibility of providing a concrete, definitive definition (the impossibility of which has clearly been stated by various authors<sup>51</sup>), this section will attempt to illustrate the current boundaries of the HAPC 2000, and thus illustrate the current issues and problems with respect to this framework. Attempting to arrive at a concrete definition would appear to be difficult as this topic deals with an enormous variety of different factual situations, ranging from adults who have been placed under court-appointed guardianship due to mental incapacity to situations in which an elderly person is simply unable to perform certain tasks as a result of old age without necessarily being mentally incapacitated. The enormous scope and variety of physical and mental conditions that are covered, necessitates a flexible solution, and hence the lack of any workable definition.

Instead of providing a concrete definition, the HAPC 2000 delineates boundaries according to which the scope of the instrument is indicated. The HAPC 2000 aims to “determine the State whose authorities have jurisdiction to take measures directed to the protection of the

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<sup>51</sup> See for example R. Frimston *et al*, *ibid*, p. 99 *et seq*. Also mentioned in various interviews: Interview with R. Frimston; Interview with P. Delas; Interview with C. Montana.



person or property of the adult”.<sup>52</sup> In drafting the Convention, the primary goal had the elderly in mind, as the *travaux préparatoires* reveal.<sup>53</sup>

“The adults whom the Convention is meant to protect are the physically or mentally incapacitated, who are suffering from an ‘insufficiency’ of their personal faculties, as well as persons **usually** elderly, suffering from an impairment of the same faculties, in particular persons suffering from Alzheimer’s disease. Although the Commission did not wish to spell this out in the text, to avoid making it pointlessly cumbersome, it accepted that this impairment or this insufficiency could be permanent or temporary, since it necessitates a measure of protection.”

In the Convention itself, it is stated that the HAPC 2000 applies to “the protection in international situations of adults who, by reason of an impairment or insufficient of their personal faculties, are not in a position to protect their interests”. This definition will, therefore, provide the starting point for a closer analysis of the concept of the ‘protection of vulnerable adults’. In doing so, reference must be made to a number of different elements in this definition, namely:

- Those persons covered, i.e. adults and minors
- The impairments covered, i.e. vulnerable and impairment
- The measures covered, i.e. power of representation, power of attorney and measures

### 3.2.1 Persons covered

Firstly, one needs to understand the concept of adulthood. The protection of adults, necessarily involves an understanding of when minority ceases and adulthood commences. According to the vast majority of legal systems around the world, this point is reached on the basis of attained a certain age. The starting point is that adults (i.e. those who have attained the age of majority) are able to make decisions on their own behalf, whereas those who have not yet attained the age of majority are unable to make such decisions, unless certain conditions are satisfied (e.g. parental consent or the type of transaction involved)<sup>54</sup>. For the purposes of the HAPC 2000, the age of majority is taken to be eighteen years of age,<sup>55</sup> and covers those persons who cannot protect their interests due to impairment or insufficiency of their personal faculties.<sup>56</sup> This Convention aims to complement the Hague Child Protection Convention 1996 (hereinafter HCPC 1996). Although in principle the division between minority and majority is clear, grey areas can arise, for example persons between the age of 16 and 18.

There are obviously situations in which a decision may have been issued prior to a person having attained the age of eighteen, yet the intention is that the content of the order should also apply after the age of majority. It is in this respect that the HAPC 2000 is regarded as

<sup>52</sup> Article 1(2)(a) HAPC 2000.

<sup>53</sup> P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: Hcch, 2000, p. 27

<sup>54</sup> R. Frimston *et al*, *International protection of adults*, 2015, p.4.

<sup>55</sup> Article 2(1) Hague Adult Protection Convention 2000.

<sup>56</sup> Article 1(1) HAPC 2000.

a complement to the HCPC 1996, which was influential in preparing the HAPC 2000.<sup>57</sup> This is due to the fact that the scope of the HAPC 2000 is broadened to include measures that were taken with respect to a child under the age of 18, despite the fact that the child has in the meantime attained the age of 18. In accordance with Article 2(2) such measures fall within the scope of the HAPC 2000. Accordingly, the HAPC 2000 is the logical subsequent instrument to the HCPC 1996, together ensuring the protection of an individual from birth to death.<sup>58</sup>

Although the system (of the HAPC 2000 and the HCPC 1996) itself is a coherent and evidently complementary system, the effectiveness of this system is dependent on the ratification of the instrument by Member States. If EU Member States fail to ratify the HAPC 2000, then the system becomes unsustainable. An example can be used to illustrate the current situation.

The competent authority in Germany takes a decision with respect to a minor child. At the time the measure is taken the child is 17 years of age. The protection measure is pronounced for the duration of a year. Prior to her 18<sup>th</sup> birthday, the minor moves to Austria. Currently the HAPC 2000 is in force in both Austria and Germany. As a result the order issued in Germany will be recognised and enforced in Austria under the auspices of the HAPC 2000. If, however, the minor had moved to the Netherlands, the German order could not be recognised under the Hague Child Protection Convention 1996 because the child is no longer under the age of 18, and the Netherlands has not ratified the HAPC 2000. The result is that the recognition and enforcement of the German decision is then dependent on the domestic private international law rules in force in the Netherlands.

In relation to the persons covered by the instruments, the HCPC 1996 and the HAPC 2000 therefore serve to complement one another on an abstract level. However, this fluid, complete system is dependent on all EU Member States having ratified both conventions; a situation which has not yet been achieved with respect to the HAPC 2000.<sup>59</sup> To furthermore place this into perspective the full ratification of the HCPC 1996 took over 14 years (from the entry into force in Slovakia on 1<sup>st</sup> January 2002, until the entry into force in Italy on 1<sup>st</sup> January 2016). Whether such a situation will occur with respect to the HAPC 2000 is uncertain, but certainly possible and even perhaps likely considering that at present the Convention entered into force in 1<sup>st</sup> January 2009, and presently only 7 EU Member States have ratified the Convention. This therefore means that until all EU Member States have ratified the HAPC 2000, the complete system of the interaction of these two conventions with respect to the persons covered is not attained. This issue can be characterised as a *temporary issue*.

<sup>57</sup> E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, p. 3.

<sup>58</sup> P. Lortie, "La Convention de la Haye du 2 octobre 1999 sur la protection internationale des adultes", *International Law FORUM du droit international*, 2000, p. 15; See also P. Lagarde, "La Convention de la Haye du 13 janvier 2000 sur la protection internationale des adultes", p. 160, 165; Borrás, "Una nueva etapa en la protección internacional de adultos", *Revista Electrónica de Geriatria*, 2000, p. 3.

<sup>59</sup> Italy finally ratified the HCPC 1996 on the 30<sup>th</sup> September 2015 and this Convention will enter into force in Italy on 1<sup>st</sup> January 2016, ensuring that this convention applies throughout the whole of the European Union (including Denmark).

Nevertheless, even once all Member States have ratified the HAPC 2000, issues could still arise, as was indicated in one of the interviews that some countries will continue to apply the HAPC 2000 provisions, whereas other states may apply the HCPC 1996 provisions.<sup>60</sup> The lack of a supranational court to solve such disputes in a uniform matter was certainly regarded as a fundamental problem to the proper functioning of the current HAPC 2000 framework. This issue can therefore be deemed to be *permanent issue*.

### 3.2.2 Impairments covered

The broad topic of the added value report is to examine the protection offered to vulnerable adults. The concept of “vulnerable” adult is, however, not defined in any international or European legal instrument. Based on the case law of the European Court of Human Rights and legislation in Member States the concept of ‘vulnerable adults’ can be encapsulated as “individuals who cannot understand or effectively exercise their legal rights because of, for instance, disability, mental impairment, a physical or psychological weakness.”<sup>61</sup> Although this definition was proffered in the context of vulnerable adults in criminal proceedings, the same basic tenets would appear to also hold true in the civil context. Even in the field of criminal proceedings, stakeholders and Member States indicated on multiple occasions that it is very difficult if not impossible to find a definition for vulnerability.<sup>62</sup> The HAPC 2000 and the accompanying explanatory report (Lagarde report) also avoid providing a definition of the term. This report continues in these footsteps and will not attempt to provide a definition to the term.

One of the possible grounds upon which someone can be deemed to be vulnerable is by virtue of an ‘impairment’. The question then arises what exactly is meant with the term ‘impairment’. The HAPC 2000 aims to “determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult”.<sup>63</sup> In drafting the Convention, the primary goal was clearly devoted to the elderly, as the *travaux préparatoires* reveal.<sup>64</sup>

“The adults whom the Convention is meant to protect are the physically or mentally incapacitated, who are suffering from an ‘insufficiency’ of their personal faculties, as well as persons usually elderly, suffering from an impairment of the same faculties, in particular persons suffering from Alzheimer’s disease. Although the Commission did not wish to spell this out in the text, to avoid making it pointlessly cumbersome, it accepted that this

<sup>60</sup> Interview with R. Frimston.

<sup>61</sup> Commission Working Document, Impact Assessment Accompanying the document Proposal for a directive of the European Parliament and the European Council, Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, SWD (2013) 480 final, p. 9.

<sup>62</sup> Commission Working Document, Impact Assessment Accompanying the document Proposal for a directive of the European Parliament and the European Council, Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, SWD (2013) 480 final, p. 20. This is supported in the civil law context by the explanatory report to the HAPC 2000, P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HccH, 2000, p. 27.

<sup>63</sup> Article 1(2)(a) HAPC 2000.

<sup>64</sup> P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HccH, 2000, p. 27

impairment or this insufficiency could be permanent or temporary, since it necessitates a measure of protection.”

It is, therefore, evident that the HAPC 2000 covers a range of ailments, not all of which are required to be either permanent or debilitating. Nonetheless, discussion has also arisen as to whether physical, as opposed to mental impairment or insufficiency is covered under the HAPC 2000. For example,

Daphne is involved in a serious car accident whilst on a skiing holiday in Austria. As a result she is unable to walk and will be confined to a wheelchair. She grants her brother, Edward, a power of representation to act on her behalf when dealing with her personal assets in her home country of Germany. Even though both jurisdictions have ratified the HAPC 2000, the question can still arise whether this issue is to be governed by the HAPC 2000. Despite the need to interpret the Convention in a uniform manner, differences could still occur, leading to the situation that the Austrian authorities could reach a different answer than the German authorities.

Attempts to clarify the matter were rejected by the Special Commission. Accordingly, the Convention itself is silent on this matter. In the academic literature, the opinions are also divided as noted by Long.<sup>65</sup> Clive notes that it “is probably that physical incapacity which is not accompanied by any mental incapacity does not put a person into a position where he or she cannot take decisions, such as to seek help voluntarily or employ an adviser or agent, and thereby project his or her interests.”<sup>66</sup> Fagan does not go so far as to make an unequivocal statement either way, basically reiterating that the HAPC 2000 is indeed silent on the matter.<sup>67</sup> Long explains that the viewpoint held by Clive is perhaps more attuned to the common law approach to vulnerable adults, and instead points to the text of the *travaux préparatoires* which highlights, as can be seen above, that the HAPC 2000 is not restricted to mental impairment. She furthermore proceeds to point out that a specific proposal by the UK delegation to clarify that ‘the incapacities within the scope of the Convention should not be sensory or physical but related to mental faculties or powers of communications’ was rejected during the Special Commission negotiations.<sup>68</sup> Regardless of the standpoint taken, it is clear that this point raises discussion, and therefore legal uncertainty.

Further problems relate to the symmetry between the protection of vulnerable adults and his or her incapacitation. According to Long, the HAPC 2000 breaks with the symmetry between the protection of the vulnerable adult and his or her incapacitation. Hence, the protection does not imply the limitation of his or her legal capacity.<sup>69</sup> From interviews it was regarded that this link has not been entirely removed from the HAPC 2000. It was

<sup>65</sup> J. Long, “Rethinking vulnerable adults’ protection in the light of the 2000 Hague Convention”, *International Journal of Law, Policy and the Family*, 2013, p. 51-73, at 61.

<sup>66</sup> E. Clive, “The New Hague Convention on the Protection of Adults”, *Yearbook of Private International Law*, 2000, §B1

<sup>67</sup> A.R. Fagan, “An analysis of the Convention on the International Protection of Adults”, p. 339.

<sup>68</sup> J. Long, “Rethinking vulnerable adults’ protection in the light of the 2000 Hague Convention”, *International Journal of Law, Policy and the Family*, 2013, p. 51-73, at 62.

<sup>69</sup> J. Long, “Rethinking vulnerable adults’ protection in the light of the 2000 Hague Convention”, *International Journal of Law, Policy and the Family*, 2013, p. 51-73, at 63.

noted that many legal systems require that incapacitation be evident prior to allowing for powers of attorney to be effective. It was suggested by one stakeholder that any future European instrument should equally apply to those cases when the adult concerned is not incapacitated, but simply that all powers of attorney should be covered by the instrument.<sup>70</sup> Such an extension to the substantive scope of the existing framework would entail a fundamental rethink of the aim of any future European instrument. Such an extension, therefore, goes beyond the bounds of the current research report. It is, nonetheless, a topic that deserves attention in a future plan to determine whether the scope of any future European instrument for the protection of vulnerable adults could be extended to the protection of adults in general, regardless of there actually being a need to determine whether incapacitation has already occurred. For the purposes of this report, this possible extension to the substantive scope of any future European instrument will not be discussed.

A problem of a supranational instrument in the form of a Hague Convention is that, despite the public international law obligation to ensure uniformity of interpretation of the Convention, there is no supranational court that can solve disputes arising from the various ways in which a Convention can be interpreted. It is, therefore, entirely feasible that the courts of one Contracting State could bring certain impairments within the scope of the Convention, whereas the courts of a different Contracting State could reach a different interpretation. The friction caused in such situations is evident with respect to the Hague Abduction Convention 1980, where this has even led to the creation of a special working group devoted to the interpretation of one particular provision of the Convention, namely Article 13(1)(b).<sup>71</sup>

The problems identified in this section are therefore to be classified as potentially *permanent issues*. It is not certain that these areas would become issues after all Member States have ratified the HAPC 2000, but the potential for disparate interpretations is certainly evident and apparent.

### 3.2.3 Measures covered

#### 3.2.3.1 Ex post vs. ex ante measures

As Long has indicated,<sup>72</sup> there are two main types of measures that can be distinguished in the current context. The first category, *ex post measures*, is the easiest to deal with as these occur after the incapacitation has already occurred. The vast majority of Member States recognise some form of measure in this respect and therefore this category does not cause the same level of problems as the second category.<sup>73</sup> As such measures would automatically be regarded as protective measures within the context of the HAPC 2000. Such a measure could occur in the following scenario:

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<sup>70</sup> Interview with A. Vrenegoor.

<sup>71</sup> For more information see, <https://www.hcch.net/en/projects/post-convention-projects/article-13-1b>.

<sup>72</sup> J. Long, "Rethinking vulnerable adults' protection in the light of the 2000 Hague Convention", *International Journal of Law, Policy and the Family*, 2013, p. 51-73, at p. 53-58.

<sup>73</sup> *ibid.*

Margriet is involved in a car accident whilst travelling from Slovenia to Austria. She is admitted to hospital in Austria and the court issues a protective measure, granting her brother Niels power of attorney over her affairs. Niels would therefore be appointed as the *Sachwalter* over Margriet's affairs. Such a measure would be regarded as a protective measure, as the adult concerned is unable to look after her own affairs.

In the second category, *ex ante measures*, problems occur because the measure is drafted and enacted prior to the vulnerable person being unable to determine his or her own will. A number of different terms are used to define such a concept, including private mandates, power or representation and anticipatory measures. For the purposes of this report, the term "private mandate" will be used.<sup>74</sup> To ensure a clear impression of the issues involved, consider the following example.

Oscar, a Swedish citizen living in Wales, wishes to regulate his affairs should he ever come to be unable to do so. He has been diagnosed with Stage II lung cancer and so knows how crucial this could be in the future. He wishes to designate his sister, Patricia, currently living in Portugal to take on this task. He drafts a Lasting Power of Attorney in accordance with English law. The question arises whether any form of private mandate drafted by Oscar would be recognised in Sweden and Portugal if and when Oscar becomes incapacitated and unable to deal with his own affairs.

When dealing with private mandates, Member States can roughly be subdivided into two distinct groups. On the one hand, one can identify a group of countries in which the court has the final decision-making power, whereas there are, on other hand, Member States in which the principle of personal autonomy supersedes the principle of court-based decision-making power. This distinction is, therefore, important to appreciate when dealing with issues related to the cross-border recognition of powers of representation.

One of the major difficulties in dealing with issues in this field is the problem that the aim of a power of attorney is that it should survive the incapacity of the granter. This is a concept that has long been recognised in common law countries, but is very foreign for many civil law jurisdictions. At the time of drafting the HAPC 2000, France for example maintained that a mandate necessarily came to an end in the event of the incapacity of the person concerned.<sup>75</sup> The following section will, therefore, first deal with the general possibilities to draft powers of attorney, before dealing more specifically with the possibility to make living wills, or lasting power of attorney that continue to survive after the death of the person concerned.

### **3.2.3.2 National protection measures**

Although this report is focussed on the cross-border implications with respect to the protection of vulnerable adults, and does not propose to provide analysis of substantive law differences between Member States, it is necessary to briefly examine the various national, domestic constructions available, in order to obtain a clear picture of the topic at

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<sup>74</sup> In accordance with the current terminology most consistently used in academic literature, see R. Frimston *et al*, *International protection of adults*, 2015, Chapter 9.

<sup>75</sup> See R. Frimston *et al*, *International protection of adults*, 2015, p. 154.

hand. A distinction will be drawn here between (a) general powers of attorney, and (b) advance directions.

(a) General powers of attorney

The legal concept “continuing powers of attorney” was first introduced in English speaking countries, and it is found throughout Australia, Canada and the United States of America. After the Council of Europe adopted Recommendation No. R (99) 4, **Scotland** enacted the Adults with Incapacity (Scotland) Act 2000, which has been improved in light of experience by an act of 2007.<sup>76</sup> The 2000 act, as amended, is a code with unifying principles and provisions, which includes continuing powers of attorney.

Various other jurisdictions also provide for similar institutions, albeit each with its own national flavour. In **England and Wales**, the 1985 legislation was replaced by the Mental Capacity Act 2005.<sup>77</sup> In **Ireland**, a bill to change the 1996 Power of Attorney Act was presented to Parliament at the beginning of 2007 (Mental Capacity and Guardianship Bill 2007, No. 12).<sup>78</sup> In states such as **Belgium**,<sup>79</sup> **Denmark**,<sup>80</sup> **Finland**,<sup>81</sup> **Germany**<sup>82</sup> and **the Netherlands**,<sup>83</sup> powers of attorney subsequent to the granter’s incapacity have been in use for some years without specific regulations other than the general legislation on powers of attorney.<sup>84</sup>

In **Germany**, the situation changed when the Second Guardianship Modification Act of 21 April 2005 entered into force in July 2005 with the purpose of strengthening self-determination for persons unable to protect their own interests.<sup>85</sup> Continuing powers of attorney, called *Vorsorgevollmacht*, constitute its main tool. In **the Netherlands**, the main tool falling within the scope of the current discussions is the living will (*levenstestament*).<sup>86</sup> In **Spain**, new legislation introduced a new provision in Article 1732 Spain Civil Code whereby the mandate terminates upon supervening incapacity of the granter, unless the mandate provides that it should continue in that event or unless the mandate has been given for the purpose of exercise in the event of the granter’s incapacity as assessed

<sup>76</sup> A. Ward, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 223.

<sup>77</sup> As supplemented by Statutory Instrument 2007 No. 253 on lasting powers of attorney, enduring powers of attorney and public guardian regulations C. van Overdijk, in: R. Frimston *et al*, *International protection of adults*, 2015, p.183.

<sup>78</sup> P. Richard-Clarke, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 273.

<sup>79</sup> C. van Overdijk and W. Pintens, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 446.

<sup>80</sup> C. van Overdijk and S. Borch, in: R. Frimston *et al*, *International protection of adults*, 2015, p.521.

<sup>81</sup> M. Hellin, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 359.

<sup>82</sup> V. Lipp, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 379.

<sup>83</sup> R. Frimston, C. Engelbertink and A. Vrenegoor, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 571-572.

<sup>84</sup> See also Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, § 24

<sup>85</sup> A series of legislative amendments have taken place over the years: *Erstes Gesetz zur Änderung des Betreuungsrechts* (1. BtÄndG) of 25 June 1998, *Bundesgesetzblatt* (BGBl.), 1998 I, p. 1580; *Zweites Gesetz zur Änderung des Betreuungsrechts* (2. BtÄndG) of 21 April 2005, BGBl. 2005, I. p. 1073; *Drittes Gesetz zur Änderung des Betreuungsrechts* (3. BtÄndG) of 29 July 2009, BGBl. 2009, I. p. 2286; *Gesetz zur Stärkung des Funktionen der Betreuungbehörde* of 28 August 2013, BGBl. 2013 I p. 3393.

<sup>86</sup> See also J. Long, p. 53-57, 63

according to the granter's instructions.<sup>87</sup> In **Austria**, the law was amended in 2007 to provide for continuing powers of attorney, called *Vorsorgevollmacht*.<sup>88</sup> In **Finland**, in April 2007 the Parliament passed *Lag om interessevaktningsfullmakt*<sup>89</sup> concerning representation powers of attorney, which entered into force on 1 November 2007. In **France**, Law No. 2007-308 of 5 March 2007 (JORF No. 56) on the reform of the legal protection of adults entitled "*Mandat de protection future*" and Articles 477- 494 of the Civil Code introduced a new form of legal protection for adults, including continuing powers of attorney. It entered into force on 1 January 2009.<sup>90</sup> Work is in progress in some other states. In 2009, a Law Reform Committee in **Sweden** published a report on "Questions concerning guardians and substitutes for adults", containing a proposal for a bill on future powers of attorney (*Lag om Fremtidsfuldmagter mv*).<sup>91</sup> According to paragraph 117 *et seq*, **Estonian** Civil Code, a right of representation may be granted by a transaction or authorisation, which would appear to equate to a private mandate or power of attorney. In the **Czech Republic**, private mandates do not automatically cease upon the incapacity of the granter, but there is also no regulation permitting the coming into force of a power of attorney upon incapacitation. **Malta**, on the other hand, does not include provision for private mandates. Although an individual may grant another person an ordinary power of attorney, such a power of attorney automatically terminates upon the grantee becoming incapacitated.<sup>92</sup>

Although outside of the European Union, it is perhaps also interesting to note that neighbouring countries are also modernising their legislation in this field. In **Switzerland**, the modification of 19 December 2008 of the Swiss Civil Code (*Protection de l'adulte, droit des personnes et droit de la filiation*) foresees new legal instruments aimed at self-determination in case of incapacity. Firstly, this would allow a natural or legal person to be responsible for providing the granter with personal assistance or for representing him or her in the event that he or she becomes incapable of proper judgment. Secondly, this law regulates the ways of deciding, in advance directives, which medical treatment the granter would consent to in the event that he or she becomes incapable of proper judgment. In **Norway**, a Law Reform Committee published its report "Guardianship" (*Vergemål*) in 2004.<sup>93</sup> In accordance with this report, the government proposed a bill to the parliament in September 2009 proposing to introduce powers of attorney into Norwegian law.<sup>94</sup>

The experience of states where continuing powers of attorney have been in place for some time indicates that adults of all ages increasingly make use of them. In England and Wales, under the old system, the registration of enduring powers of attorney took place at the onset of the granter's incapacity. The registration of the new lasting powers of attorney

<sup>87</sup> *Ley 41/2003 de 18 de noviembre de protección patrimonial de las personas con discapacidad*. See further R. Frimston, M. de los Reyes Sánchez Moreno and J. Delgado Galindo, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 616.

<sup>88</sup> Law Gazette 2006, part I No. 92, Art. 284 f, 284 g and 284 h of the Civil Code. See further, A. Perscha and R. Frimston, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 332-334.

<sup>89</sup> Law No. 648/2007.

<sup>90</sup> P. Delas, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 370.

<sup>91</sup> *Frågor om Förmyndare och ställföreträdare för vuxna*, SOU 2004:112.

<sup>92</sup> R. Frimston, C. Overdijk and A. Micallef, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 370.

<sup>93</sup> NOU 2004:16.

<sup>94</sup> Chapter 10 (*Fremtidsfuldmagter mv*), Ot.prp.nr. 110 (2008-2009) *Om lov om vergemål (vergemålsloven)*.



must take place before the attorney can use them, regardless of whether the granter has lost capacity. Once registered, the attorney may use the powers and many powers come into force immediately after signing. In the first 13 months after the new system came into force (1 October 2007), the number of registrations of enduring and lasting powers of attorney was 69,377.<sup>95</sup>

In **Scotland**, the present regime of continuing powers of attorney was introduced in 2001. Since then, the number of registrations has continued to grow. Documents are most commonly registered at the time of granting, rather than later at the time of loss of capacity. Some 5,592 powers of attorney were registered in the year to 31<sup>st</sup> March 2002. The number rose to 18,113 in the year to 31<sup>st</sup> March 2005, and to 32,066 in the year to 31<sup>st</sup> March 2008. The figure for 2007/2008 could usefully be compared with the number of guardianships in that year (only 876). In 2007/2008, 791 of the registered powers conferred only personal welfare powers, 1,850 only financial powers, and 14,451 both welfare and financial powers. In 2001/2002, 29% of powers of attorney registered concerned personal matters, in 2003/2004 the number had risen to 48%, and now it is 82%. Some 80% of granters were 60 years old or more.<sup>96</sup>

In **Germany**, it was estimated that more than 1.5 million continuing powers of attorney agreements had been concluded by autumn 2008, and the proportion of adults whose affairs were managed by an attorney rather than a publicly appointed legal representative was constantly increasing. According to a recent study, 30% of residents in German care homes for the elderly were represented by an attorney. Furthermore, in **Austria**, 5,155 registrations were made from the entry into force of the new legislation on 1 July 2007 to October 2008.<sup>97</sup>

#### (b) Advance directions

Advance directions are recognised in a number of member states. They are found either in legislation concerning measures of protection of incapacitated adults, in legislation on continuing powers of attorney, or in health legislation. All these rules permit capable persons to make statements about certain aspects of their lives in the event of incapacity. Some may be legally binding, others may be wishes which must be taken into consideration and given due respect. As they may deal with health issues, they are often called “living wills” or *Patientenverfügung*.<sup>98</sup>

In **Austria**, instructions may be given to a medical doctor orally or in writing (*Beachtliche Patientenverfügung*) about objections to future medical treatment. They are not legally

<sup>95</sup> Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, Recommendation CM/Rec(2009)11 and explanatory memorandum, p. 22, §28.

<sup>96</sup> Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, Recommendation CM/Rec(2009)11 and explanatory memorandum, p. 22, §29.

<sup>97</sup> Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, Recommendation CM/Rec(2009)11 and explanatory memorandum, p. 22, §30.

<sup>98</sup> *Ibid.* § 32

binding, but should be used as guidelines. The *Verbindliche Patientenverfügung* is a binding instruction made in writing with a lawyer or a public notary following the receipt of detailed and extensive information from the person concerned. Such instructions have effect for a five-year period and can be renewed. If requested, such a binding instruction may be registered in a centralised register, *Patientenverfügungsregister*, of the Austrian Chamber of Notaries.<sup>99</sup>

In **Denmark**, where the Health Law provides for “living wills” (*livstestamenter*), the patient may express wishes as regards treatment in case he or she is no longer able to make decisions him/herself.<sup>100</sup> The same holds true in **Finland**, where the Act on the Status and Rights of Patients imposes an obligation on health-care professionals and the patient’s representatives to respect the previously expressed will of the patient.<sup>101</sup> In the Mental Capacity Act 2005 of **England and Wales**, there are also some principles on advance decisions limited to decisions to refuse treatment. In **Belgium, France and the Netherlands**, there is a possibility to state wishes regarding care, and eventual refusal of a treatment in the event of incapacity. Another possibility relates to statements by the person concerned about who should be guardian, if a decision of guardianship is to be made (*Betreuungsverfügung* or *Sachwalterverfügung* in German-speaking countries). This is the case in **Austrian, Belgian, French, German and Italian** law.<sup>102</sup>

#### (c) Cross-border implications

This brief overview illustrates that there are a large variety of solutions available across the member states of the European Union. However, this overview also illustrates that this diversity creates a great deal of issues in an international setting. How will the Dutch *levenstestament* be recognised in France or Germany? How will Estonia respond to a French *mandat de protection future*?

#### 3.2.3.3 Measures covered by HAPC 2000

The HAPC 2000 applies to the protection of those adults falling within the scope of the Convention.<sup>103</sup> Accordingly, the HAPC 2000 will apply to all measures aimed at protecting vulnerable adults. Furthermore, matters that are not directly related to the protection of adults are not covered by the Convention. An example would be a measure taken to protect the spouse of a vulnerable adult.<sup>104</sup> The exact scope of the measures to be covered can be gleaned from Articles 3 and 4. Article 3 contains a list of illustrative matters that are at any rate covered by the Convention.<sup>105</sup> Article 4, on the other hand, contains an exhaustive list of those measures that are excluded from the scope of the Convention. The scope of the matters excluded by virtue of Article 4 can be divided into various categories.<sup>106</sup>

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<sup>99</sup> *Ibid.* § 33

<sup>100</sup> *Sundhedslov* nr 546 of 24 June 2005. See also Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, § 34

<sup>101</sup> No. 785 of 1992.

<sup>102</sup> Council of Europe, *Principles concerning continuing powers of attorney and advance directives for incapacity*, §§ 35-38

<sup>103</sup> Article 1(1) HAPC 2000

<sup>104</sup> E. Clive, “The New Hague Convention on the Protection of Adults”, §B2

<sup>105</sup> *Ibid.*

<sup>106</sup> P. Lagarde, “La Convention de la Haye du 13 janvier 2000 sur la protection internationale des adultes”, *Revue critique de droit international privé*, 2000, p. 166.

Firstly, those matters that by virtue of the nature of the HAPC 2000 do not fall within the nature of the matters covered,<sup>107</sup> e.g. maintenance obligations, succession etc. Other European instruments, e.g. Maintenance Regulation, Succession Regulation etc., for the most part also cover these matters. Secondly, those matters which are not measures of protection, e.g. because the measure is directly solely towards public safety. Thirdly, those matters that are not directed towards an individual adult; measures of a general nature are not covered by the Convention.<sup>108</sup> Despite these general exclusions, a number of particular exclusions should be dealt with in greater detail.

With regard to trusts, it is clear from the Lagarde Explanatory Report that this exclusion is to be construed restrictively, in that it should be read as entailing an exclusion of those matters that fall within the Hague Convention on the Law Applicable to Trusts and their Recognition 1985.<sup>109</sup> Imagine the following situation.

Iris lives in England and has set up a trust to ensure that her daughter's education is secure after her death, as she suffers from terminal cancer. The trust itself is also to be administered by a trustee if and when Iris is unable to manage her own affairs. The trust itself would fall outside of the scope of the HAPC 2000. The issues regarding the establishment of the trustee would not be excluded from the scope of the HAPC 2000, as these are matters that are not covered by the Hague Convention on the Law Applicable to Trusts and their Recognition 1985.

Complex problems arise with respect to testamentary dispositions of property. According to Article 3(f) HAPC 2000, the administration, conservation or disposal of an adult's property falls within the scope of the HAPC 2000. However, according to Article 4(d) HAPC 2000, the law of succession falls outside the scope of the HAPC 2000. This means that if the law applicable to the succession imposes certain requirements with regard to the method or manner an adult under a protective measure must accept or renounce the succession, the HAPC 2000 will not apply to the protective measure. Instead the law applicable to the succession will govern such issues. Since the 17<sup>th</sup> August 2015, this now falls within the scope of the European Succession Regulation, and will therefore enjoy uniform interpretation across the Member States (with the exception of the United Kingdom, Ireland and Denmark).<sup>110</sup>

### 3.2.3.4 Matters excluded from the scope of HAPC 2000

Before dealing further the technicalities posed by the power of representation in the form of advance directions, it is first necessary to determine whether such measures even fall within the scope of the HAPC 2000, as this is certainly not self-evident at present. It has been suggested that private mandates do not constitute protective measures in the sense of the HAPC 2000 and therefore fall outside the substantive scope of the Convention. This

<sup>107</sup> A. Borrás, "Una nueva etapa en la protección internacional de adultos", *Revista Electrónica de Geriátria*, 2000, p. 4.

<sup>108</sup> *Ibid.*

<sup>109</sup> P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HcCH, 2000, p. 34.

<sup>110</sup> See also R. Frimston *et al*, p. 106.

statement can be supported with reference to the text of the Convention itself,<sup>111</sup> the Explanatory Report to the Convention,<sup>112</sup> academic literature,<sup>113</sup> as well as an analogous reference to the HCPC 1996.<sup>114</sup> That being said, private mandates do appear in the Convention in the context of Article 15, which will be discussed later when dealing with applicable law (Section).

It has furthermore been suggested in academic literature that the following aspects would also be deemed not be covered by the HAPC 2000, namely:

- Advance decisions to refuse medical treatment;
- Advance statements as to a particular form of medical treatment;
- Statements of wishes and feelings;
- Joint accounts;
- Pure factual measures (e.g. wearing a bicycle helmet);
- Decisions made by medical practitioners;<sup>115</sup> and
- Instruments executed by adults whose faculties are impaired but how are not the subject of a protective measure

The first three categories may fall within the scope of the HAPC 2000 if they are included within a relevant private mandate.<sup>116</sup> In principle, these matters currently do not fall within the scope of any other European instrument, and therefore would be left to the private international law rules of the various Member States. As a result there is no harmonised or unified approach to these issues within the European Union, which in turn leads to diverse and diffuse results. Having identified that this is the case, the next question is whether these issues *should* be brought within the scope of any future European instrument.

### 3.2.3.5 Other issues

In the interviews conducted as part of this report, it was indicated that the HAPC 2000 applies when a person becomes incapacitated, but the HAPC 2000 does not provide for the nuance between those situations when the person has become incapacitated for certain transactions, but not for others.<sup>117</sup> The current “on/off” system provided for by the HAPC 2000 is, therefore, problematic in practice.<sup>118</sup> The HAPC 2000 would apply from the

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<sup>111</sup> Article 38, dealing with the certificates that can be drafted, refers to situations “where a measure of protection has been taken or a power of representation confirmed.” In the situation outlined with Oscar, the private mandate was never *confirmed*. This is furthermore supported with reference to the temporal scope provided for in Article 50(2), which notes a different scope applicable to those private mandates that fall within the scope of Article 15 HAPC 2000.

<sup>112</sup> See P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HcCH, 2000, §§ 93, 94, 96, 106, 109, 124, 134 and 146.

<sup>113</sup> E. Clive, “The New Hague Convention on the Protection of Adults”, *Yearbook of Private International Law*, 2000, p. 15 and R. Frimston *et al*, *International protection of adults*, 2015, p.156.

<sup>114</sup> See N. Lowe and M. Nicholls, *The 1996 Hague Convention on the Protection of Children*, Bristol: Jordans, 2012, §2.6-2.7 and E. Clive, *The New Hague Convention on Children*, *Juridical Review*, 1998, p. 171.

<sup>115</sup> Bucher refers, for example, to the fact that a medical practitioner is not an authority in the sense of the HAPC 2000. It has also been suggested that acts sanctioned by judicial and administrative authorities on purely ethical grounds would also fall outside the substantive scope of the Convention. A. Bucher, “La Convnetion de la Haye sur la protection internationale des adultes”, *Revue suisse de droit international et de droit européen*, 2000, p. 44.

<sup>116</sup> See also R. Frimston *et al*, p. 107-108.

<sup>117</sup> Interviews with A. Vrenegoor, R. Frimston, P. Delas.

<sup>118</sup> Interview with R. Frimston.

moment that a person has become incapacitated and then the power of attorney granted would apply in its entirety; the nuance that the power of attorney may only apply to certain types of financial transactions was believed not to be possible under the HAPC 2000.<sup>119</sup> The following example was provided in the interviews.

Joyce is 75 years old and lives in the Netherlands. She is still able to move around and do her daily activities, but with increasing difficulty. She wishes for her son, Keith, who lives in the Germany to carry out certain tasks on her behalf, such as managing her financial affairs. She seeks the assistance of a local Dutch notary and drafts a general power of attorney, known as a *levenstestament*. This document provides the agent with a power of attorney that commences immediately, regardless of whether the principal is incapacitated. Joyce is the owner of a ski chalet in south Germany, which she now wishes to sell. Keith is confronted with the problem that unless the *levenstestament* is recognised in Germany, he will not be entitled to act on his mother's behalf.

### 3.3 Geographical scope

The geographical scope of the HAPC 2000 is dependent upon the private international law provisions at stake. The geographical scope of the instrument is different depending upon whether the question relates to jurisdiction, applicable law or recognition and enforcement of judgments.

#### 3.3.1 Geographical scope: Jurisdiction

It is implicit in the HAPC 2000, as is the case in the HCPC 1996 that the geographical scope<sup>120</sup> of the HAPC 2000 is limited to those cases in which the adult concerned is habitually resident in a Contracting State. If the vulnerable adult concerned is not habitually resident in a Contracting State then the Convention is geographically not applicable, and States are free to utilise their domestic, national rules of international jurisdiction.<sup>121</sup>

This limited geographical scope is a standard feature of Hague instruments, but has recently begun to disappear in European private international law instruments. The recently enacted European Maintenance Regulation and the European Succession Regulation both depart from the premise that the national, domestic rules on jurisdiction are to be completely replaced by the European rules contained in the regulations. Although this feature is not explicitly included in a provision of the instrument, reference is made to this position in the preamble. It is stated in recital 12:

“In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on

<sup>119</sup> Interview with A. Vrenegoor.

<sup>120</sup> This concept is also referred to as the formal scope of the instrument.

<sup>121</sup> E. Clive, “The New Hague Convention on the Protection of Adults”, *Yearbook of Private International Law*, 2000, p.7

jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.”

This citation illustrates that the new trend of European private international law departs from a position of universal application, thus negating the need for reference to national, domestic rules of international jurisdiction. Although this trend has been adopted in the Maintenance Regulation and the Succession Regulation (both dealing with cross-border familial situations), this trend has not been adopted in other civil and commercial law instruments. The recently enacted Brussels I (recast) has opted to continue the previous position in the Brussels I Regulation, and opted for a limited geographical scope, restricting the application of the Regulation to situations in which the defendant has his or her domicile in a Member State.<sup>122</sup>

In the field of family and inheritance law, the European private international law landscape has been confronted with the issue of the limited geographical scope of the applicable instruments. The first European instrument in the field of family law was the Brussels II-bis Regulation.<sup>123</sup> In Articles 6 and 7 of this Regulation reference was made to the geographical scope of the Regulation, and the interaction between this Regulation and the national, domestic rules of international jurisdiction. The exact delineation between the European rules and the national rules has led to a great deal of confusion and uncertainty, ultimately leading to a reference for a preliminary ruling from the European Court of Justice. In the *Sundelind Lopez* case, the European Court explained how the geographical scope of the Brussels II-bis instrument was to be interpreted in light of Articles 3, 6 and 7. Even after this decision, uncertainty still surrounds certain aspects of the delineation of these two instruments.<sup>124</sup>

The issue of the restricted geographical scope of the HAPC 2000 is a *permanent issue*, as even if all Member States ratify the Convention, reference will still need to be made to domestic rules of jurisdiction in cases where the adult concerned does not have habitual residence in a Member State. This can obviously lead to differences between the domestic rules of jurisdiction applicable in various Member States.

### **3.3.2 Geographical scope: Applicable law**

According to Article 18 HAPC 2000, the Chapter on applicable law has a universal application, meaning that the HAPC 2000 will apply even if the designated law is that of a

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<sup>122</sup> Certain exceptions are applicable to this rule, but this is not relevant for the purposes of this report at this stage. The exceptions are contained in articles 18, 21, 24 and 25.

<sup>123</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) No 1347/2000, OJ L338-29.

<sup>124</sup> In Dutch literature, for example, reference has been to the uncertainty as to the application of the instrument if the respondent is the national of Member State, but both parties live outside of the Member States and the claimant possess a nationality different to that of the defendant. A.E. Oderkerk, “Ontbinding van het huwelijk”, in: T. De Boer and F. Ibili (eds.), *Nederlands internationaal personen- en familierecht. Wegwijzer voor de rechtspraktijk*, Kluwer: Deventer 2012, p. 136-138.

non-contracting state.<sup>125</sup> This is also in line with the vast majority of Hague instruments in field of applicable law, e.g. Hague Child Protection Convention 1996 and the Hague Maintenance Protocol 2007. In practice, the universality of the applicable law rules does not cause any significant problems with respect to the application of this Convention, especially since there are no other conventions applicable, thus avoiding complex questions of concurrence (which do occur for example with respect to the HCPC 1996 and the HCPC 1961, as well as the Hague Maintenance Protocol 2007 and the Hague Maintenance Convention 1973).

### 3.3.3 Geographical scope: Recognition and enforcement

The rules on recognition and enforcement of judgments are contained in Chapter IV of the Convention. Both sets of rules (i.e. for recognition on the one hand, and enforcement on the other) are based on the principle of reciprocity. Only those measures taken by authorities of a Contracting State will be entitled to be recognised (article 22) and enforced (article 25) in another contracting state. Obviously this creates a highly unequal situation exemplified with the following scenarios:

Albert grants Bertina a power of attorney over his property and medical affairs. Albert and Bertina move from France to Germany. The power of attorney granted in France is entitled to recognition and enforcement in Germany under the HAPC 2000.

Carl grants Daphne a power of attorney over his property and medical affairs. Carl and Daphne move from France to the Netherlands. The power of attorney granted in France is not entitled to recognition and enforcement in the Netherlands under the HAPC 2000.

Obviously this situation is highly unsatisfactory within the European Union, as the limited geographical scope of the recognition and enforcement rules means that prior to the ratification of the HAPC 2000 by *all* Member States, two groups of states will continue to exist in the European Union, thus leading to uncertain and unjustifiable results across the EU. This problem is, therefore, a *temporary issue*, as this issue will be solved if all Member States ratify the HAPC 2000.

## 3.4 Jurisdiction

Chapter II HAPC 2000 contains a set of jurisdictional rules to be applied in cases falling within the scope of the HAPC 2000. In general these jurisdictional grounds ensure that the judicial and/or administrative authorities of the state in which the adult concerned has his or her habitual residence will be competent (Article 5). During the discussion leading to the enactment of the HAPC 2000, an important and highly controversial debate took place with respect to the role of nationality as a connecting factor in the context of the rules of jurisdiction. Despite the fact that the initial debate was highly fraught and many proposals were rejected, the ultimate solution adopted by the HAPC 2000 received widespread support.<sup>126</sup>

<sup>125</sup> See also A. Borrás, “Una nueva etapa en la protección internacional de adultos”, *Revista Electrónica de Geriátria*, 2000, p.6

<sup>126</sup> E. Clive, “The New Hague Convention on the Protection of Adults”, *Yearbook of Private International Law*, 2000, §III.A.

According to the HAPC 2000, habitual residence remains the main ground upon which jurisdiction can be based (Article 5 HAPC 2000). Alongside this general ground, nationality plays a secondary jurisdictional role, in the form of a *forum non conveniens* rule (Article 7). This provision provides that the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property of the adult. This assumption of jurisdiction is, however, restricted to the court of the adult's nationality reaching the conclusion that they are in a better position to assess the interests of the adult, after having advised the courts under Article 5 or Article 6(2). The jurisdictional rules are themselves very user friendly and cause little problem in their execution.<sup>127</sup> In fact, from some telephone interviews,<sup>128</sup> it was stated that it would be better to use the same ground as listed in the HAPC 2000, as the jurisdictional rules create so few problems.

However, the jurisdictional rules contained under the HAPC 2000 raise three crucial issues. The first relates to those issues that will arise in the period prior to all Member States having ratified the HAPC 2000. As stated, these issues can be classified as *temporary issues* as these issues will disappear from the moment that all Member States ratify the HAPC 2000. Currently only 7 EU Member States have ratified the HAPC 2000 and therefore apply the rules contained therein. The following examples will explain the difference according to the current state of affairs.

Patricia, a Croatian national, is habitually resident in Germany. Germany has ratified the HAPC 2000 and therefore the German courts would have jurisdiction to deal with issues falling under the scope of the HAPC 2000. Croatia has not ratified the HAPC 2000, and would therefore apply their own national law. According to the HAPC 2000, the German courts would have jurisdiction because according to Article 5 HAPC 2000, Patricia has her habitual residence in a Contracting State. According to Croatian law, the Croatian courts would also have jurisdiction because Patricia is Croatian.<sup>129</sup> As a result courts in both countries could claim jurisdiction, thus leading to conflicting decision. If, on the other hand, Patricia had French nationality, then the answer would be different because France has ratified the HAPC 2000. Therefore, before the French courts could claim jurisdiction on the basis of Patricia's French nationality, then they would first have to consult the German authorities in accordance with Article 7 HAPC 2000.

A second issue relates to a potential *permanent issue*, i.e. one that will not disappear once all Member States have ratified the HAPC 2000. As stated in the previous paragraph, the HAPC 2000 only applies in those situations in which the adult concerned has habitual residence in a Member State.<sup>130</sup> Therefore, in those situations when the question arises whether a judicial or administrative authority in the EU has jurisdiction with respect to a matter falling within the scope of the HAPC 2000 and the adult concerned has habitual

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<sup>127</sup> There were no issues with respect to the application of the jurisdiction rules indicated by any of those interviewed.

<sup>128</sup> Interviews with A. Vrenegoor and R. Frimston.

<sup>129</sup> A. Ward and I. Milas Laric, in: R. Frimston *et al*, *International protection of adults*, 2015, p. 514.

<sup>130</sup> Article 5 HAPC 2000; See also E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, p. 7



residence outside of the EU, all Member States (regardless of whether they have ratified the HAPC 2000), will apply their national domestic rules of internal jurisdiction. This situation will necessarily lead to diversity of result, as has previously been indicated with reference to the geographical scope of application of the Brussels II-bis Regulation in the field of divorce.

The third category of cases also refers to a permanent problem, which arises due to the fact that the HAPC 2000 does not provide for the possibility of a choice of court clause.<sup>131</sup> Although Article 15 HAPC 2000 (which will be discussed in Section 3.5 below) provides for the possibility of a choice of law clause, Chapter II does not provide for the possibility of a choice of jurisdiction clause. Given the increased acceptance of choice of court clauses in family law cases in recent instruments,<sup>132</sup> it is certainly to be regarded as a gap in the current regulatory framework that an adult cannot provide prior designation of those authorities competent to address matters falling within the scope of this report.

The fourth category of problems identified in the literature relates to the lack of a definition for the concept of habitual residence<sup>133</sup>. It has been proposed, amongst others by Frimston, that this concept could be defined further by the European Union in any future EU instrument. Although at first glance, providing a definition to the concept of habitual residence appears advantageous, it has on numerous occasions been noted that the concept of habitual residence is attractive exactly due to the fact that it is not a rigid, legal concept, but instead a flexible factual concept that provides for flexibility and thus caters for every situation. As put by Clive and Lagarde, the concept of habitual residence was accepted unanimously, thus this must be viewed as an important advance.<sup>134</sup> Moreover, as emphasised by Lagarde, the concept should remain factual. Implementing a quantitative or qualitative definition to the concept in the HAPC 2000 would challenge its interpretation in the various other conventions in which it is used.<sup>135</sup>

Nevertheless, it is necessary to acknowledge that the lack of a definition does create legal uncertainty, which is to be regarded as a *permanent issue*. In this context, it is perhaps illustrative to note the solution adopted in the Succession Regulation. This Regulation also fails to provide a legislative definition of the concept of habitual residence, however, the recitals to the Regulation do provide for indications as to those criteria that can play a role in determining the habitual residence of the deceased. In this way, flexibility is retained in the Regulation itself, but the recitals assist in ensuring a uniform interpretation of the concept.

<sup>131</sup> This issue was raised during the interview with R. Frimston.

<sup>132</sup> Article 12 Brussels II-bis Regulation, Article 4 Maintenance Regulation, Article 5 Succession Regulation, Article 25 Brussels I (recast) Regulation, as well as the current debate surrounding choice of court clauses for divorce cases under the Brussels II-bis Regulation.

<sup>133</sup> See also P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HccH, 2000, §49, p. 39

<sup>134</sup> E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, §C2; Lagarde Report §49; G. Dehart, p.5

<sup>135</sup> P. Lagarde, *Explanatory Report for the Convention on the International Protection of Adults*, The Hague: HccH, 2000, §49

### 3.5 Applicable Law

#### 3.5.1 General rules

As stated earlier, those states party to the HAPC 2000 apply the applicable law rules in all cases, resulting in the *erga omnes* application of these choice of law rules. The content of the rules themselves was not subject to intense discussion during the negotiations of the HAPC 2000, as the application of the *lex fori* encountered little resistance.<sup>136</sup> Various commentators have welcomed this principle as important in promoting the administration of justice.<sup>137</sup> In fact, no interviewee referred to issues with respect to the application of the rules of applicable law; even the Central Authorities noted the easy application of these rules.<sup>138</sup> Article 13 HAPC 2000 is very similar to Article 15 HCPC 1996 and from the point of view of convenience and practicality the application of the *lex fori* is relatively uncontroversial. Since all Member States were parties to the negotiations leading to the final text of the HAPC 2000, it is therefore presumed that the application of this rule would also be without objection within the entire EU.

#### 3.5.2 Private mandates

The main difference between the operation of the HAPC 2000 and the HCPC 1996 is the provision for the possibility to make a choice of law clause and thus designate the applicable law (Article 15 HAPC 2000); this option is not available under the HCPC 1996. This is an important provision as it grants effect to power of attorneys that are possible in some Member States and not in others. The fact that the adult concerned is only granted a limited list of legal systems from which he or she is permitted to choose, strikes a balance between the principle of personal autonomy and the idea that these issues relate to matters that should not be at the free disposal of the parties involved.<sup>139</sup> Accordingly, Article 15 HAPC 2000 not only provides for increased flexibility, but it can also be used to enable the choice of law of the place where the property of the vulnerable individual is situated, thus ensuring a highly pragmatic application of the law.<sup>140</sup> This provision can be used in the following way.

Stephanie is a French citizen living in Scotland. She wishes to draft a lasting power of representation in favour of her brother, Thomas, who lives in France. Stephanie drafts the power of attorney and two years later returns to France. One year later, she develops MS and rapidly becomes unable to take care of herself. Her brother now wishes to use the Scottish power of attorney, which has been drafted in his favour.

Although the acknowledgement of the principle of party autonomy does not cause much controversy any more, the practical application of the Convention rules does raise a number of interpretation issues. Article 15(1) HAPC 2000 states that the existence and

<sup>136</sup> Article 13(1); See also E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, §D1

<sup>137</sup> See, for example, P. Mostermans, "A New Hague Convention on the international protection of adults" *International Law FORUM du droit international*, 2000, p. 10

<sup>138</sup> Interview with German Central Authority and written answers from French Central Authority.

<sup>139</sup> De Hart, p. 5.

<sup>140</sup> E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, §D1

extent of a power of attorney is to be governed by the law of the state of the adults' habitual residence at the time the power of attorney was executed, or the law designated by the adult concerned. According to Article 15(3) HAPC 2000, the law of the state in which they are exercised governs the manner of exercise of such powers of representation.

In the case that the law designated by the adult concerned is not congruent with the law of the state in which the power is to be used, the question arises to those issues that fall within the scope of Article 15(1) HAPC 2000 and those issues that fall within the scope of Article 15(3) HAPC 2000. An inherent disadvantage of the HAPC 2000 is that such interpretation issues cannot be laid before a supranational court. Instead, the supreme judicial body in each Contracting State is competent to issue rulings on the interpretation of these provisions. Obviously, this can and often does lead to different results being adopted in different Contracting States. Although inherent and to some degree acknowledging in a global setting, within the European Union, such a result would appear to be less acceptable, as this will lead to different substantive results being achieved in similar cases in different Member States, thus leading to a decrease in legal certainty and a possible increase in the obstacles to the free movement of persons.

According to French law, a private mandate (*mandat*) must be executed in notarial (*authentique*) or in private form and must be witnessed by an *avocat*. The private mandate only becomes effective once it has been established that the adult can no longer protect his interests himself. The mandated person (*mandataire*) must make a declaration to this effect to the local *tribunal d'instance*. A specialist physician registered on the list held by the *Procureur de la République* is also required to provide proof of the incapacity. According to Article 15(1) HAPC 2000, the "existence, extent, modification and extinction of powers of representation granted by an adult ... are governed by the law of the state of the adult's habitual residence at the time of the agreement." According to Article 15(3) HAPC 2000, the "manner of exercise of such powers of representation is governed by the law of the State in which they are exercised."

The question arises, therefore, whether when Thomas wishes to utilise the power of representation granted by Patricia according to Scottish law in his favour, he will also have to go through the same procedure involving the declaration before the *tribunal d'instance* etc. In other words, do these issues fall under the scope of Article 15(1) or 15(3)?

In a similar fashion to the criticism levied at the lack of a definition of habitual residence, some have called for more explanation to be provided with respect to the concept of public policy (Article 21 HAPC 2000). Although this call is understandable from a practitioners point of view, the very essence of the public policy exception is that it provides a *ultimum remedium* to prevent the application of a foreign law that would be contrary to the fundamental norms and values of the state called upon to apply this law. Providing a definition to this concept would, therefore, reduce the intrinsic value of such an exception. Case law on the topic of how the public policy exception has been clarified in private

international law instruments for decades would provide for the necessary explanation of this.<sup>141</sup>

Obviously, another question is whether the public policy exception should be included at all. As with areas in the family law field, the inclusion of a public policy exception is a necessity to ensure an ultimate safety valve for the wide-variety of substantive solutions that are available across the Member States, which may lead to unacceptable situations in other Member States. At present, the inclusion of a public policy exception is, especially in a controversial field such as the one at hand, almost a necessity to ensure further co-operation and negotiation.

### **3.6 Recognition and enforcement**

As stated earlier with respect to the geographical scope of the convention, the major restriction imposed by the HAPC 2000 is that it only provides for recognition and enforcement of measures taken in other Contracting States; this provides for a huge gap. Currently only 6 Member States have ratified the Convention (and Scotland as a legal system within a Member State), the other Member States have yet to ratify this Convention, thus ensuring that the Convention cannot apply to the mutual recognition and enforcement of measures between these states. Two possible solutions could be envisioned to solve this problem. Firstly, all EU Member States could ratify the HAPC 2000. This would be the simplest solution to solve this particular problem. However, without ratifying the HAPC 2000 itself, the EU is left at the hands of the individual member states, and the citizens of Europe are dependent upon the ratification process in each individual Member State. As has been stated with respect to the HCPC 1996, this process was a long-time coming in some Member States. A second possible solution would be the creation of a European instrument that would thus ensure that this situation is resolved. In the interviews, the lack of a provision ensuring mutual recognition of foreign powers of attorneys was regarded as one of the most important deficiencies of the current system. The current situation is highlighted most eloquently via a brief example.

Albert grants Bertina a power of attorney over his property and medical affairs. Albert and Bertina move from France to Germany. The power of attorney granted in France is entitled to recognition and enforcement in Germany under the HAPC 2000.
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Carl grants Daphne a power of attorney over his property and medical affairs. Carl and Daphne move from France to the Netherlands. The power of attorney granted in France is not entitled to recognition and enforcement in the Netherlands under the HAPC 2000.
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As is common in Hague instruments dealing with the recognition and enforcement of foreign measures and decisions, a distinction is drawn between the recognition and enforcement of decisions. The HAPC 2000 provides that the recognition of a measure is to be automatic and by operation of law (Article 22(1) HAPC 2000). A limited number of

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<sup>141</sup> Take, for example, the public policy applied to the recognition of foreign marriages. Such an exception needs to be broad and rather undefined to cater for the array of foreign marriages that might contravene the fundamental norms and values of the forum state, e.g. polygamous marriages, child marriages, arranged marriages, forced marriages, postume marriages etc. See, K. Boele-Woelki, I. Curry-Sumner, W. Schrama, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, 2009.

grounds for refusal is also provided for (Article 22(2) HAPC 2000). With reference to the grounds for the refusal to recognise, one could call into question whether a jurisdictional test as provided for in Article 22(2)(a) HAPC 2000 is still opportune within the European Union. Such a ground for the refusal of recognition has been removed in many other European private international law regulations.<sup>142</sup>

Although in practice it would not appear to be utilised often, the grounds for refusing to recognise a measure are much broader than equivalent recognition regimes in the field of European private international family law. According to Article 22(2) HAPC 2000, the authority confronted with the recognition of the measure from another contracting state may refuse recognition on the grounds that the measure was taken by an authority whose jurisdiction was not based on, or in accordance with, one of the grounds listed in the provisions of Chapter II. When comparing such grounds for the refusal of recognition with other European instruments in this field, it is apparent that the jurisdictional test is no longer a ground upon which recognition can be withheld. For example in accordance with the Brussels II-bis Regulation, Article 23 Brussels II-bis lays down those grounds that can be used to refuse or deny recognition to a foreign decision in the field of parental responsibility. In this list the reference to the jurisdictional ground upon which the decision was taken is not listed. The same is also true for the recognition of foreign maintenance decisions,<sup>143</sup> foreign divorce decisions,<sup>144</sup> or foreign inheritance decisions.<sup>145</sup> Also in the field of civil and commercial matters, jurisdiction as a ground for refusal of recognition has only been allowed in very limited situations, when dealing with weaker party protection or exclusive jurisdiction.<sup>146</sup>

Furthermore, with respect to the enforcement of a measure, the HAPC 2000 states that a declaration of enforceability is required (Article 25 HAPC 2000). The question could certainly be posed whether within the context of the European Union this requirement should still be required. According to the new Maintenance Regulation for example, the requirement to obtain a declaration of enforceability has been removed, at least with respect to those decisions issued by courts from jurisdictions that apply the Hague Maintenance Protocol 2007.<sup>147</sup> Although this issue would appear to be of significance, this was certainly not highlighted by those interviewed, none of whom appeared to see a practical obstacle being raised by the existence of an exequatur procedure. Nonetheless, within the context of an area of freedom, security and justice, the existence of exequatur for certain types of decisions and not for others raises certainly theoretical issues and matters of overall consistency within the European Union framework of private international law rules; a two track scheme applying exequatur to certain types of decision and not to others is difficult to justify.

<sup>142</sup> See, for example, the Maintenance Regulation and the Succession Regulation.

<sup>143</sup> Articles 19 and 24 Maintenance Regulation.

<sup>144</sup> Article 22, Brussels II-bis Regulation.

<sup>145</sup> Article 40, Succession Regulation

<sup>146</sup> Article 35(1) Brussels I Regulation and see also article 45(1)((3) Brussels I (recast) Regulation.

<sup>147</sup> I. Curry-Sumner, *Tekst en Commentaar. Personen- en Familierecht. Mensenrechten en IPR*, Kluwer: Deventer 2015, p. 3191.

### 3.7 Administrative co-operation

The system of administrative co-operation is a long-standing tradition in Hague instruments. The system aims to channel cross-border cases through national authorities that closely cooperate with each other and liaise with national authorities, the idea being that the close link between the national Central Authority and the national competent authorities will assist a foreign central authority in ensuring the most effective and efficient solution in cross-border cases. This system of cooperation is similar to the one used under the HCPC 1996, being regarded as essential for the success of both Conventions.<sup>148</sup> These rules on cooperation are to be used not only by the central authorities, but also by public and other bodies or authorities interested in the decision.<sup>149</sup>

The provisions on the central authority system in the HAPC 2000 are rather summary in nature and not as extensive as though contained in, for example, the Hague Maintenance Convention 2007. The question could arise whether further specification is required. Contact with the German Central Authority suggests that the cases that have been received by the Central Authority cover a large diversity of different types of requests. From the moment of application of the Convention in Germany in 2009 until today, the Central Authority has only received 48 cases. No real line in the types of requests received could be made, thus ensuring that the requests are very much individual requests covering a multitude of different requests for assistance. It would therefore be perhaps unwise to attempt to channel these requests into pre-defined categories of requests (as is the case under the Hague Maintenance Convention 2007 and the European Maintenance Regulation) as this may lead to increased rigidity and reduction in the flexibility that is actually required in this field.

It is furthermore important to note that the role of the Central Authority in matters related to the protection of adults is very different than that with respect to matters related to maintenance or international child abduction. With respect to requests dealing with matters of the protection of adults, the vast majority of cases do not enter the Central Authority system. This is, therefore, a very different type of procedure than maintenance or abduction. Those involved in an international maintenance of child custody case gain particular advantages in opting to proceed through the Central Authority system. In relation to the protection of vulnerable adults, the vast majority of cases have no need to seek the assistance of the Central Authority. The cross-border issues occur in a very different way, and thus the need for assistance from the Central Authority is reduced. The following examples will illustrate the difference.

#### ***International Child Abduction***

Eva and Fred are living in Germany together with their son Henry. The couple decide to split up and Eva takes Henry and returns to Austria. If she removes Henry from Germany without Fred's consent, then she will be deemed to have wrongfully removed Henry (given that Fred has rights of custody over Henry). Fred is still living in Germany, whilst Eva and

<sup>148</sup> Dehart, p. 5; See also E. Clive, "The New Hague Convention on the Protection of Adults", *Yearbook of Private International Law*, 2000, §F; P. Mostermans, "A New Hague Convention on the international protection of adults" *International Law FORUM du droit international*, 2000, p. 10; See also A. Borrás, "Una nueva etapa en la protección internacional de adultos", *Revista Electrónica de Geriátria*, 2000, p. 7

<sup>149</sup> *Ibid.*

Henry are now living in Austria. The system of Central Authorities can assist Fred is trying to have Henry returned. In this case the Central Authority assists Fred in navigating the Austrian legal system.

#### *International Recovery of Maintenance*

Issac and Joan have divorced. Joan is living in Slovakia and Issac is living in Hungary. Joan has obtained a court order from the Slovakian courts ordering Issac to pay spousal maintenance. Issac refuses to pay. Joan can seek the assistance of the Central Authority system. Once again, the system of central authorities assists Joan in navigating the Hungarian legal system.

#### *Protection of Vulnerable Adults*

Katerina (Polish national) has been diagnosed with terminal breast cancer. She wishes to draft a lasting power of attorney granting the right to make medical decisions on her behalf to her brother, Lukas (Polish national). Katerina is living in France and Lukas is living in Belgium. In order for Katerina to draft the lasting power of attorney in France, the assistance of the Central Authority system will not necessarily be of assistance. Nevertheless, the case is a matter involving the cross-border protection of a vulnerable adult, and thus any future EU instrument would apply.

One possible issue caused by the lack of specification in the HAPC 2000 relates to the issues of costs. If State A orders that an adult is to be placed under a protective measure, and the competent authority agrees to placement abroad, the question arises which state is responsible for the costs incurred. In many jurisdictions State A may authorise a placement abroad, and the competent authorities themselves may agree upon placement abroad, but it is left outside scope the current instruments as to where exactly the costs fall.

### **3.8 Optional Certificate**

According to Article 38 HAPC 2000, where a measure of protection has been taken or a power of attorney of representation has been confirmed, the authorities of the contracting states may deliver to the person entrusted with protection of the adult's person or property a certificate indicating the capacity in which that person is entitled to act and the powers conferred.

Communication with the German Central Authority has indicated that this certificate is very rarely used, if at all. Communication with the various legal practitioners provided a very different picture. In all of these interviews it was noted that the use of a standard certificate for the creation of private mandates, as well as a mandatory certificate with respect to court proceedings, would vastly improve the current situation.<sup>150</sup> A compulsory standardised form would ascertain in ensuring adherence to the uniform rules of application. Furthermore a standardised form created at EU level would be capable of dealing with the various differences between the domestic systems of protection afforded. All interviewees pointed to a similar advantage with regard to the recently enacted Succession Regulation. The optional nature of the certificate under the HAPC 2000 was certainly noted as a drawback to the effectiveness of such a certificate; a problem that

<sup>150</sup> Interview with R. Frimston, P. Delas, A. Ward, A. Vrenegoor, and C. Montana.

should be regarded as a *permanent issue*, as this would remain even after all Member States were to ratify the HAPC 2000.<sup>151</sup>

### 3.9 Summary of issues

On the basis of the above-mentioned analysis, it is clear that there are a number of issues that require attention. These issues can be divided into two main categories, spread across a variety of topics. The first category relates to the *temporary issues*. These issues are regarded as temporary because they would be solved as soon as all European Union Member States ratify the HAPC 2000. The second category relates to the *permanent issues* that will remain despite the fact that all EU Member States ratify the HAPC 2000. These various issues have been summarised in the table below.

Table 2: Overview of various issues as a result of the current HAPC 2000 system

Topic	Temporary Issues	Permanent Issues
Scope (substantive)	Connection between HAPC 2000 and HCPC 1996	Applicability of the HAPC 2000 to children 16-18
		Types of vulnerability and impairments covered
		Types of measures covered
Scope (geographical)	Only recognition for EU those states that have ratified HAPC 2000	Reference to domestic rules of jurisdiction
Jurisdiction	Reference to different grounds for jurisdiction	Reference to domestic rules of jurisdiction
		No choice of court clause possibility
		Lack of definition of habitual residence
Applicable law	-	Interaction between Article 15(1) and 15(3) HAPC 2000
Recognition and enforcement	Recognition only afforded to those states that have ratified	Jurisdiction remains ground for refusal of recognition
		Declaration of enforceability is required

<sup>151</sup> Interview with A. Vrenegoor.



Administrative Co-operation	-	Lack of specification in terms of tasks and responsibilities
Certificate	Not all Member States are able to issue such a certificate	The certificate is optional, and therefore is not obligatory

## 4 Legislative basis for EU action

### 4.1 Introduction

As illustrated in the beginning of this report (Section 1), the lack of uniformity across the European Union with respect to the protection of vulnerable adults causes significant burdens on the free movement of families encountering such issues. As was stated in one of the interviews, the following situation occurs all too frequently across the EU.

Ursula is a citizen of State A living in State B. She has appointed her brother to act as her representative in accordance with the law of State A. She is involved in a car accident in State B and is admitted to hospital. In order to be discharged, it is a requirement that the hospital have the discharge signed by her legal representative. The question is whether Ursula's brother is regarded as the legal representative, as this depends on whether State B will recognise the power of representation drafted in favour of Ursula's brother.

This situation would become even more poignant if the question to be posed was whether Ursula should be taken off life support. If the power of representation were to be recognised then Ursula's brother would be entitled to make these decisions. If the power of representation was not recognised, then the general provisions laid down in the applicable law would need to be utilised to determine who was responsible to make the respective decision.

Such scenarios are not only emotionally damaging to those concerned, but the unnecessary uncertainty also places an unnecessary financial burden on the State as people are unable to be discharged on time from hospital, or could be taken off-life support equipment earlier, thus reducing the burden on the precious costs on the state health-care budget.<sup>152</sup> The strain, stress, expense and uncertainty encountered by these families should also be of concern to the European Union. Section 3 of this report has furthermore clearly identified two main categories of problems created by the current existing framework: (a) the problems that arise due to the fact that some Member States have ratified the HAPC 2000 and other Member States have not (*temporary issues*), and (b) the problems created by the provisions of the HAPC 2000 itself (e.g. limited scope, lack of choice of court clauses, need for declaration of enforceability etc.) (*permanent issues*). A brief overview of the various issues (both temporary and permanent) was provided in Section 3.9 of this report. Having established the gaps in the current existing legislative framework and the ensuing practical problems caused as a result, the question arises whether action at the European Union level would assist in solving these issues. Moreover, if this is indeed the case, the question is what form such action should take.

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<sup>152</sup> This point was specifically noted in the interview with A. Ward, who noted the extra financial burdens to all parties concerned, including the person vested with the power of attorney, as well as the State who is oftentimes burdened with extra medical care due to the fact that no clarity has been achieved with respect to the person vested with decision-making power.

## 4.2 Institutional framework

### 4.2.1 Introduction

Currently, a number of different international organisations are working or have worked on the legal protection of vulnerable adults. These organisations include the United Nations, the Hague Conference for Private International Law and the Council of Europe. As already outlined in section 2.2.4, the work at the level of the United Nations is greatly needed as this provides for a global set of minimum substantive standards for the protection of vulnerable adults. However, although a number of the provisions of the 2006 UN Convention on the Rights of Persons with Disabilities are useful in the private international law field (e.g. article 3 with respect to the autonomy of disabled adults), this instrument does not purport to - nor can it - solve the issues identified in section 3 of this report. Therefore, despite the intrinsic relevance of these developments to the current study, it is certainly not the case that the United Nations is better suited to achieve solutions to the problems identified in this report. The developments at the Hague Conference have already formed the cornerstone of analysis of this report, as the work done at the Hague Conference has ultimately resulted in the creation of the HAPC 2000. It has, however, been identified in this report, that the HAPC 2000, even if ratified by all EU Member States, would still not solve all the problems raised by academic and practitioners alike with regard to the protection of vulnerable adults (i.e., those permanent issues identified in Section 3).

The only other organisation that may therefore be *better* suited to deal with the issues raised in this report is the Council of Europe. Hence, the next section will be devoted to an analysis of the work that has already been piloted by the Council of Europe in this field (§4.3.2). Thereafter, it will also be necessary to identify the work which has already been conducted by the European Union (§4.3.4) in order to ascertain which of these institutions would appear to be better suited to deal with the *private international law* issues raised in this report.

### 4.2.2. Action within the Council of Europe

The 3<sup>rd</sup> European Conference on Family Law on the subject “Family law in the future” (Cadiz, Spain, 20<sup>th</sup>- 22<sup>nd</sup> April 1995) addressed, in particular, the question of the protection of incapable adults. The conference requested the Council of Europe to invite a group of specialists on this matter to examine the desirability of drafting a European instrument to protect incapable adults, guaranteeing their integrity and rights and, wherever possible, their independence. Following this proposal the Committee of Ministers of the Council of Europe set up, in 1995, the Group of Specialists on Incapable and Other Vulnerable Adults (CJ-S-MI), later re-named the Group of Specialists on Incapable Adults.<sup>153</sup> The Group of Specialists completed its work on the draft recommendation on principles concerning the legal protection of incapable adults during its sixth meeting. The recommendation was finally adopted in the form of Recommendation CM/Rec(2009)11 on 9<sup>th</sup> December 2009.

<sup>153</sup> Recommendation on Principles Concerning the Legal Protection of Incapable Adults, No. R (99) 4, 1999, § 1

For the purposes of the present report, it is important to note that these developments relate to the *substantive* protection afforded to vulnerable adults, rather than dealing with the *cross-border* implications of such measures. These developments do not therefore necessarily affect any instrument that would be adopted by the European Union. However, the Council of Europe has focused on the harmonisation of substantive law, i.e., the creation of minimum standards across Contracting States in the form of recommendations, such an instrument lacks binding force across the contracting states. In the interview with Adrian Ward regarding the work currently being undertaken by the Council of Europe, this issue was addressed. In his view, the work at the Council of Europe should be done in tandem with any future work at the European Union. The organisations should work hand in hand to achieve the best possible protection for all those involved, but the difference in their ambit should be made clear.<sup>154</sup>

At this juncture, it is evident that the work at both the United Nations and the Council of Europe is essential in ensuring adequate substantive law protection is afforded to vulnerable adults in jurisdictions around the world. Such steps are best taken in soft-law instruments, ensuring states are provided with recommendations and principles to guide them when framing their own legislative parameters. However, when it comes to cross-border solutions, as already noted, hard-law alternatives are required with binding, imperative obligations. The recognition and enforcement of decisions and power of attorneys require reciprocal binding obligations.

#### **4.2.3 Action within the European Union**

In November 2008, the Committee on Legal Affairs (JURI) published a report with recommendations to the Commission on the cross-border implications of the legal protection of adults (Rapporteur Antonio Lopez-Isturiz White).<sup>155</sup> In this report, the European Parliament called on Member States to sign and ratify the HAPC 2000, but also stated a need for European action to promote recognition and enforcement of legal and administrative cases involving two or more Member States. This report led to the European Parliament adopting recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123/(INI)) on the 18<sup>th</sup> December 2008.<sup>156</sup> In these, the European Parliament called on the Commission to submit to the Parliament a proposal to achieve this goal specifically in regard to decisions on the protection of adults, incapacity mandates, and lasting power of attorney. In the explanatory statement to this report, it was noted that,

“harmonised community forms should be created to promote the circulation and recognition of measures or decisions taken, and to help arrange or manage protection. In the same way, a mechanism could be established for the forwarding of dossiers, thereby ensuring that this is done efficiently, not least in emergencies, such as when an individual is covered by a protection measure has to be hospitalised while temporarily resident outside his or her Member States of habitual residence.”

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<sup>154</sup> Interview with A. Ward.

<sup>155</sup> European Parliament, Report with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)), 24 November 2008, A6-0460/2008.

<sup>156</sup> 2010/C 45 E/op.

#### 4.2.4 Summary

In conclusion, it can be stated that, of the four organisations operative in this field, the European Union is the best placed to deal with the problems identified in this report. Furthermore, the European Union has a strong legislative history of enacting workable private international law instruments, and thus inspiration will be able to be gleaned from this activity and experience. Work done by the EU should ideally be done in conjunction and close co-operation with the other competent authorities, especially the Hague Conference for Private International Law and the Council of Europe.<sup>157</sup> In this way, the dovetailing of the various instruments can be achieved in the best possible manner, thus avoiding overlap, contradiction and confusion.

### 4.3 Legal basis for legislative action

#### 4.3.1. Basic principles

Being based on the rule of law, any European Union legislative instrument must be founded on the treaties that form the primary source of EU legislation in accordance with the principle of conferral of powers. The current area falls within the area of freedom, security and justice (Article 4(2)(j) TFEU) and is therefore, an area of shared competence. Accordingly, as the Union has “only those powers which have been conferred on it”,<sup>158</sup> the EU can adopt legislative measures in the field of private international law based on Article 81 TFEU.

As the area of competence is not exclusive, the European Union is only able to operate within its field of competence within the bounds of the principles of subsidiarity and proportionality (as laid down in Article 5 Treaty on European Union (TEU)). These principles are further explained in Article 5, Protocol No. 2, Treaty on the Functioning of the European Union. The *principle of proportionality* requires that Union action must not go beyond what is necessary to achieve the objectives of this Treaty, both in relation to its form and in relation to its content. As it is clear that the competence granted to the EU is not exclusive, the *principle of subsidiarity* will also need to be adhered to by any future EU instrument in this field and thus the European Union should act only insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. Subsidiarity can only bind the EU to defer action in the favour of the Member States, thus it does not apply to areas of exclusive competence for the EU.<sup>159</sup>

De Búrca has argued that the general principle in European Union law of proportionality entails a three-part test: (a) is the measure suitable to achieve a legitimate aim, (b) is the measure necessary to achieve that aim or are less restrictive means available, and (c) does the measure have an excessive effect on the applicant's interests.<sup>160</sup> Therefore, the general principle of proportionality requires that a measure is both appropriate and necessary. In determining whether the principle of subsidiarity has been satisfied, it is best to approach

<sup>157</sup> This point was specifically highlighted during the interview with A. Ward.

<sup>158</sup> Opinion 2/94 [1996] ECR I-1759, para. 25

<sup>159</sup> Alan Dashwood *et al*, “European Union Law” (6th ed), Hart Publishing, 2001, p. 115, 324-325

<sup>160</sup> See further, Craig and De Búrca, *EU Law. Text, cases and Materials*, OUP: Oxford, 2015, p. 111-18 and 172-174.

the issue from a two-stage test, namely: necessity (why can the objective not be sufficiently achieved by Member States?) and EU added value (why would EU level action better attain the objective?).<sup>161</sup>

The principle of subsidiarity appears to be an ambiguous concept that can be invoked to foster the community-wide pooling of certain competences or on the contrary to renationalise others.<sup>162</sup> Clearly, the question posed is relative and ‘the allocation of competences depends on a reliable assessment of relative sufficiency’.<sup>163</sup> Subsidiarity remains a relative test as between levels of actions, but should be understood as allowing both actions in a complementary way and not as an exclusive allocation of competence. As the issue of subsidiarity is controversial and relative, this issue must first be addressed before delving further into the type of instrument that should be chosen. This will be done further in Section 4.4.

#### 4.3.2 Legislative basis

Although the Europeanisation of civil procedure within the European Union has been provided with a specific legal basis in Article 81 TFEU, a number of instruments have been adopted on the basis of Article 114 TFEU, dealing with the harmonisation of the internal market. The reason for this choice is to be found in the case law of the Court of Justice of the European Union.<sup>164</sup> The choice of the legal basis for a legal act at EU level must be able to be founded on objective factors amenable to judicial review, which include the aim and the content of the measure. The Court has stated:

“44. According to settled case-law, the choice of the legal basis for a European Union measure must be based on objective factors amenable to judicial review, which include the aim and content of that measure and not on the legal basis used for the adoption of other European Union measures which might, in certain cases, display similar characteristics. In addition, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision (*Parliament v. Council*, paragraph 34 and the case-law cited).

45. If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (*Parliament v. Council*, paragraph 35 and the case-law cited).

46. With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked

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<sup>161</sup> Koen Lenaerts and Piet van Nuffel, “European Union Law”, 3rd ed. (Sweet & Maxwell, 2001), p. 134-135

<sup>162</sup> C. Degryse, *European social dialogue: state of play and prospects*, Final Report OSE/ETUC 2011.

<sup>163</sup> B. Bercusson, *European Labour Law*. Cambridge: Cambridge University Press, 2nd ed. 2009.

<sup>164</sup> See, for example, *Commission v Council (Titanium Dioxide)*, Case C-300/89, para. 17; *Commission v. Council*, Case C-269/97, para. 43; *Commission v. Council*, Case C-211/01, para. 38; *Parliament v. Council*, Case C-490/11, para. 44.

without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (*Parliament v. Council*, paragraph 36 and the case-law cited).

47. None the less, the Court has previously held that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (*Parliament v. Council*, paragraph 37 and the case-law cited)."

Therefore, if a given legal act mainly focuses on harmonising civil procedure, it should be based exclusively on Article 81 TFEU, and if it is mainly concerned with the harmonisation of rules governing the internal market, then it should be based on Article 114 TFEU. Accordingly, it is necessary to examine the grounds laid down in the current Article 81 TFEU. Although debate has surfaced whether EU instruments could be founded on both provisions, it is submitted here that the purposes of this EU instrument would be restricted to the private international aspects of the protection of vulnerable adults, instead of any attempt to harmonise substantive private law matters (which at any rate would more-than-likely fall outside of the competency of the European Union, as substantive harmonisation in the field of law of persons / family law matters does not fall within the purview of Article 114 TFEU). The following overview is taken from a study conducted by the European Parliamentary Research Service to illustrate the fundamental differences between the legislative basis provided for in Article 81 TFEU and the basis provided for in Article 114 TFEU.

Table 3: Comparison of two legal bases for Europeanization of civil procedure

	<b>Article 81 TFEU</b>	<b>Article 114 TFEU</b>
Cross-border element	Cross-border 'implications' required	Applicable also to purely domestic measures
Internal market element	Not required	Measure must serve the smooth functioning of the internal market
Are of law affected	Civil procedure, private international law, but not substantive private law	Any area of law, public or private
Types of instruments	Directives, regulations, including optional instruments	Mainly directives, regulations; optional instruments doubtful

Exemptions	Family law subject to special legislative procedure	Free movement of persons, rights and duties of employees, fiscal provisions (subject to Article 115 TFEU – special legislative procedure)
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#### 4.3.3. Pre-Treaty of Amsterdam

The source of the creation of ‘European family law’ provisions can be traced back to the Treaty of Amsterdam. With respect to private international law, this instrument fundamentally changed the legislative landscape. It was on this basis that the Brussels II Convention was converted into the Brussels II Regulation.<sup>165</sup> The Treaty of Nice added legitimacy to the inclusion of family law matters in the scope of European legislative competency with actual reference to family matters being made, albeit indirectly.<sup>166</sup> Although some authors have called into question whether the move of the European Union into the field of family law even satisfies the principle of subsidiarity,<sup>167</sup> this fundamental question is no longer one that would appear to be widely disputed within academic circles. The Treaty of Lisbon increased those areas where ordinary legislative procedure can be used to achieving the desired aims. This means that before investigating which instrument of secondary legislation the EU may use to fill the gaps in the field of the protection of vulnerable adults, one first has to identify the legislative basis for the adoption of such an instrument and the applicable procedure for the adoption of such an instrument.

Prior to the entry into force of the Treaty of Lisbon, the legislative basis for action in the field of private international law was stated to be Articles 61(c), 65(b) and Article 67(1) of the Treaty establishing the European Community. This basis was utilised, for example, for the enactment of the Brussels II-bis Regulation and the Maintenance Regulation. These provisions allowed the European Community to legislate in the field of judicial co-operation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market.

#### 4.3.4 Post-Treaty of Amsterdam

The equivalent powers are now to be found in Article 81 of the Treaty on the Functioning of the European Union. With reference to Article 81(1) TFEU it is clear that the European Union has competence to legislate and develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions. In achieving this aim, and in particular when necessary for the proper functioning of the internal market (but not necessarily dependent on that), measures

<sup>165</sup> U. Magnus and P. Mankowski, *Brussels II-bis Regulation*, Sellier European Law Publishers: Munich 2012, p. 10.

<sup>166</sup> P. McEleavy, “The Brussels II Regulation: How the European Community has Moved in to Family Law” (2002) ICLQ 883-908, at 895

<sup>167</sup> P. McEleavy, “First steps in the communitarisation of family law: too much haste, too little reflection?” (2003) Intersentia: Antwerp 2003, p. 509-526. See also Honorati, in: Bariatti (ed.), *La famiglia nel diritto internazionale private comunitario*, Milano 2007, p. 3. This issue was especially contentious in the initial stages of European development in the field of family law, but has since almost evaporated.



should be taken in order to achieve better mutual recognition and enforcement between Member States.

The measures envisaged in this report relate to those that are expressly mentioned in the non-exhaustive list set out in Article 81(2). This includes the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases (Article 81(2)(a)), the compatibility of the rules applicable in the Member States concerning rules on jurisdiction and conflict of laws (Article 81(2)(c)), the effective access to justice (Article 81(2)(e)), 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 (Article 81(2)(f)). These four areas in particular illustrate the clear inclusion of private international law topics in the legislative mandate of the European Union with respect to cross-border familial relationships. Although the substantive matter of the protection of vulnerable adults is an issue dealing with the law of persons, it must be stressed that the work involved in a future European instrument is related to the cross-border or private international law issues in this field.

The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union adopts measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market. As pointed out in the previous paragraph, such actions may include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction (Article 81(2)(c) TFEU). The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle. A programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, common to the Commission and to the Council, was adopted on 30 November 2000. That programme identifies measures relating to the harmonisation of conflict-of-laws rules as measures facilitating the mutual recognition of decisions. It is also possible, should it be established that EU-wide measures cannot be achieved within a reasonable period of time, that enhanced cooperation be utilised *inter se* on the basis of Article 20 TEU. However, this option should only be used as a last resort.<sup>168</sup>

Finally, as already identified elsewhere in this report, it is also possible for the EU to participate directly in international instruments on the basis of Article 216 TFEU. This was, for example, utilised when becoming party to the Hague Conference's Protocol of 23 November 2007 on the law applicable to maintenance obligations,<sup>169</sup> as well as the Hague Convention of 23 November 2007 on the international recovery of child support and other

<sup>168</sup> Directorate-General for Internal Policies, *Which legal basis for family law? The way forward*, European Parliament: Brussels, 2012, p. 17. This option of last resort was used for the Council Regulation (EU) No 1259/2010 of 20 December 2010 harmonised the law applicable to divorce and legal separation, OJ L 343, 20 December 2010, p. 10.

<sup>169</sup> OJ L 331, 16 December 2009, p. 17

forms of family maintenance.<sup>170</sup> In the field at hand, the European Union has also ratified the 2006 UN Convention.

The possibility for the European Union to ratify an international instrument is, however, conditional on this being provided for in the instrument itself. Different options have been conceived in various instruments. The first option is to explicitly provide for ratification or accession by a regional economic integration organisation (hereinafter: REIO). According to Article 58(3) Hague Maintenance Convention 2007, it is provided “[a]ny other State or Regional Economic Integration Organisation may accede to the Convention after it has entered into force in accordance with Article 60(1).” The definition of a Regional Economic Integration Organisation is provided in Article 59(1), namely “A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention.” A similar solution has also been achieved in the 2006 UN Convention where it is stated in Article 42 that ratification is open to all states and regional integration organisations. It is, therefore, generally agreed that the term “States” in an international treaty or convention refers to a nation state, and therefore does not include ratification by the European Union.

Turning one’s attention to the HAPC 2000, Articles 53 and 54 relate to the possibility for States to ratify, accept, approve or accede to the Convention. These provisions only refer to “States”, and thus in accordance with the abovementioned explanation, the HAPC 2000 does not necessarily provide for ratification or accession by the European Union. This therefore means that at present, the possibility for the EU to accede to the HAPC 2000 are not available. However, this does not exclude all possibilities.

Firstly, the HAPC 2000 can be amended so as to provide for such a possibility. Such an amendment is not common, but is not impossible. The textual possibilities for such an amendment are, after all, available in the Hague Choice of Forum Convention 2005 and the Hague Maintenance Convention 2007. An alternative is for the EU to empower the Member States to ratify the HAPC 2000 themselves. At present, the EU has only encouraged the Member States to ratify the HAPC 2000. This option has recently been used in the context of the HCPC 1996. However, it should be noted that although the EU obliged the Member States to ratify the HCPC 1996 in 2004, and yet the last ratification did not take place until 2016. Therefore, this possibility would not necessarily solve the temporary issues indicated in this report within a short period of time.

## **4.4 Issue of subsidiarity**

### **4.4.1 Introduction**

One of the major principles of European Union law, that ensures that the powers delegated to the Union are only used when necessary, is the principle of subsidiarity. This means, as outlined earlier, that action is necessary at EU level because the problems identified cannot

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<sup>170</sup> OJ L 192, 22 July 2011, p. 39.

adequately be solved at the level of the Member States themselves.<sup>171</sup> Although ratification of the HAPC 2000 by the EU itself has been identified as a possible option, this solution will not solve the permanent issues identified in this report. Accordingly, a number of arguments will be identified in this section, which illustrate why action at EU level is absolutely required and cannot be left to the Member States.

#### 4.4.2 Mutual recognition

As indicated in section 3.2.3.2 of this report, the mechanisms available in the domestic legislation of the Member States differ greatly. In a domestic setting, this does not cause any substantial issues. The fact that a vulnerable adult in the Netherlands is entitled to draft and execute a *levenstestament*, whilst in Scotland one has to draft a power of attorney, does not create any real problems, so long as these instruments only operate within the national boundaries and context. As soon as the instrument begins to circulate outside of the nation state, cross-border implications cause significant problems. As identified throughout this study, various recognition and enforcement problems occur when a power of attorney executed or a judicial measure of protection issued in one jurisdiction is not recognised in another.

Being in possession of a power of attorney in one Member State, which is not recognised in another Member State can lead to serious practical problems. Uncertainty as to the legal status of the power of attorney leads to public and private institutions being unsure as to the person legally entitled to act on behalf of a vulnerable adult with practical implications for the public authorities and the parties concerned. For instance, this can lead to increased financial burdens on public institutions, as vulnerable persons may remain in hospital beds longer than necessary whilst awaiting permission to discharge the adult concerned.<sup>172</sup> On an emotional and personal level, this situation can obviously lead to increased strain being placed on families involved in such legal disputes, oftentimes at a period of time which in and of itself is extremely stressful.<sup>173</sup> As legal practitioners in the field know the legal obstacles to recognition, the chances are high that such legal and practical difficulties ultimately dissuade many from going abroad (especially permanently) within the European Union if they may need to utilise their power of attorney. Take for example the following scenario.<sup>174</sup>

Thomas, a German citizen living in Munich, has decided to immigrate to Spain after retiring. He is suffering from a number of medical problems and wishes to have his power of attorney granting his son-in-law power over his medical and financial affairs recognised in Spain. He has been informed of the legal hurdles that this would entail and so has instead decided not to go.

<sup>171</sup> Craig and De Búrca, *EU Law. Text, cases and Materials*, OUP: Oxford, 2015, p. 95-102 and 172-4

<sup>172</sup> Interview with A. Ward.

<sup>173</sup> Interview with R. Frimston.

<sup>174</sup> From discussions with the German Central Authority, it is difficult to ascertain how frequent such situations occur, as these persons simply decide not to emigrate, and thus remain in their home jurisdiction. The problems really arise when the emigration does take place, or a person enters into difficult whilst on a temporary visit abroad. Attempts to ascertain the scale of the problem when someone decides not to move abroad due to the legal difficulties faced, are difficult, if not impossible.

The need for action on these issues is, therefore, evident. The major question is which level is more suitable: the Member States or the European Union. Although the Member States do possess the competency to ensure cross-border recognition and enforcement of decisions, this requires bilateral initiatives. This would entail that each Member State within the Union would need to enter into bilateral treaties with each and every other Member State to ensure that their decisions would be recognised and enforced in each and every other Member State. With the advent of supranational organisations such as the European Union, the use of multilateral international instruments is certainly preferred over the use of the multiple bilateral instruments.<sup>175</sup> At present, the use of bilateral instruments within Member States of the European Union in the field of family law and the law of persons is confined to the relationship with third states, such as the bilateral agreements that have been drafted with the United States of America in the field of maintenance payments.<sup>176</sup> It is, thus, certainly a more feasible goal that activity with regard to the improvement of the rules on recognition and enforcement be undertaken by the European Union instead of the Member States, as this would otherwise entail a vast array of individual bilateral instruments to achieve the same goal as one directly effective European instrument applicable in all Member States.

#### 4.4.3 Interpretation

One of the major issues identified at multiple stages of this research and by numerous actors in the field, is the problem of interpretation. Even if all EU Member States sign and ratify the HAPC 2000, issues of interpretation can, and ultimately will still arise. The fundamental difference between the use of the HAPC 2000 and a possible EU instrument is therefore to be found in the uniform interpretation of EU instruments provided by the Court of Justice of the European Union. Take the following example from the field of parental responsibility.

Penny is a Finnish citizen, living in Sweden. The Swedish child protection authorities determine that it would be in Penny's best interests to issue a supervision order in her favour. The question arises whether the issuance of a supervision order falls under the concept of "parental responsibility"; a supervision order could be regarded as a public law measures and thus falling outside the civil law definition of parental responsibility. As the term is used in both a European Regulation (Brussels II-bis Regulation) and an international convention (HCPC 1996), the matter can be referred to the Court of Justice of the European Union as this relates to the interpretation of Article 1 Brussels II-bis. If the European Union had not enacted the Brussels II-bis Regulation, then the interpretation of

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<sup>175</sup> See, for example, the use of bilateral instruments in the field of the recognition and enforcement of decisions in the field of civil and commercial matters prior to the introduction of the Brussels I Convention (which is now operational in the form of the Brussels I (recast) Regulation). The Netherlands, for example, had bilateral conventions with Belgium, Germany, Italy and Austria, amongst many others. Each Convention with its own rules and conditions, thus leading to extremely complicated practical matters when multiple conventions applied.

<sup>176</sup> For example, the 2001 Convention between the Kingdom of the Netherlands and the United States of America with regard to the enforcement of the obligation to provide support and maintenance (*Dutch Bulletin of Treaties* 2001, 117 and 134). Such agreements have also been entered into with multiple European States, Canadian provinces, as well as other nations around the world, see A.L. Estin, "Migration, remittances and mutual obligations", in: P. Beaumont *et al* (eds.), *The Recovery of Maintenance in the EU and worldwide*, Hart 2014, p. 108.

this term (which is also utilised in the HCPC 1996) would be left to the individual courts of the Member States, which could thus lead to divergent interpretations.

The abovementioned example was, however, not just a hypothetical scenario. The issue of whether public law measures fall within the context of a private law instrument was formally submitted to the Court of Justice in *In re A (Second Finnish case)*.<sup>177</sup> As the Court of Justice determined this to be a matter that falls within the substantive scope of the Brussels II-bis Regulation, academic literature has tended to suggest that the same will also be true of the same concept, as found in Article 4 Hague Protection Convention.<sup>178</sup> As was stated in Section 3.2.2 of this report, even if all Member States were to ratify the HAPC 2000, problems of interpretation would continue to exist.

As was noted in one of the interviews, the interpretation of Article 15(1) and 15(3) HAPC 2000 has already proven to cause difficulties between states party to the Convention (Scotland and France). Consider the following example:

Stephanie is a French citizen living in Scotland. She wishes to draft a lasting power of representation in favour of her brother, Thomas, who lives in France. Stephanie drafts the power of attorney and two years later returns to France. One year later, she develops MS and rapidly becomes unable to take care of herself. Her brother now wishes to use the Scottish power of attorney, which has been drafted in his favour.

As was stated in section 3.5.2 of this report, a problem has arisen in such scenarios because Scotland would regard the power of attorney as valid. However, according to French law, a private mandate (*mandat*) must be executed in notarial (*authentique*) or in private form and must be witnessed by an *avocat*. The private mandate only becomes effective once it has been established that the adult can no longer protect his interests himself. The mandated person (*mandataire*) must make a declaration to this effect to the local *tribunal d'instance*. A specialist physician registered on the list held by the *Procureur de la République* is also required to provide proof of the incapacity. According to Article 15(1) HAPC 2000, the "existence, extent, modification and extinction of powers of representation granted by an adult ... are governed by the law of the state of the adult's habitual residence at the time of the agreement." According to Article 15(3) HAPC 2000, the "manner of exercise of such powers of representation is governed by the law of the State in which they are exercised." The question arises whether the approval by a French *avocat* or the requirement to be examined by a local physician fall within the purview of Article 15(1) or 15(3).

Such interpretation issues will continue to exist even if all Member States ratify the HAPC 2000. These issues would, however, not arise if the EU were to enact a European instrument that utilised the same rules and terminology as the HAPC 2000. In determining whether Article 15(1) or Article 15(3) HAPC 2000 should apply to the issue of the approval of a physician, it is clear that the Court of Justice of the European Union could provide interpretation if a EU instrument was enacted. However, if the terminology utilised in a

<sup>177</sup> *Second Finnish Case* 2<sup>nd</sup> April 2009, C-523/07.

<sup>178</sup> See, for example, D. Van Iterson, *Ouderlijke verantwoordelijkheid. IPR Praktijkreeks*, Maklu: Apeldoorn 2012, p. 37-44.

European instrument is the same as that used in a Hague instrument, the Court of Justice is thus able to harmonise the interpretation of the Hague instrument within the Member States, as it is unlikely that the two instruments would diverge in interpretation. Returning to the example provided above in the field of parental responsibility, if the term “parental responsibility” is understood as covering a supervision order within the context of the Regulation, the chances are much greater that Member States will also take this approach with respect to the equivalent term in the Hague instrument, in order to ensure the uniform interpretation of the instruments.

#### **4.4.4 Delay in ratification**

A European Union instrument is necessary to solve issues related to the recognition and enforcement of decisions between Member States. Although the basic problem of non-recognition would be solved to some extent if all Member States signed and ratified the HAPC 2000, this situation could take a long time to achieve.<sup>179</sup> Putting this situation into perspective, the full ratification of the HCPC 1996 took more than 14 years from the entry into force in Slovakia on 1<sup>st</sup> January 2002, until the entry into force in Italy on 1<sup>st</sup> January 2016. This delay in time was somewhat eased by the fact that the European Union opted to enact a Regulation during this period, i.e. via the Brussels II Regulation (No. 1347/2001), which was subsequently replaced by the Brussels II-bis Regulation (No. 2201/2003). As a result, all children in the EU were afforded the guarantee that decisions covered by the term “parental responsibility” would be afforded mutual recognition in all other Member States as of 1<sup>st</sup> March 2001 (the date of enactment of the Brussels II Regulation). In the end, this provided complete protection within the entire EU context for more than fifteen years, before all Member States had managed to sign and ratify the HCPC 1996. As an interim solution - although this report indicates elsewhere that the solution could go much further than the mere solution of temporary issues caused due to the lack of widespread ratification of the HAPC 2000 - could solve the mutual recognition of decisions related to the protection of vulnerable adults.

In doing so, the European Union could therefore ensure that one more step is taken on the road to improving the mutual trust between Member States in this field. As identified in the context of the harmonisation and unification of procedural law in Europe, three different options can be pursued in order to increase mutual trust in any given field.

“Firstly, through the creation of uniform European procedures in the form of optional instruments, leading to the pronouncement of judgments on the basis of common rules of procedure. Secondly, a sectoral harmonisation of procedural law is possible, addressing selected issues in line with a piecemeal approach. Thirdly, a set of common minimum standards, in the form of principles and rules, could be developed and later enacted in the form of a directive.”<sup>180</sup>

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<sup>179</sup> See also Michael Bogdan, *Concise Introduction to EU Private International Law* (2nd ed), Europa Law Publishing 2012, p. 16

<sup>180</sup> EPRS, *Europeanisation of civil procedure. Towards common minimum standards?*, European Parliamentary Research Service: Brussels 2015, p. 4.

Ultimately, the process of ratification could also be accelerated if the EU were to ratify the HAPC 2000 itself, although as noted above this is subject to certain problems. Although such a solution would indeed ensure automatic application of the HAPC 2000 in all Member States, this would not solve the permanent issues identified in this report. Ratification of the HAPC 2000 by the EU would therefore only serve to alleviate the pressing issues faced by vulnerable adults across the EU.

#### **4.4.5. Influence on other areas**

In another – slightly more obtuse way – a European instrument dealing with the protection of vulnerable adults can go a long way to assist the protection of others not covered by the instrument itself. As noted by Lagarde in the explanatory note to the Convention and other academics, the HAPC 2000 does not cover victims of domestic violence.<sup>181</sup> Hence, because of the impact it generally has in national legal frameworks, an EU legal instrument on the cross-border protection of adults could have considerable added value by complementing the existing international and European instruments, addressing their shortcomings and thus considerably enhancing the effectiveness of women's protection against violence.

#### **4.4.6 Lack of choice-of-law test**

A specific EU instrument on the protection of adults would present enormous added value in effectively completing the existing international and European framework, thus offering improved, more effective and more complete legal protection to vulnerable adults. It could allow for standard forms to be drafted, thus ensuring greater protection for those citizens within the European Union who wish to have their wishes recognised outside of their country of origin.

The main goal of the unification of the rules of private international law is to make it possible for vulnerable adults to act with full knowledge of the situation, without being subjected to the diversity of national systems. It thus guarantees certain 'legal predictability'. For example, on the basis of the rules determining the applicable law, the competent court shall give a decision based on the substantive law, which has the closest connection with the case. This also allows avoiding the most unfair situations: the maintenance creditor will obtain a result adapted to his or her situation, without having to suffer from the disparity of the conflict-of-law rules. Thus, the conflict-of-law rules accompany and facilitate the elimination of 'intermediate measures' at the stage of recognition: the decision is less problematic to accept if it is given in accordance with a law designated according to harmonised rules. Moreover, and in a more direct way, the conflict-of-law rules bring an end to the refusal of recognition, if the law applied in the case does not satisfy the national domestic applicable law rules. Therefore, ensuring that the choice of law rules are unified throughout the EU, will therefore in turn ensure that fewer problems are encountered at the stage of recognition and enforcement.

#### **4.4.7 Simplification and transparency**

By supplementing the HAPC 2000 with a EU instrument, this field of law will be simplified enormously. Currently, a whole host of different instruments apply to this field of law,

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<sup>181</sup> Lagarde, Explanatory Report, §9, and J. Long, *ibid*, p. 63.

which leads to a high degree of uncertainty. An EU instrument in this field would therefore bring an end to the huge diversity of sources of the law in this field, and would ensure that the legal practitioners involved needed to have recourse to the EU instrument, and where necessary the HAPC 2000.

Action at EU level would also ensure a simplified application of the rules of private international law. Reference to national, domestic private international law rules in the field of jurisdiction could, for example, be avoided. This would ensure not only for application of the general rules of jurisdiction as laid down in the HAPC 2000 throughout the European Union, but would also ensure that the subsidiary rules of jurisdiction would be unified. As a result, practitioners would only have to resort to the application of two instruments when entertaining private international law questions regarding vulnerable adults, namely the HAPC 2000 and any future EU instrument. The simplification of the sources of law application in any one jurisdiction, but also the simplicity creating ensuring uniform rules throughout the entire EU would also bring about simplifications in judicial and non-judicial procedures, ultimately leading to the possibility that fewer errors will be made with respect to the application of these rules.

Furthermore, in ensuring that fewer sources need to be applied, and consulted in any given case, associated advantages could also be achieved, including a reduction in cost (i.e. professionals will spend relatively less time in solving cases because the application of the rules will require less research to be done. Accordingly, such an EU instrument would improve the overall legal process in this field, thus improving the overall bird's eye view of this area of law. Such improvements in transparency can then only go further to ensure that the rules are easier able to be applied by non-experts.

#### **4.5 Policy options**

Four main policy options can be considered: status quo (Option 1), a soft law option (Option 2) and two policy options which would take the form of legislative action, either in the form of a directive (Option 3) or a regulation (Option 4). The status quo would involve taking no action at EU level. As has already been acknowledged in the previous sections, option 1 is not a feasible possibility, as the problems that have already been identified in this report as being either of a temporary or of a permanent nature cannot be solved without action being taken. Therefore, the question is not *whether* action should be taken, but *what form* such action should take and *who* should take such action. If all the problems identified were of a temporary nature, then perhaps one might have been able to consider exerting more pressure on Member States to ratify the HAPC 2000, as the sooner all Member States ratify the Convention, the sooner all of the temporary issues could be solved. However, this is certainly not the case. Both the literature review and the interviews have clearly displayed that the HAPC 2000 displays weaknesses in a European context that can only be solved with further action. As the question in this report is whether the European Union can provide any added value to the applicable legislative framework, the question could better be phrased as: what effect could European Union action have with respect to the protection of vulnerable adults in international situations?



Option 2 (non-legislative action/soft-law action) would support the protection of the rights of vulnerable persons through, for example, monitoring and evaluation, training and good practice examples dissemination, but its impact would be rather low compared to the problems encountered and faced in practice. “Soft law” refers to international norms that are deliberately non-binding in character, but still have legal relevance, located “in the twilight between law and politics.”<sup>182</sup> Therefore, although soft law options would in and of themselves be positive measures, they would probably be unsatisfactory to solve the permanent issues identified in this report. In order to fully appreciate the disadvantages of soft law in the field of private international law, it is also necessary to analyse the advantages of possible hard law options.

- Hard law instruments allow states to commit themselves more credibly to international agreements. They ensure that state commitments are regarded as more credible, because they increase the cost of reneging, whether on account of legal sanctions or on account of the costs to a state’s reputation where it is found to have violated its legal commitments.<sup>183</sup>
- Hard-law instruments are more credible because they can have direct legal effects in national jurisdictions (“self-executing”), or they can require domestic legal enactment. Where treaty obligations are implemented through domestic legislation, they create new tools that mobilize domestic actors, increasing the audience costs of a violation and thus making their commitments more credible.<sup>184</sup>
- Hard-law instruments also provide better options for the long term, in providing routes for interpretation and implementation monitoring. The enforcement of such commitments through dispute-settlement bodies, such as courts, is also advantageous.<sup>185</sup>

Nevertheless, defenders of soft law argue that such instruments offer significant offsetting advantages over hard law alternatives. They find, in particular, that:<sup>186</sup>

- Soft-law instruments are easier and less costly to negotiate. Hard law options entail significant costs, whilst also creating formal commitments that can affect the behaviour of states. The idea has been proffered that states are less willing to agree to impose legally binding commitments due to the implications of state budgets, and therefore all more willing to negotiate fiercely in achieving such hard law options.<sup>187</sup>

<sup>182</sup> D. Thürer, “Soft Law”, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Elsevier: Amsterdam 2000, Volume 4, p. 452-454.

<sup>183</sup> K.W. Abbott and D. Snidal, “Hard and Soft Law in International Governance”, (2000) 54 *International Organisations* p. 421 at p. 428.

<sup>184</sup> K.W. Abbott and D. Snidal, *ibid*, p. 433.

<sup>185</sup> K.W. Abbott and D. Snidal, *ibid*, p. 427.

<sup>186</sup> G.C. Shaffer and M.A. Pollack, “Hard vs. soft law alternatives, complements and antagonists in international governance”, (2010) *Minnesota Law Review* p. 706.

<sup>187</sup> K.W. Abbott and D. Snidal, *ibid*, p. 434.

- Additionally, hard-law agreements can be more difficult to adapt to changing circumstances,<sup>188</sup> as it oftentimes presupposes a fixed condition when actually the legal field requires constant adjustment.<sup>189</sup>
- Soft-law instruments allow states to be more ambitious and engage in “deeper” cooperation than they would if they had to worry about enforcement.
- Soft-law instruments cope better with diversity.
- Soft-law instruments are directly available to non-state actors, including international secretariats, state administrative agencies, sub-state public officials, and business associations and nongovernmental organizations (NGOs).<sup>190</sup>

With respect to the field of private international law, solutions can only realistically be achieved through hard-law options as the flexibility afforded to states by virtue of soft-law mechanisms (which is the very same advantage of such instruments) is not suited to the field of private international law, especially when dealing with international procedural law aspects (i.e., jurisdiction and recognition and enforcement of judgments).<sup>191</sup> Although there is a generally held belief that “it is preferable to resort to non-binding instruments rather than binding ones”,<sup>192</sup> this is not sufficient in this given context, for the reasons outlined above. In other words, due to the fact that this is an area of the law with little flexibility as the rules themselves aim to achieve legal certainty, binding options would be preferred. Nevertheless, although option 2 could lead to improvement as regards information dissemination, it would not lead to solutions being proffered for the solution of the permanent issues listed in section 3 of this report. For example, a soft-law commitment to abolishing the barriers to the recognition and enforcement of powers of attorney identified in section 3.6 of this report would not be solved with soft-law instruments. The majority of legal systems require some form of reciprocity for the mutual recognition of decisions.<sup>193</sup> A soft-law instrument would not solve this issue, as reciprocity requires an international legal obligation, which can only be achieved by means of hard-law instruments.

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<sup>188</sup> K.W. Abbott and D. Snidal, *ibid*, p. 433.

<sup>189</sup> See, for example, G. de Búrca & J. Scott, *Introduction*, (2007) 13 *Columbia Journal of European Law* p. 513 (arguing that a lack of fixed conditions “necessitates a degree of experimentation with different kinds of public policy-making strategies”).

<sup>190</sup> For good discussions on the purported strengths of soft law, see, for example, J.J. Kirton & M.J. Trebilcock, ‘Introduction’, in: J.J. Kirton and M.J. Trebilcock (eds.), *Hard Choices, Soft law: Voluntary Standards in Global Trade, Environment and Social Governance*, 2004, p. 3, at 9; K.W. Abbott and D. Snidal, *ibid*, at 434–54; F. Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, (2006) 19 *Leiden Journal of International Law*, p. 829, at 832; See also H. Hillgenberg, *A Fresh Look at Soft Law*, (1999) 10 *European Journal of International Law*, p. 499, at 501 and 504.

<sup>191</sup> A position that is also supported in the field of civil procedure in general, see, EPRS, *Europeanisation of civil procedure. Towards common minimum standards?*, European Parliamentary Research Service: Brussels 2015, p. 12.

<sup>192</sup> *Ibid*.

<sup>193</sup> See J. Carlos Martinez, “Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted”, (1995) 4 *Journal of Transnational Law and Policy* p. 49 and Y. Zeynalova, “The law on recognition and enforcement of foreign judgments: is it broken and how do we fix it?”, (2013) 31 *Berkeley Journal of International Law* p. 151.

Another example of a problem that could not be solved via soft law alternatives is the issue of subsidiary rules of jurisdiction. The very nature of this problem is that in cases that fall outside of the scope of the rules laid down by the HAPC 2000, the EU Member States currently refer to the own national domestic rules of jurisdiction. Attempts at harmonisation of these rules are futile because the harmonisation exercise has already taken place in drafting the rules laid down in the HAPC 2000. The problem is related to the few minimal rules of jurisdiction that remain, that operate predominantly in situations that fall outside of the geographical scope of the HAPC 2000. In other areas, the choice of soft law alternatives has been rejected for this very reason.<sup>194</sup>

Another example of a permanent issue that would not be solved by the introduction of a soft-law instrument relates to the issues surrounding the current certificate available under the HAPC 2000. From the interviews conducted in the context of this report,<sup>195</sup> it can be concluded that the optional certificate available under the HAPC 2000 has, however, proven to be used extremely infrequently. This point of view was furthermore supported both by the legal professionals operational in the field, as well as the Central Authorities consulted. In this respect, although the HAPC 2000 is to be regarded as a hard-law instrument, in the form of an international Convention, the introduction of an optional certificate is similar to a soft-law solution, i.e. a soft-law solution in the framework of a hard-law instrument.

Although the option of soft-law would not necessarily solve the majority of the issues listed in section 3 of this report, it is certainly an option that could operate alongside a hard-law legislative solution. Accordingly, the benefits of a soft-law solution as outlined above could be used to assist in the implementation of a hard-law, legislative option. Nevertheless, a solution solely centred on a soft-law instrument would not be suitable in addressing the problems in this private international law field. At present, pure soft-law solutions have never been proffered in the field of private international law, due to the quandaries listed above. Thus far in the field of private international law, the European legislature has always opted for hard-law options either in the form of regulations (e.g. the Brussels I-bis Regulation, Brussels II-bis Regulation, the Maintenance Regulation, the Succession Regulation, the Service Regulation, the Rome I, II and III Regulations etc.) or in the form of directives which have implications for the field of private international law (e.g. the E-commerce directive, insurance directives etc.).<sup>196</sup>

Options 3 and 4 both provide for hard-law alternatives, i.e., in the form of legislative action either in the form of a directive (option 3) or in the form of a regulation (option 4). Option 3 would aim to lay down minimum rules in applying the *acquis* and pertinent aspects of relevant international provisions on procedural safeguards, whereas option 4 is possibly the most ambitious and prescriptive option that goes beyond option 3 on certain safeguards by ensuring that the proposed rules are provided in the form of binding legislation. On the other hand, this option would more-than-likely effectively contribute to

<sup>194</sup> See, for example, EPRS, *Europeanisation of civil procedure. Towards common minimum standards?*, European Parliamentary Research Service: Brussels 2015.

<sup>195</sup> For example, interview with A. Ward and interview with R. Frimston.

<sup>196</sup> P. Stone and O. Farah, *Research Handbook EU Private International Law*, Elgar Publishing: Utrecht 2015, p. 250.

the objectives proposed in this report. The discussion between options 3 and 4 is discussed at greater length later in this report, although it should be noted here that the use of directives has predominantly been restricted to those areas where the EU legislature has also attempted some degree of substantive law harmonisation, albeit that the fields of European private law (i.e. harmonisation of substantive law) and European private international law (i.e. harmonisation of conflict of law rules) have long been regarded as working in splendid isolation of each other”.<sup>197</sup>

## **4.6 Type of action**

### **4.6.1 Introduction**

Having established that European Union action is required (both in terms of societal need, in terms of institutional framework, subsidiarity and proportionality) and would satisfy the competency criteria contained within the TEU and TFEU, it is necessary to identify the form in which such action should take place. The European Union pursues integration through a multi-layered legal system that includes primary law, secondary law and so-called “soft law”, as well as the case law of the Court of Justice of the European Union. Knowing that action in this field is not suited to the primary legislative field a choice has to be paid between two categories of measures, namely secondary measures and soft law measures. As previously stated at the beginning of this section, soft law measures in this field would not be sufficient to solve the issues of mutual recognition of decisions, nor create the desired uniformity of approach required when for example attempting to implement standard forms for durable powers of attorney. Soft law would not provide the necessary commitment from the Member States that is required when dealing with cross-border recognition and enforcement of measures. Binding legislative measures are therefore required.

### **4.6.2 Legislative action**

European Union law allows for the adoption of a variety of secondary measures or legal acts aimed at achieving the fulfilment of the tasks listed under Union law. Article 81(2) TFEU does not favour one type of legislative action above and beyond any other. Article 81(2) talks of “measures” to be adopted without further specifying the type of legislative action to be taken. Article 288 TFEU states that “in exercising the Union’s competencies, the institutions shall adopt regulations, directives, decisions, recommendations and opinions”. These various forms of legislative action can furthermore be categorised into hard law measures (regulations, directives and decisions) and soft law measures (recommendations and opinions, as well as other soft law mechanisms such as resolutions, communications, opinions etc.).<sup>198</sup> Article 296 TFEU states that where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. At this juncture it is important to note that the vast majority of instruments adopted via the former Article 65 (the current Article 81 TFEU) have been in the form of regulations.

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<sup>197</sup> R. Michaels, “EU law as private international law? Reconceptualising the country of origin principle as vested rights theory” (2000) *Journal of private international law* 196.

<sup>198</sup> Koen Lenaerts and Piet van Nuffel, “European Union Law”, p. 918-925

Private international law by virtue of its very nature as international procedural law requires precise, unconditional provisions that are applicable across the EU. Accordingly, the option for soft law possibilities is not an option in this case. The gaps identified in this report cannot be solved by means of a soft law instrument indicating to Member States the minimum standards that they need to satisfy. The gaps and problems identified in this report require a strictly defined and harmonised set of rules of private international law. Rules on the cross-border recognition and enforcement of judgments will simply not work if these rules are to be implemented on a voluntary basis. The rules required must, therefore, constitute a set of precise, unconditional provisions that are directly and uniformly applicable in a mandatory way and, by their very nature, require no action by the Member States to transpose them into national law. As has been seen in other areas of private international law, the use of Regulations has been highly successful to achieve this aim. In the field of family law, reference can be made to the Brussels II-bis Regulation, Rome II Regulation, Maintenance Regulation, Succession Regulation and Protection Regulation. In the field of civil and commercial matters, one can point to the Brussels I (recast) Regulation, the Insolvency Regulation, Rome I Regulation, Rome II Regulation, the Order for Payment Regulation, Small Claims Procedure Regulation, European Order Uncontested Claims Regulation, Service of Documents Regulation, and Evidence Regulation.

At this stage, reference can also be made to the Commission's arguments when opting to utilise the form of a regulation instead of a directive with respect to matters of maintenance,

"The Member States cannot be left with the discretion not only to determine rules of jurisdiction, the purpose of which is to achieve certainty in the law for the benefit of individuals and economic operators, but also the procedures for the recognition and enforcement of decisions, which must be clear and uniform in all Member States. The same applies to conflict-of-law rules. The proposal [for a Maintenance Regulation, author] contains indeed uniform rules on applicable law, which are detailed, precise and unconditional and require no implementation in national law. If Member States had, on the contrary, margin of appreciation for the implementation of these rules, one would reintroduce the legal uncertainty that this proposal is specifically intended to eliminate."<sup>199</sup>

The Commission continued,

"In a more general way, transparency is a vital objective in this context; the rules applicable in the Community should be easily and uniformly understood without the need to seek the provisions of national law that transpose the content of the Community instrument, bearing in mind that national law will very often be foreign to the plaintiff. Opting for a Regulation

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<sup>199</sup> Explanatory Memorandum, Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final, p. 9.

enables the Court of Justice to ensure that it is applied uniformly throughout the Member States.”

As indicated by Borras, these arguments “are not only related to maintenance obligations, but they can be used in all areas of family law.”<sup>200</sup> Hence, it would seem that on the basis of the above-mentioned arguments, there are extremely convincing arguments that can be put forward to support the choice of a Regulation in this field of law instead of a directive. Furthermore, due to the direct applicability of a regulation, issues such as late or incorrect transposition of a directive within the domestic legal system are avoided.<sup>201</sup> In a note on the cross-border implications of the legal protection of adults, it was advised that the HAPC 2000 should be converted into a Regulation so as to harmonise the individual definitions and place the field of law under the jurisdiction of the Court of Justice of the European Union.<sup>202</sup> Although the conversion of the HAPC 2000 into a Regulation is not possible owing to the fact that the HAPC 2000 is not a European Treaty, but a product of a different international organisation.

The benefits of introducing a European instrument in the field of the protection of vulnerable adults are multiple. As illustrated, there are areas of the current framework which lead to various results being achieved depending upon the Member State in which action is sought. This is not only due to the lack of uniformity in the application of the HAPC 2000, but also due to the limited substantive scope of the instrument and the restricted geographical scope of the jurisdiction rules. As a result, the ensuing situation is highly diffuse and non-uniform. In order to ensure the goals of predictability and uniformity of decision, an EU instrument would be needed. As noted in a study on the need for a European codification of private international law, the gaps identified can be filled by a sectoral approach.<sup>203</sup> This means that although possibilities exist for the codification of private international law in its entirety, at present the sectoral approach (whereby the European Union addresses one sector or field of law at any one given time) would appear to be preferable.

## **4.7 Possible methods of enactment**

### **4.7.1 Introduction**

Given that the European Union is competent to act in this field, the question arises which shape such private international law rules should take. Obviously, at this stage of the process, the first question is not what shape such a measure would take, but whether such a measure is indeed required. However, given that the issues of subsidiarity have already been addressed in §4.4 of this report, and raised a rather clear picture that an EU legislative instrument is desirable, it is perhaps opportune to briefly outline a number of enactment methods that could be utilised when drafting a future instrument. In this way, an opening

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<sup>200</sup> A. Borras, “Institutional framework: Adequate instruments and the external dimension”, in: J. Meeusen *et al*, *International Family Law for the European Union*, Intersentia: Antwerp, 2007, p. 133.

<sup>201</sup> Koen Lenaerts and Piet van Nuffel, “European Union Law”, p. 901-905

<sup>202</sup> Policy Department C: Citizens Rights and Constitutional Affairs, *Cross-border implications of the legal protection of adults*, DG Internal Policies, PE 462.497, 2012, p. 22.

<sup>203</sup> EAVA, *Cost of non-Europe report. European Code of Private International Law*. European Parliament: Brussels, 2013.

will be created ensuring a discussion of how the problems identified in this report could best be solved using European Union legislative instruments.

#### **4.7.2 Extension of scope**

On the basis of the interviews conducted during the course of this report, as well as the literature study, it was noted that the current HAPC 2000 ensures that the framework for protection only applies to situations in which the adult has become impaired. It was suggested by a number of interviewees<sup>204</sup> that a future EU instrument could be expanded in terms of its substantive scope. It was suggested that the rules applicable to vulnerable adults whose abilities were impaired could then in this way also be applied to those situations in which elderly persons were able to provide an agent with a power of attorney to act on their behalf (see, for example, the situation outlined in section 3.2.2). Although at first sight, this would appear to be a rather straightforward exercise, such an option has not thus far ever been utilised in the field of private international family law within the EU context. The issues are subtle, but extremely complicated. One of the major reasons for exclusion of a given group of individuals from the scope of an instrument, is because the general rules would require amendment and adaptation if they were to apply to that other group; a simple analogous application would more-than-likely not work, and is in essence the very reason why this issue was excluded from the substantive scope of the original instrument.

Addressing the issues at hand, this is clearly obvious. The situation in which an adult is unable to make decisions for him or herself, and instead these decision need to be made by a third person is a different situation to one where the adult wished to delegate their decision-making power is still able to make decisions, but chooses not to. Issues of undue influence and the extent of the delegation are just two of the differences between these categories. Obviously, the situation in which an adult delegates decision-making power to another adult, it not something unheard of in legal terms; this is simply the pre-existing institution of agency. The question really is whether an elderly person delegating their decision-making power to an agent is deserving of the protection afforded to an individual who is incapable of making decisions, or whether such a category of individuals is more similar to general agency constructions. At any rate, it has not been possible to identify examples of where such a construction has been opted in the context of EU private international family law.

#### **4.7.3 Additional provisions**

In the area of jurisdiction, it was especially noted that the HAPC 2000 goes only so far in unifying the international rules of jurisdiction. Any future European instrument could take this process one step further and also ensure that the residual grounds of jurisdiction were also unified, thus ensuring complete decisional harmony within the European Union. Such a solution would entail the European Union declaring that the provisions of the HAPC 2000 would be applicable to the extent that a given case fell within the scope of the Convention. If the Convention was deemed not to be applicable, then additional residual grounds of jurisdiction could supplement the jurisdictional rules.

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<sup>204</sup> Interview with A. Vrenegoor, interview with R. Frimston and interview with A. Ward.

Obviously, this would require a two-stage approach given that not all Member States have currently ratified the HAPC 2000. The first stage would be to ensure that all the Member States would apply the same rules on jurisdiction. A possible solution to this issue has been adopted with respect to the application of the Hague Form of Wills Convention 1961 (hereinafter HFWC 1961). Currently, 19 EU Member States are signatories to the HFWC 1961, whilst the Convention is in force in 17 of them.<sup>205</sup> When the Succession Regulation was drafted, the question arose how to deal with this disparity. The solution was an interesting compromise between the need to ensure that those States that have signed the Convention continue to apply the Convention and do not need to renounce the Convention, and the need to ensure decisional harmony within the EU. According to Article 75(1) Succession Regulation, the HFWC 1961 will take precedence over the Succession Regulation insofar as this Convention is applicable in the state seized of the case. In those states that are not signatory to the Convention, they are to apply the equivalent rules in Succession Regulation. In terms of applicable instrument, a difference therefore arises; in some Member States the issues surrounding the validity of a last will and testament will be governed by the HFWC 1961, whereas in other Member States the Succession Regulation is applicable to these issues. Despite this difference in formal source, the rules themselves are virtually identical. Article 27 of the Succession Regulation is essentially a carbon copy of the relevant rules laid down by Article 1, HFWC 1961. Accordingly, regardless of the country in which one proceeds, (i.e. a state party to the HFWC 1961 or a state that is not party to this Convention), the substantive answer to the issues surrounding the validity of the last will and testament will be answered in the same manner.

A similar solution could also be adopted in any future EU instrument in the field of protection of adults. A chapter on jurisdiction could ensure that those states that have signed and ratified the HAPC 2000 continue to apply these rules should the case fall within the scope of the Convention. In those states that have not ratified this Convention, they would use the jurisdiction rules laid down in a future EU instrument, which in turn would be copies of the jurisdictional rules laid down in the HAPC 2000. The EU instrument could then go further and that all Member States, regardless of whether they are signatories to the HAPC 2000, would then apply the same residual grounds of jurisdiction if the case fell outside the scope of the HAPC 2000.

Such a solution achieves a two-fold aim. Firstly, it ensures that the solutions proposed by the HAPC 2000 are achieved in all EU Member States regardless of whether they have signed the HAPC 2000. If a Member State has signed the HAPC 2000, then the jurisdictional rules of the Convention would be directly applicable; if a Member State has not signed the Convention, then equivalent rules would be applicable on the basis of the EU instrument. This solution ensures respect for the Hague instrument, whilst ensuring decisional harmony in those cases that fall within the scope of the HAPC 2000. The second advantage of such an approach is ensuring decisional harmony and predictability in those cases that

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<sup>205</sup> Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, "Status table", available at <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=40](http://www.hcch.net/index_en.php?act=conventions.status&cid=40)> last accessed 28th October 2015



fall outside the scope of the HAPC 2000. As has already been witnessed with respect to the Maintenance Regulation and the Succession Regulation, the new EU approach is to ensure complete unification of jurisdictional rules, instead of the complex interaction caused by a delineated geographical scope of application.

#### **4.7.4 Incorporation of Hague Instrument**

With respect to the rules on applicable law, all those interviewed agreed that the rules adopted in the HAPC 2000 are able to be applied without problems and in that sense do not require further adjustment. The only exception to this point was the issues addressed in section 3.5.2 with regard to the exact delineation between those issues that fall within the ambit of Article 15(1) HAPC 2000 and those that fall within the purview of Article 15(3) HAPC 2000. The question arises, therefore, how the European Union would best address this situation in an EU instrument. In light of the comments made with respect to interpretation referrals, it would certainly be advantageous to have the applicable law rules form an integral part of the *acquis*. In order to achieve these goals, reference could be made to the solution adopted by the EU in the field of the international recovery of maintenance. Article 15, Maintenance Regulation ensures that issues of applicable law in the field of maintenance are to be determined in accordance with the rules laid down in the Hague Maintenance Protocol 2007.

Although the Hague Maintenance Protocol 2007 has since entered into force, at the time of entry into force of the European Maintenance Regulation, this was not the case. As a result of this incorporation, the EU was able to ensure uniformity throughout the EU, whilst at the same time also ensuring that Member States were not overly burdened with two differing sets of applicable rules – one for intra-EU disputes on the basis of the Regulation, and one for disputes involving third states on the basis of the Hague Maintenance Protocol 2007. This innovative solution could well be a possible approach to dealing with the area of applicable law.

#### **4.7.5 Standard forms**

The recently enacted Succession Regulation provides a number of examples that could serve as inspiration for any future European instrument in the field of vulnerable adults. One of the areas in which the two fields display similarities is with respect to the free circulation of documents. In the field of cross-border inheritance issues, one of the problems signalled prior to the enactment of the European Succession Regulation was that a declaration of succession drafted in one Member States was not automatically recognised in other Member States. This led to problems of legal uncertainty and conflicting decisions. The same is also true in the field of the protection of vulnerable adults. Currently a decision taken in one Member State with respect to the protection of a vulnerable adult, or the private mandate drafted by a citizen in one Member State, is not entitled to automatic recognition in other Member States. Accordingly, the citizen involved is placed in a highly uncertain and precarious situation, which ultimately depends on the national, domestic rules of private international law as to whether the decision or mandate will be granted recognition. This is a highly undesirable situation. As already outlined elsewhere in this report, a future European instrument in this field would assist in the automatic recognition and enforcement of such decisions and mandates. However, a future European instrument

could also go one step further and introduce a standardised form in a similar fashion to the Succession Regulation.

In a similar fashion to the Succession Regulation, a future European vulnerable adults instrument could introduce standardised certificates to be issued by competent authorities that have issued judicial or administrative decisions with respect to vulnerable adults, but could also produce standardised forms for European citizens to use to draft private mandates. Such steps were welcomed by all those interviewed, including the central authorities. All interviewees noted that such standard forms would aim transparency, improve mutual trust, provide for more efficient solutions to cross-border problems and at the same time would reduce costs in cross-border litigious situations, as well as extra-judicial settings. Such forms would assist in the cross-border recognition of documentation, but would also simplify the entire field for citizens across the European Union. A citizen living in Latvia would be able to use the standard form to draft a power of attorney, which could then be recognised and enforced in all other EU Member States. The form itself would be easily recognisable because citizens in other EU Member States would use the same form.

Similar steps have also been taken outside of the field of inheritance. The recent developments in the field of maintenance could also serve as inspiration for the future action in this field. In 2007, both the European Union and the Hague Conference for Private International Law drafted standard forms for use in the field of cross-border recovery of maintenance. The forms in the Hague Maintenance Convention 2007 are, however, optional in nature, whereas the European forms are compulsory.

#### **4.7.6 Creation of identical or similar rules**

One option that could be utilised is the creation of a set of rules that are virtually identical. This option has been used in a number of different settings, but has led to complicated problems regarding concurrence, and interpretation. For example, in the field of maintenance, both the Maintenance Regulation and the Hague Maintenance Convention 2007 establish a system of Central Authorities. The provisions of administrative co-operation are contained in Chapter VII of the Maintenance Regulation and Chapters II and III of the Hague Maintenance Convention 2007. The tasks and duties are enumerated in both of these instruments. Although the two instruments are virtually identical, a number of small differences are evident. Questions can then be posed whether these differences are intentional, thus requiring different practical application, or whether these differences are unintentional, in which case they should be ignored. Such unintentional interpretational issues should, however be avoided.

A similar problem has arisen in the context of the jurisdictional rules contained in the Brussels II-bis Regulation and the HCPC 1996. Although both instruments contain rules of direct jurisdiction, these rules are different both in terms of principle (e.g. the Brussels II-bis Regulation departs from the principle of *perpetuation fori*, whereas the HCPC 1996 does not), as well as the actual grounds of jurisdiction (e.g. the Brussels II-bis provides for prorogation in procedures not ancillary to divorce proceedings, whereas the HCPC 1996 only provides for prorogation in ancillary matters). It is, therefore, essential in any given

case to know which set of jurisdictional rules apply. In practice, this has proven extremely difficult and has led to differences of approach.

It is, therefore, arguable that such an approach would not be advisable and should only be used as a last resort. If the rules contained in the HAPC 2000 are suitable, then it would be better to either refer to those rules (e.g. solution adopted in Article 15 Maintenance Regulation, incorporating the Hague Maintenance Protocol 2007), or incorporate them into any future EU instrument (e.g. solution adopted in Article 27 Succession Regulation in conjunction with Article 75(1) Succession Regulation and the HFWC 1961).

If the rules contained in the HAPC 2000 do not go far enough, then an alternative solution would be to provide additional, complementary rules in an EU instrument. Such a solution has also previously been adopted in the field of international child abduction. Article 11 Brussels II-bis provides a complementary set of provisions in cases of intra-EU child abduction. As the mutual level of trust is higher within the EU, the exceptions to the return of a child can be applied more strictly in such circumstances, thus ensuring that the basic principles of the Convention (immediate return of the child) can be applied in more cases.<sup>206</sup> In this way, the legal basis for the return order remains that of the Hague Abduction Convention 1980, whilst in intra-EU cases, these provisions are supplemented by the provisions of Article 11 Brussels II-bis. Such a solution could be preferable in the field of the central authority co-operation for example. In this way, the basic provisions for the central authority co-operation and the applicable framework could remain those laid down by the HAPC 2000, however these rules could be supplemented with added (or perhaps more elaborated) tasks and responsibilities) in a future EU instrument.

#### 4.7.7. Different recognition regimes

As noted earlier in this report, the recognition regime provided for under the HAPC 2000 is not sufficient for the EU context. The recognition regime provides for multiple grounds for non-recognition, and could be removed within the EU context (in a similar fashion to the grounds for recognition in the Maintenance Regulation, as compared to the Hague Maintenance Convention 2007). Furthermore, the requirement to obtain a declaration of enforcement under the HAPC 2000 would not be needed within the EU context, as is evident in the Maintenance Regulation, Succession Regulation and the Brussels I (recast) Regulation. Therefore, it would be advisable to create a separate regime for the recognition of intra-European situations. Take, for example, the following situations.

Albert grants Bertina a power of attorney over his property and medical affairs. Albert and Bertina move from France to Germany. The power of attorney granted in France is entitled to recognition and enforcement in Germany under the HAPC 2000.

Carl grants Daphne a power of attorney over his property and medical affairs. Carl and Daphne move from France to the Netherlands. The power of attorney granted in France is not entitled to recognition and enforcement in the Netherlands under the HAPC 2000.

<sup>206</sup> E. Pataut, in: U. Magnus and P. Mankowski (eds.), *Brussels II-bis Regulation*, Sellier: Munich 2012, p. 128.

In creating a recognition regime for intra-EU cases, both of the abovementioned scenarios would be treated identically. Furthermore, in both situations, recognition *and* enforcement could be automatic and subject to extremely limited grounds for refusal. A similar situation is also currently the case with respect to judgments in the field of parental responsibility, where decisions of EU Member States are recognised on the basis of the Brussels II-bis Regulation, whereas the HCPC 1996 and the HCPC 1961 can be applied to the recognition of decisions that originate from contracting states outside the EU.

#### **4.7.8 Summary**

It is clear on the basis of this brief overview of legislative possibilities, that various techniques could be utilised to ensure that the problems identified in this article could be addressed in a future EU instrument. The problems can be best dealt with by ensuring that a variety of legislative techniques are utilised (e.g., creation of additional subsidiary rules of jurisdiction, the incorporation of the HAPC 2000 with regards to jurisdiction and applicable law rules, the creation of a separate recognition regime etc.). At this stage, the most striking conclusion is that a standard legislative approach to enactment within a future EU instrument would not be suitable, as this could lead to the creation of other problems.

### **4.8 European Added Value**

On the basis of the information provided in this section, it is clear that the area currently under discussion deals with a field of law that falls within the shared competence of the European Union and the Member States (Article 4 TFEU). As long as the principles of subsidiarity and proportionality are satisfied – which has also been shown to be the case – the European Union would be competent to adopt legislative instruments to tackle the problems identified in this report.

In identifying why the European Union is competent to address the issues raised with respect to this topic, it has also been indicated that a European instrument would provide added value to this field. The issues raised in relation to the international protection of vulnerable adults cannot be solved by the Member States themselves, and thus requires action at EU level. Accordingly any action at EU level would serve added value in this field, if it is done in such a way so as to complement the working of the HAPC 2000. Furthermore, it has also been shown that the added value that a possible European instrument could best be achieved in the form of a Regulation, on the basis of Article 81(2)(a), (c), (e) and (f) TFEU.

## 5 Conclusions

The world's population is ageing and living longer. Estimates have been made that by 2050, people over the age of 60 should constitute 37% of the population of Europe, with 10% of them being 80 or over. This demographic shift has major economic, social, health and budgetary impacts and is the subject of numerous European-level studies.<sup>207</sup> Life expectancy is increasingly rapidly, as too are the number and extent of age-related illnesses, such as Alzheimer's and dementia. Furthermore, the world's population is becoming increasingly mobile, thus ensuring that problems once the virtually exclusive domain of national legal systems are quickly becoming international problems raising complex private international law questions. The number of northern Europeans wishing to retire in warmer southern European climates is a clear example of such combined trends. Issues arise, however, when adults become incapacitated and require the assistance by third parties, either at their own bequest or at the order of a court. These issues have led to the need being recognised within the European Union for attention to be paid to these issues.

These societal changes have led to a rapid increase in the number of private international law problems associated with vulnerable adults. These private international law issues are currently addressed through an array of international, European and domestic instruments. The diversity of regulation is itself a problem in that many practitioners are faced with a complex network of applicable regulations, and thus advising clients correctly is a difficult and time consuming task, which in turn increases the costs of the client as well as the possibility of the incurrance of errors. The fact that these societal problems are also becoming legal problems was noted by the Hague Conference for Private International Law, which drafted the Hague Adult Protection Convention 2000 in order to attempt to solve some of these issues.

Currently, only a small number of EU Member States have actually signed and ratified this Convention. As a result, large discrepancies currently exist within the legal framework for the international protection of adults within the EU. Such a situation leads to a number of temporary issues that will be solved once all Member States have signed the Convention. Despite the possibility that all Member States could ratify the HAPC 2000, this has as of yet not occurred, nor does it appear to be going to happen in the near future. This report has, however, also identified a number of permanent issues that will remain despite the ratification of the HAPC 2000 by all Member States and/or the EU itself. Accordingly, it has been noted that further legislative action would be welcomed to address these issues within the EU.

On the basis of the information provided in this report, it is clear that the area currently under discussion deals with a field of law that falls within the shared competence of the European Union and the Member States (Article 4 TFEU). As long as the principles of subsidiarity and proportionality are satisfied (as proved to be the case in section 4 above),

<sup>207</sup> Information and statistics published by the European Commission, Dg Health and Consumer Protection, in the field of ageing and health: [http://ec.europa.eu/health/ph\\_information/indicators/docs/healthy\\_ageing\\_en.pdf](http://ec.europa.eu/health/ph_information/indicators/docs/healthy_ageing_en.pdf).

the European Union would be competent and best suited to adopt legislative instruments to tackle the problems identified in this report. In doing so, the option of a Regulation would be preferable and could be founded on the basis of Article 81(2)(a), (c), (e) and (f) TFEU. Furthermore, this report has also recommended that the European Union, in drafting such a regulation, should also pay close attention to a variety of possible methods if drafting such an instrument. The regulation should deal with all traditional areas of private international law, namely international jurisdiction, applicable law, recognition and enforcement of judgments, as well as with respect to administrative co-operation and the creation of a system of central authorities. Nonetheless, perhaps the most added value could be gained from the introduction of standard forms with respect to lasting powers of attorney, gleaning much needed inspiration from the recently enacted European Succession Regulation and the creation of a standard European declaration of succession.

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## **Annex II**

# **The Protection of Vulnerable Adults in EU Member States. The added value of EU action in the light of The Hague Adults Convention**

by Pietro Franzina and Joëlle Long

### **Abstract**

The analysis of law and practice relating to the protection of vulnerable adults in cross-border cases shows that a wide ratification of The Hague Convention of 13 January 2000 on the International Protection of Adults would improve the present situation in all EU Member States. In addition, the adoption of EU legislation should be considered with a view to fixing the few weaknesses of the Convention and making cooperation in this field in relations among Member States even more efficient.

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## List of abbreviations and acronyms

<b>Brussels Ia Regulation</b>	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 (recast)
<b>Brussels IIa Regulation</b>	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
<b>ECHR</b>	European Convention for the Safeguard of Human Rights and Fundamental Freedoms – Rome, 4 November 1950
<b>European Maintenance Regulation</b>	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
<b>European Measures of Protection Regulation</b>	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
<b>European Succession Regulation</b>	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
<b>European Taking of Evidence Regulation</b>	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
<b>Hague Adults Convention</b>	Convention on the international protection of adults – The Hague, 13 January 2000

<b>Hague Apostille Convention</b>	Convention abolishing the requirement of legalisation for foreign public documents – The Hague, 5 October 1961
<b>Hague Child Abduction Convention</b>	Convention on the civil aspects of international child abduction – The Hague, 25 October 1980
<b>Hague Child Protection Convention</b>	Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children – The Hague, 19 October 1996
<b>Italian PIL Statute</b>	<i>Legge 31 maggio 1995 n. 218 – Riforma del sistema italiano di diritto internazionale privato</i> [Law of 31 May 1995 No 218 – Reform of the Italian system of private international law]
<b>Rome I Regulation</b>	Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
<b>Rome II Regulation</b>	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN RPD Committee</b>	UN Committee on the Rights of Persons with Disabilities
<b>UN CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities – New York, 13 December 2006

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## Executive summary

This study illustrates the way in which issues relating to the protection of vulnerable adults in cross-border situations are currently addressed in three EU Member States – Italy, France, and the United Kingdom – which have been chosen on grounds of representativeness. The analysis shows that a wide ratification of The Hague Convention on the International Protection of Adults of 13 January 2000 would make the protection of vulnerable adults throughout Europe more effective and efficient, and would improve the conditions under which the persons concerned exercise their right to move and reside freely in the EU.

Under the Convention, the difficulties experienced in Italy with the use of citizenship as the primary connecting factor for the protection of adults, which potentially leads to the application of a law other than the law of the forum, would almost cease to exist. The same holds for the problems caused by the present lack of conflict-of-law rules dealing with powers of attorney granted in contemplation of a loss of capacity. Other problems arise because of the absence of provisions ensuring the proper management of ‘positive conflicts of jurisdictions’ (i.e., situations in which the authorities of two or more countries are concurrently seised of the protection of the person or property of the same adult).

If The Hague Convention on the International Protection of Adults were in force for all EU Member States, the situation would equally improve in those Member States that are already bound by the Convention, such as France and the United Kingdom, with respect to Scotland. The authorities of these States would be entitled to seek the cooperation of the authorities of the other Member States with which the situation is, or may become, connected, while adults and those in charge of their protection could easily rely on the effects of measures of protection taken in one Member State as soon as the need arises to protect the adult in another Member State. For similar, but stronger, reasons, the situation would improve in those other Member States, like the United Kingdom, with respect to England and Wales, that are not a party to the Convention, but have decided to enact domestic legislation to give effect to its provisions.

Based on these findings, the study concludes that the EU should take the necessary measures to have all EU Member States ratify, or accede to, the Hague Convention on the International Protection of Adults.

In addition, the EU should consider enacting legislation, based on Article 81 of the Treaty on the Functioning of the European Union, aimed at furthering cooperation in the relations among Member States, while keeping The Hague Convention as the basic set of uniform rules governing the international protection of adults in Europe. Such legislation would fix the few weaknesses of the Convention and ensure consistency with EU legislation relating to neighbouring areas of private international law. A future legislative measure relating to the protection of vulnerable adults in cross-border cases could, among other things: (i) improve the cooperation among the authorities of EU Member States, in particular by strengthening their direct communications; (ii) abolish, under appropriate circumstances, the requirement of *exequatur* for the enforcement in a Member State of measures of protection taken in another Member State; (iii) create a European Certificate of Powers Granted for the Protection of an Adult, to replace the Certificates contemplated under Article 38 of the Convention; (iv) enable adults, subject to appropriate safeguards, to choose

the Member State whose authorities should have jurisdiction to take measures directed to their protection in the event of incapacity; and (v) provide for the 'continuing' jurisdiction of the authorities of the Member State of the former habitual residence of the adult for a period following the transfer of the adult's habitual residence to another Member State.

# 1. Introduction

## I - What this study is about

This study concerns the protection of 'vulnerable' adults in cross-border situations. For instance, where measures of protection are sought before the authorities of a State other than the State of nationality or the State of habitual residence of the adult, or where those charged with representing or assisting adults are asked to perform their duties in several countries.

### Box 1 – Private international law issues in the field of adults' protection

Adriana, a young Romanian living in the Netherlands, suffers from partial paralysis and brain damage as a consequence of a car accident that occurred in Nijmegen. Adriana's sister, Iulia, who lives in Timișoara, realises that, due to the accident, Adriana is unable to make decisions by herself about her health and economic interests. Due to the cross-border character of the situation, some private international law issues will arise in this scenario. Will the Dutch court requested by Iulia to take measures directed at the protection of Adriana consider that it has jurisdiction to entertain the case? In the affirmative, will this court apply Dutch law or Romanian law to decide the substance of the protection (for example, to assess whether the substantive conditions for the required protection are satisfied and to determine the content and organisation of the protection)? Will the measures of protection issued by the Dutch court be regarded as effective in Romania? For instance, supposing that Iulia is appointed Adriana's guardian, will Iulia be able to rely, in Romania, on the powers granted to her under a Dutch measure of protection to manage Adriana's financial interests in Romania? Finally, should Iulia envisage to take her convalescent sister to Romania for a few months for rehabilitation, will the Dutch authorities supervising the protection of Adriana be able to discharge effectively their duties while Adriana is in Romania, with the cooperation of Romanian authorities?

A double vulnerability often exists in these cases, since the international element may hinder the exercise of the fundamental rights of the adult in question and prevent them from enjoying a thoroughly efficient and timely protection. Furthermore, the diversity of applicable laws and the multiplicity of competent jurisdictions may adversely affect the exercise by the adult of their right to move and reside freely within the EU.

## II – Purpose and structure

The purpose of the study is to collect evidence that may be used to assess the added value of possible EU measures regarding the protection of vulnerable adults in cross-border situations, and to outline the possible content of such measures.

To this end, a survey has been conducted concerning the way in which issues relating to the international protection of adults are currently addressed in three EU Member States – France, Italy, and the United Kingdom – under their respective domestic rules or, where applicable, under The Hague Adults Convention. The latter is the most important legal instrument laying down uniform rules of private international law on the protection of adults<sup>1</sup> and is presently in force for seven EU Member States, namely Austria, the Czech

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<sup>1</sup> For an outline of the Convention, see Lortie, Groff, 2012. See also Ian Curry-Sumner, Research Paper on Vulnerable Adults in Europe. European added value of an EU legal instrument on the protection of vulnerable adults, 2016: 44-69.



Republic, Estonia, Finland, France, Germany, and the United Kingdom (albeit solely with respect to Scotland).<sup>2</sup> In addition, the Convention is in force for Switzerland and will enter into force for Monaco on 1<sup>st</sup> July 2016.

The study consists of four chapters. Chapter 1, the present introduction, sets out the scope of the study, explains its methodology, and defines the main concepts addressed in the paper. Chapter 2 illustrates the *status quo* in the three selected Member States. Chapter 3 describes the difficulties experienced in these countries and discusses the advantages that would be achieved if The Hague Adults Convention were in force for the Member States in question (where this is not already the case) and for all remaining Member States. Finally, Chapter 4 provides some suggestions as regards the measures that the EU may consider adopting with a view to enhancing the protection of vulnerable adults throughout Europe.

### III - Methodology

#### 1. Sources of information

As literature and case law dealing specifically with the international protection of adults remain limited, it proved necessary to conduct a field survey in order to gather the information required for this study. The survey involved semi-structured interviews and questionnaires submitted to legal professionals with the aim of identifying recurrent practical problems and gaining insight into the actual operation of the applicable provisions.<sup>3</sup> It also included the search for, and analysis of, unpublished case law.

#### 2. Reasons for focusing on Italy, France, and the United Kingdom

The three Member States selected for this study were chosen on account of their representativeness. Although rules in this area vary from one State to another, the analysis of the above countries provides some general indications as to the situation in other EU Member States. This assumption is based on the following considerations.

##### 2.1. Italy

Italy signed The Hague Adults Convention in 2008, but has not yet ratified it.<sup>4</sup> Accordingly, Italian courts continue to deal with the cross-border protection of adults under domestic rules of private international law. While these rules are not identical to those in force in other countries, the non-applicability of The Hague Adults Convention makes the situation

<sup>2</sup> Other EU Member States are currently considering the possibility of becoming a party to the Convention, including Ireland, Portugal, and Sweden, and have actually initiated (and in some cases almost completed) the internal procedures required to this effect. See further, in this connection, the answers given by Member States to a Commission's questionnaire, collected in Council Document 5831/15. As far as Italy is concerned, see also below, Chapter 1, para. III.2.1.

<sup>3</sup> The list of persons contacted is appended to this study.

<sup>4</sup> A bill concerning the ratification of the Convention was submitted to the Italian Parliament in December 2014, at the initiative of the Government. No major objection has been raised so far as to the desirability of Italy becoming a party to the Hague Adults Convention. On the contrary, scholars have expressed the view that a similar development would bring significant advantages (Franzina, 2012: 281 ff). No reliable prediction may be made at this stage as to whether and when the ratification process could be completed, as the topic does not appear to be among the current priorities in the Italian political agenda.

in Italy roughly comparable to the situation in Greece, Luxembourg, Spain, and in other Member States that are not parties to the Hague Adults Convention.

## **2.2. France**

France ratified The Hague Adults Convention in 2008. French authorities apply its provisions as of 1 January 2009. The situation in France may thus be presumed to resemble the situation in Austria, Finland, Germany, and in the other Member States for which the Convention already applies.

## **2.3. The United Kingdom**

The legal tradition of the United Kingdom is markedly different from the legal traditions of France and Italy, in general and as regards the protection of adults.<sup>5</sup> The analysis of the situation in the United Kingdom was intended to determine whether the added value of The Hague Adults Convention is influenced by the legal tradition of a given country and its general approach to the protection of adults.

Another reason for choosing the United Kingdom is the mixed attitude of this country regarding The Hague Adults Convention. Following a declaration made under Article 55(1), the Convention applies in Scotland and in respect of Scottish protective measures, but not in England and Wales or in Northern Ireland. While, as will be seen, most of the rules applicable in England and Wales and in Northern Ireland do not substantially differ from those applicable in Scotland under the Convention, the existence of different regimes within the same Member State further facilitates a comparison among situations that benefit from The Hague Adults Convention, and situations that do not.

## **3. The relevance of substantive law**

While this study focuses on cross-border situations, and is accordingly concerned, in essence, with rules of private international law, the analysis of the situation in the three selected Member States also includes a description of the substantive provisions that govern the protection of vulnerable adults in the legal system concerned.

There are basically two reasons for this: (i) the substantive regulation of a legal institution tends to represent the background against which the rules of private international law relating to the same institution are elaborated and applied in the legal order in question: they thus provide an important key to understanding the design and operation of private international law rules; and (ii) where the protection of a vulnerable adult is at issue in one State, the substantive rules of that State play a significant role also in cross-border cases: this occurs, for example, where the public-policy exception is raised (since the notion of public policy implies a reference to the fundamental principles of the law of the forum), and where the relevant provisions prescribe the application of local rules in cases of urgency or in the implementation of measures taken abroad.

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<sup>5</sup> See further Chapter 2, para. IV.1.

## IV - Key concepts

### 1. Adults

Adults are persons who have reached the age of majority. The age at which majority is attained is fixed by each legal system. While the law of most countries sets the age of majority at 18,<sup>6</sup> the issue of whether a person is an adult in the legal sense is to be decided, as a rule, under the law that governs the capacity of the person concerned, as designated by the relevant conflict-of-laws rules.

Instead, for the purposes of The Hague Adults Convention, adulthood is reached at 18, regardless of whether the national law applicable to capacity provides otherwise.<sup>7</sup> This 'independent' solution is consistent with The Hague Child Protection Convention, which regards as 'children' all those who have not reached the age of 18.

### 2. Adults in need of protection

In general, legal systems consider that an adult is in need of protection if he or she is not in a position to protect his or her interests (in other words, if he or she depends on others for decisions relating to their personal or economic interests, like the decision to undergo a certain medical treatment, or to sell a property). The personal condition that prevents the person concerned from effectively protecting his or her interests can be strictly medical (for example, intellectual disability), or not (examples include age, prodigality, or addiction to drugs or alcohol). It does not matter whether the impairment is permanent or temporary.

### 3. Vulnerability vs incapacity

In essence, all EU Member States protect vulnerable adults by vesting a person or body with the power to act as their substitute and/or the duty to assist them in the performance of all or some acts.<sup>8</sup>

In continental Europe, this approach mostly implies the appointment of tutors and curators by courts.<sup>9</sup> In the past, the designation of a representative was mainly made to prevent the vulnerable person from carrying out acts detrimental to his or her assets and used to result in the 'incapacitation' of the individual concerned (in other words, in a full deprivation of legal capacity, resulting in the inability to validly conclude any transaction).

Over the last few decades, several, civil-law countries have reformed their legal systems, introducing new forms of protection.<sup>10</sup> These have essentially been meant to favour

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<sup>6</sup> Different standards are employed in this regard under the law of the EU Member States that have been selected for this study. Adulthood commences at 18 under French and Italian law. By contrast, the law of England and Wales, while setting the age of majority at 18 for most purposes, provides that the rights exercisable under the rules relating to protection of people lacking capacity apply, in general, to those aged 16 or over. Scottish law follows a similar solution.

<sup>7</sup> Curry-Sumner, 2016: 45, 46.

<sup>8</sup> See, generally: Herring, 2016: 6; Long, 2013: 61.

<sup>9</sup> As explained below in this study, in common-law jurisdictions the approach is mainly focused on personal self-determination. However, under the *parens patriae* doctrine, the State is allowed, subject to certain qualifications, to make decisions as to mental-health treatment on behalf of those who are mentally incompetent (Long, 2013: 57).

<sup>10</sup> Reference is made, *inter alia*, to France (1968, 2007, 2015), Austria (1984), Germany (1990), Greece (1996), Spain (2003), Italy (2004), Switzerland (2012).

*supported* decision-making instead of *substitute* decision-making. Today, the loss or limitation of legal capacity is no longer the only available means to protect an adult. In the same vein, where a limitation of legal capacity is decided, it is generally confined to individual acts or categories of acts, as determined by the court in light of the circumstances of the case and the conditions of the adult in question. The traditional symmetry between protection and incapacitation is ultimately severed.

#### **4. Powers of attorney and mandates**

Another way to protect a vulnerable adult consists in the appointment of an attorney by the adult. The attorney is charged with making decisions on behalf of the adult during the time in which the individual concerned will not be in a position to protect effectively his or her interests.<sup>11</sup>

In common-law systems, persons enjoying full capacity are allowed to grant powers of attorney that are specifically intended to organise the care of financial and property matters and/or personal welfare in the event of future incapacity. The effects of such lasting (or enduring, or continuing) powers of attorney, or private mandates, come into effect, or remain in effect, when the impairment arises.<sup>12</sup> In addition to specifying the type of decisions that the attorney is entitled to take on behalf of the grantor, these instruments usually set out the directives under which the attorney must act.

Some civil-law countries have enacted legislation that similarly allows the grant of powers of representation in contemplation of a future impairment. Thus, by way of example, German law envisages the possibility of giving a *Vorsorgevollmacht*, while French law provides for a *mandat de protection future*, and Swiss law for a *Vorsorgeauftrag*, or *mandat pour cause d'incapacité*.<sup>13</sup>

As these arrangements may involve the transfer of considerable powers from the grantor to the attorney, and possibly allow the latter to perform acts having a significant impact on the personal and economic interests of the former, the legal systems that regulate such mandates make them subject to a number of conditions and safeguards.

One further possibility consists in relying on common legal devices, such as unilateral powers of attorney and agency agreements. These instruments, however, may be significantly less effective than powers of attorney specifically conceived for protective purposes. The former, in fact, are governed by the law of agency and contracts (Lush, 2015: 50) and, as such, according to the legislation of several countries, are terminated by operation of law as soon as the principal loses capacity.

#### **5. Private international law**

Private international law deals with relationships in the field of private law that involve a foreign element. A foreign element may be present when the matter concerns persons living in different countries or relates to property located in the territory of two or more States. Based on the specific function they perform, the rules of private international law may be grouped under five main headings: (i) the rules on *jurisdiction* determine whether

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<sup>11</sup> Long, 2013: 56.

<sup>12</sup> See 2(IV)(1), below, on the lasting power of attorney in England and Wales.

<sup>13</sup> Long, 2013: 57.

the courts (or, generally, the authorities) of a given country are entitled to adjudicate a case connected with a State other than their own; (ii) the rules on the *applicable law*, or conflict-of-law rules, identify the legal system whose provisions must be deemed to govern the situation; (iii) the rules on the *recognition and enforcement of foreign judgments and other acts* prescribe whether, and subject to which conditions, the effects of a judgment rendered in one State (or the effects of a court settlement or an authentic instrument) may be relied upon in another State, either as a binding determination of a disputed claim or as grounds for enforcement; (iv) the rules on the *production of foreign public documents* determine which requirements (for example, legalisation, apostille, etc.) must be met for a public document executed in one country (including a notarial act) to be relied upon before the authorities of another State; and (v) the rules on *international judicial assistance and inter-jurisdictional communications* set out the conditions under which the authorities of one State are entitled to exchange information with, and obtain the cooperation of, the authorities of another State.

## 2. The *status quo* in the selected Member States

This section provides an illustration of the substantive and private international law rules that apply to the protection of adults in France, Italy, and the United Kingdom, preceded by an outline of the general principles governing this area of law.

### Key findings

- The substantive rules that govern the protection of vulnerable adults vary significantly from one Member State to another, although they are based on the same general principles, as enshrined in the UN CRPD and in the ECHR.
- Important differences also exist as regards the rules of private international law: some EU Member States are parties to The Hague Adults Convention, others have decided to give effect to the Convention in their respective legal systems, without becoming a party to the Convention, and still others continue to apply their own domestic rules in this area.

### I - General principles governing the protection of adults

#### 1. The human-rights-based approach to disability

The protection of vulnerable persons is regarded today as a human-rights concern.<sup>14</sup> This is the result of a paradigm shift that emerged in this area of law in the last two decades of the 20th Century, in parallel with a general reconsideration of the notion of disability. Under the current human-rights-based approach, as chiefly expressed in the UN CRPD, a disabled person is seen as a holder of rights, and no longer as a passive recipient of care. For their part, States are under an obligation to ensure and promote, both alone and in cooperation with each other, the full and effective participation of the disabled in society, on an equal basis with others.

#### 2. The impact of the new paradigm on the protection of vulnerable adults

##### 2.1. Equal recognition before the law and capacity to act under the UN CRPD

Issues of legal capacity and capacity to act, while remaining the province of private law, need to be considered in light of the new paradigm. States are not only required to recognise, pursuant to Article 12(2) of the UN CRPD, that persons with disabilities 'enjoy legal capacity on an equal basis with others in all aspects of life'. They also have a positive obligation, under Article 12(3) and (4), to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity', and to ensure that measures relating to the exercise of legal capacity 'provide for appropriate and effective safeguards to prevent abuse'.

As noted by the UN RPD Committee,<sup>15</sup> the term 'support' encompasses support arrangements of varying types and intensity, including the possibility to 'choose one or more trusted support persons to assist [the persons concerned] in exercising their legal

<sup>14</sup> Kayess, French, 2008; Harpur, 2012.

<sup>15</sup> General comment No. 1 (2014) - Article 12: Equal recognition before the law, CRPD/C/GC/1.

capacity for certain types of decisions'. In this connection, the Committee observed, all persons with disabilities should be recognised as having 'the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others'.

## 2.2. European developments

European countries played a crucial role in the legal and political process that resulted in Article 12 of the UN CRPD. Notably, the development of the principles of personal autonomy, non-discrimination and social inclusion largely reflects the work of the Council of Europe. In 1999, the Committee of Ministers of the Council of Europe adopted a recommendation laying down a set of principles on the legal protection of incapable adults.<sup>16</sup> These include: (i) the principle of *maximum preservation of capacity* ('a measure of protection should not result automatically in a complete removal of legal capacity'); (ii) the principles of *necessity and subsidiarity* (no measure of protection should be established 'unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned'); (iii) the principles of *proportionality and individualisation* (protection should be 'proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned'); and (iv) the *paramountcy of the interests* of the adult concerned in the design and actual operation of measures of protection.

In a more recent recommendation, adopted in 2009 to deal specifically with continuing powers of attorney and advance directives for incapacity,<sup>17</sup> the Committee of Ministers stressed 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.

Recommendations are not legally binding texts. However, the European Court of Human Rights has on various occasions referred to the above principles as a means to clarify and develop the interpretation of the ECHR, in particular as regards the right to a fair trial and the right to respect for family and private life under Articles 6 and 8 of the ECHR.<sup>18</sup>

EU Member States, which are all parties to the ECHR, must conform to the ECHR both in their legislation and in the practice of their authorities. Member States cannot ignore the way in which the relevant provisions are interpreted by the European Court of Human Rights, in light of the principles outlined above. The same principles are also generally protected, in Member States, at a constitutional level.

## 3. The relevance of the new approach to cross-border situations

The general principles that govern the protection of vulnerable adults inform any pertinent rule, including the rules of private international law.<sup>19</sup> Human-rights considerations are relevant to private international law in two ways: (i) the availability of a properly designed

<sup>16</sup> Recommendation (1999) 4 - Principles concerning the legal protection of incapable adults.

<sup>17</sup> Recommendation (2009) 11 - Principles concerning continuing powers of attorney and advance directives for incapacity.

<sup>18</sup> See, *inter alia*, the judgments of 27 March 2008, *Shtukaturv v Russia* (application no. 44009/05); 17 July 2008, *X v Croatia* (no. 11223/04); 13 October 2009, *Salontaji-Drobnjak v Serbia* (no. 36500/05); 17 January 2012, *Stanev v Bulgaria* (no. 36760/06); 25 April 2013, *M.S. v Croatia* (no. 36337/10); 18 September 2014, *Ivinovic v Croatia* (no. 13006/13).

<sup>19</sup> Franzina, 2012: 14 ff.

set of rules of private international law in this area is essential to ensure the effective protection of vulnerable adults: these rules, by determining the way in which a national legal order should deal with matters that other legal orders might want to regulate as well, actually reduce the risk of fragmentation and lack of spatial continuity in protection; and (ii) the design of the rules of private international law relating to the protection of vulnerable adults must ensure the respect for the human rights of adults lacking capacity, including the right to self-determination, and to facilitate their realisation in international cases.

## II - Italy

### 1. Substantive law

In keeping with the civil-law tradition, the Italian legal system achieves the protection of vulnerable adults essentially through the judicial appointment of a legal representative charged with acting on behalf of the protected person in the performance of all or some acts.

The representative may be an *amministratore di sostegno* (support administrator), a *tutore* (full guardian), or a *curatore* (curator), depending on whether the protection is organised in the form of an *amministrazione di sostegno* (support administration), *interdizione* (full guardianship), or *inabilitazione* (curatorship).

Support administration is the preferred solution when the situation does not require a more limiting intervention.<sup>20</sup> The administrator is appointed by a probate judge in the framework of rapid and informal proceedings, in which the prospective beneficiary must be heard in person. The administrator is chosen on the basis of the beneficiary's interests, and, if possible, is selected from the members of his or her family (Article 408 of the Italian Civil Code). The administrator replaces or assists the vulnerable person in the performance of the acts enumerated in the decree instituting the protection, while the beneficiary retains the ability to perform all other acts.

If the complexity of the case so requires (for example, due to the presence of substantial assets to be managed), the protection may be organised in the form of full guardianship. This involves the appointment of a guardian, who has the power to act as substitute for the vulnerable person in decisions concerning property and financial affairs, as well as personal welfare and health. The ward is deprived of his or her legal capacity to act, although, by way of exception, the court may decide that the adult retains the ability to perform certain acts of routine administration without the intervention of the guardian.

Curatorship may be set up for adults who are mentally infirm if their condition is not serious enough to justify guardianship, as well as in the case of prodigality (Article 415). Statistical evidence, however, shows that curatorship has since 2004 been *de facto* replaced by *amministrazione di sostegno*.

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<sup>20</sup> According to case law, it is unnecessary to assess whether a person is in full possession of his or her faculties, or if a medical condition of impairment is present. Actually, a person may be unable to look after his or her own interests, for the purposes of support administration, for reasons associated with age, alcoholism, or prodigality.



Both the guardian and the support administrator are subject to court supervision. They must regularly submit a report on their actions on behalf of the beneficiary and need to seek court authorisation prior to performing acts of particular importance.

Decisions that institute guardianship and support administration are recorded in the register of civil status.

In addition to the institutional protection described so far, a limited possibility exists for an adult to organise his or her protection in advance.

A formal designation of a support administrator in contemplation of future incapacity may be made in the form of a notarial act or private deed (Article 408(1)). The court seised in the protection of the adult in question will only be allowed to disregard such designation if 'serious reasons' so require, in light of the adult's best interests. The Court of Cassation has ruled that, although the Code is silent on this point, the instrument whereby the appointment is made by the person concerned may also contain advance directives for treatment, which will guide the administrator, health professionals, and the courts themselves in their decisions as to the adult's personal care and health.<sup>21</sup>

Some Italian courts admit that an individual who is still capable may already seek the institution of an *amministrazione di sostegno*, the effects of which will be deferred to the time of his or her future incapacity.<sup>22</sup> The prevailing view, however, is that judicial measures of protection cannot be taken as long as the adult concerned is still capable.<sup>23</sup>

On a different note, as long as a person remains capable of understanding, he or she can grant another person the power to represent them in respect of some acts. This may be done through a *procura* (if unilateral) or a *mandato* (if bilateral). The power of representation can be either general or specific (in other words, limited to a particular act or a predetermined set of matters). In no case, however, will it encompass acts that are legally excluded from representation, such as the power to marry, to make a will, and to execute health care decisions. If the principal is placed under guardianship, the powers of representation thus granted will automatically cease to have effect (Article 1722(4)). The same applies in the case of support administration, to the extent to which the powers judicially entrusted to the administrator correspond to those granted to the legal representative through an 'ordinary' power of attorney.<sup>24</sup>

## 2. Private international law

In Italy, pending ratification of The Hague Adults Convention, the protection of vulnerable adults in cross-border situations is an issue currently dealt with in accordance with the Italian PIL Statute. The Hague Convention of 17 July 1905 on the deprivation of civil rights, while formally in force for Italy, is apparently no longer applied in practice.<sup>25</sup>

<sup>21</sup> *Corte di Cassazione*, judgment No 23707 of 20 December 2012, 28 *La nuova giurisprudenza civile commentata* (2013), I, 421.

<sup>22</sup> An example is *Tribunale Modena*, decree of 1 July 2015, <http://www.personaedanno.it>.

<sup>23</sup> *Corte di Cassazione*, judgment No 23707 of 20 December 2012, mentioned above.

<sup>24</sup> Bonilini, Tommaseo, 2008: 449.

<sup>25</sup> The Convention has apparently not been used by Italian courts for decades now. The same holds true, it seems, for the other States that are still formally bound by the Hague Convention of 1905, namely, Poland, Portugal, and Romania: Lagarde, 1999: 73.

## 2.1. Applicable law

Pursuant to Article 43 of the Italian PIL Statute, the protection of adults is governed by the law of the State of nationality of the adult in question (*lex patriae*).

*Renvoi*, the process whereby relevance is accorded to the conflict-of-laws rules of the foreign, legal order specified by the conflict-of-laws rules of the forum, may affect the identification of the applicable law in two situations. Both situations are contemplated in Article 13 of the Statute, when the foreign conflict-of-laws rules either: (i) refer back to Italian law (first-degree *renvoi*); or (ii) refer to the law of a third country which considers its own substantive rules to be applicable to the circumstances (second-degree *renvoi*).<sup>26</sup>

According to Article 19(1) of the Italian PIL Statute, if the adult is a stateless person or a refugee, the law of the State of his or her residence or domicile will apply. As regards adults possessing the nationality of two or more States, Article 19(2) provides for the application of the law of the State, among the States of nationality, with which the adult is most closely connected. However, if the adult in question is also an Italian national, then Italian law will apply, regardless of other considerations.<sup>27</sup>

As an exception to the rule illustrated above, which prescribes the application of the *lex patriae*, the second part of Article 43 states that Italian law will apply whenever the need arises to adopt provisional measures for the urgent protection of an adult's personal or economic interests.

Under Article 16 of the Italian PIL Statute, the application of foreign law may be excluded on grounds of public policy, in other words, where the substantive rules of the designated foreign legal systems would lead to a result that conflicts to an intolerable degree with a fundamental policy of the Italian legal system.<sup>28</sup> To the extent to which the matter comes within the scope of application of an Italian overriding mandatory provision, the latter will apply, pursuant to Article 17 of the Statute, irrespective of any otherwise applicable foreign law.

## 2.2. Jurisdiction

The jurisdiction of Italian courts in matters relating to the protection of the person or property of an adult is dealt with under Article 44 of the Italian PIL Statute. This begins by stating that the general rules that set the limits of Italian jurisdiction in contentious and

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<sup>26</sup> Thus, for example, an Italian court, based on the combined operation of Article 43 and Article 13 of the Italian PIL Statute, will consider the protection of a Romanian living in Italy to be governed by Italian law, not by Romanian law, since the relevant Romanian conflict-of-law rules (namely Article 2578(1) of the Romanian Civil Code, as amended in 2011), provide, in this field, for the application of the law of the country where the adult is habitually resident (Italy, in the circumstances). For a similar finding, albeit in a slightly different scenario, see *Tribunale Pordenone*, judgment of 7 March 2002, 19 *Corriere giuridico* (2002), 773.

<sup>27</sup> The privilege thus accorded to Italian citizenship will be disregarded whenever its application would infringe on the prohibition of discrimination on grounds of nationality enshrined in Article 18 of the TFEU; that is, if the adult in question, in addition to being Italian, is a national of another EU Member State.

<sup>28</sup> No court cases have been found that specifically discuss the issue of public policy in matters relating to the protection of adults. It is contended that this safeguard would be invoked, for example, if the foreign, applicable law only provided for full incapacitation, thereby preventing the court from acknowledging the remaining capacity of the adult in a situation where such capacity actually exists.

non-contentious cases (Articles 3 and 9 of the Italian PIL Statute, respectively) equally apply to the protection of adults. This two-fold reference reflects the fact that the protection of an adult may involve proceedings of a different nature. The proceedings whereby a court ascertains that the adult in question is not in a position to protect his or her interests, and accordingly orders that the adult be assisted or substituted by an administrator or a guardian, are deemed to be contentious in nature; proceedings whose purpose is to authorise the guardian or administrator to enter into a particular transaction on behalf of the adult, or to replace the guardian or administrator, are of a non-contentious nature.<sup>29</sup>

Italian courts are entitled to hear *contentious* proceedings, pursuant to Article 3(1) of the Italian PIL Statute, if the adult in question resides or is domiciled in Italy. According to Article 3(2), as supplemented by Article 29(2) of Legislative Decree No. 71 of 3 February 2011 on consular services, Italian courts equally possess jurisdiction if the adult in question is an Italian national residing abroad. In addition, Article 18(2) of the Italian Code of Civil Procedure provides that Italian courts can claim jurisdiction over an adult who is neither resident, nor domiciled, nor present in Italy, provided that the person who brings the proceeding (such as, the spouse or child of the adult in question) resides in Italy.<sup>30</sup>

As regards *non-contentious* proceedings, Italian jurisdiction extends to all cases in which the protection of an Italian citizen or a person residing in Italy is involved, as well as to cases the substance of which, according to Article 43 of the Italian PIL Statute (in combined operation with Article 13, as the case may be), is governed by Italian law.

Article 44(1) of the Italian PIL Statute goes on to provide that, in urgent matters, Italian courts are entitled to take urgent interim measures aimed at protecting a person who is present in Italy or concerning assets located in Italy.

Finally, Article 44(2) clarifies that, whenever a foreign decision regarding the protection of an adult is recognised in Italy, Italian courts are entitled to take such measures as may be necessary to supplement or to modify that decision.

### **2.3. Recognition and enforcement of foreign decisions**

Foreign decisions relating to the protection of vulnerable adults are recognised and enforced in Italy in accordance with Articles 64 to 67 of the Italian PIL Statute.<sup>31</sup>

Articles 64 and 65 set out the conditions for the recognition of foreign judgments rendered in a contentious case. Article 64 covers all civil judgments, whereas Article 65 is concerned with measures (including, but not limited to, judicial decisions) relating to specific subject matters, including the capacity of natural persons.

<sup>29</sup> Franzina, 2012: 131 ff.

<sup>30</sup> Doubts have been expressed as to the constitutionality of the combined applicability, in such cases, of Article 3(2) of the Italian PIL Statute and Article 18(2) of the Italian Code of Civil Procedure: Franzina, 2012: 140 ff.

<sup>31</sup> Italy has concluded several bilateral agreements on judicial cooperation in civil matters. Most of these apply to the protection of vulnerable adults, and provide, *inter alia*, for the mutual recognition of judgments. However, since the requirements laid down in these agreements, generally speaking, are not more liberal than those established in the Italian PIL Statute, the effectiveness of foreign decisions relating to the protection of adults is almost systematically assessed against the backdrop of the Italian PIL Statute alone, irrespective of whether the country of origin of the decision in question is a country with which a bilateral agreement is in force.

Articles 64 and 65 provide that foreign measures appointing a guardian or administrator, or otherwise creating a regime for the protection of a vulnerable adult, will be recognised in Italy by operation of law whenever the following requirements, *inter alia*, have been met: (i) the court that rendered the judgment relied, in a contentious case, on grounds of jurisdiction that substantially conform to those laid down by Italian law; alternatively, the measure must emanate from the State whose law is considered by the relevant Italian conflict-of-law rules (i.e., Article 43 of the Statute, in combined operation with Article 13, as the case may be) to be the law applicable to the substance of the situation at hand; (ii) no infringement has occurred, in the foreign proceedings, of the fundamental procedural guarantees safeguarded under Italian law; and (iii) the judgment is not incompatible with Italian public policy.

Pursuant to Article 66 of the Italian PIL Statute, a foreign *non-contentious* decision relating to the protection of a vulnerable adult is recognised in Italy: (i) if it comes from the country whose law is considered by Article 43 (in combined operation with Article 13, as the case may be) to be the law governing the substance of the situation (if the decision has been issued elsewhere, the latter requirement is deemed to be met if the decision itself qualifies for recognition in that country); or, alternatively, if the court that issued the decision relied on grounds of jurisdiction that substantially conform to those provided for by Italian law (i.e., the grounds contemplated in Article 44 of the Italian PIL Statute for non-contentious cases; (ii) the proceedings that led to the judgment have not been in breach of the fundamental, procedural guarantees of the parties, as construed under Italian law; and (iii) the judgment is not incompatible with Italian public policy.

Pursuant to Article 67 of the Italian PIL Statute, foreign decisions that qualify for recognition can only be enforced in Italy once declared enforceable there.

#### **2.4. Foreign public documents**

As a rule, public documents executed abroad, including notarised powers of attorney granted in contemplation of incapacity, can be produced in Italy only after they have been legalised by the Italian diplomatic or consular authorities in the country where the act was executed.<sup>32</sup> Legalisation is the formality whereby the authorities of the country in which the document is to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted, and, where appropriate, the identity of the seal or stamp that it bears.

Italy is party to several bilateral and multilateral conventions exempting foreign documents from legalisation. One of these, The Hague Apostille Convention, is currently in force for 112 countries, including all EU Member States. Under The Hague Apostille Convention, the only formality that may be required in a Contracting State for the production of a foreign public document is the addition of an 'apostille', issued by the competent authority of the Contracting State from which the document emanates.

Other conventions provide for broader exemptions, and actually make the apostille itself unnecessary in the cases contemplated therein. These include: (i) the Brussels Convention

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<sup>32</sup> See generally, on the requirement of legalisation: Articles 2657(2) and 2837 of the Civil Code; Article 21(3) of Decree of the President of the Republic No 396 of 3 November 2000; Article 2(d) of Decree of the President of the Republic No 131 of 26 April 1986; and Article 68(1) of Royal Decree No 1326 of 10 September 1914.

of 25 May 1987 Abolishing the Legalisation of Documents in the Member States of the European Communities;<sup>33</sup> (ii) the Convention on the Exemption from Legalization of Certain Records and Documents, signed at Athens on 15 September 1977;<sup>34</sup> and (iii) the European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers, opened for signature in London on 7 June 1968.<sup>35</sup>

Where the requirements of legalisation or apostille are met, or are entirely dispensed with, the use of foreign public documents before Italian authorities may still be subject to some conditions. This is true, in particular, for linguistic requirements. Documents drawn up in a language other than Italian must be accompanied by an official Italian translation prior to being produced in judicial or administrative proceedings,<sup>36</sup> and before being given to a public register office<sup>37</sup> or a notary.<sup>38</sup> However, courts are allowed to dispense with this requirement if the foreign document is reasonably easy to understand and its meaning is undisputed between the parties.<sup>39</sup> Additionally, notaries are entitled to append their own translation to a foreign document if they are familiar with the language employed.

Where the question arises of determining the substantive effects of the foreign, public document in question, such as the qualified evidentiary value of the statements therein or the enforceability of its provisions against third parties, it may prove necessary to refer to the laws of different States. Depending on the issues considered, the authority before which the document is produced may need to consider, in particular, the law of the country of origin of the document and the law applicable to the legal relationship affected by the purported effects of the document in question.<sup>40</sup>

## 2.5. Cooperation with foreign authorities

No rules can be found in the Italian legal system which specifically address the issue of cooperation with foreign authorities as regards the protection of adults. Some cooperation may be achieved, in principle, under the European Taking of Evidence Regulation. It should be noted, however, that the latter Regulation was not specifically intended to apply to the taking of evidence needed by an authority charged with the protection of a vulnerable adult, and may actually prove unsuitable for this particular purpose. For example, where evidence is obtained under a request for 'active' cooperation, the requesting authority is prevented from establishing a direct contact with the person

<sup>33</sup> The Brussels Convention is not in force internationally. However, some contracting States – namely Belgium, Denmark, Estonia, France, Ireland, Italy and Latvia – declared, upon ratification, that they intend to apply the Convention on a provisional basis in their relations with other States which have made the same declaration.

<sup>34</sup> The Athens Convention applies in the relations between Italy and 9 other States, 8 of which are EU Member States: Austria, France, Greece, Luxembourg, the Netherlands, Portugal, Poland and Spain.

<sup>35</sup> The London Convention is in force for Italy and 21 more States, 17 of which are EU Member States: Austria, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.

<sup>36</sup> Article 122 of the Italian Code of Civil Procedure and Article 33(3) of Decree of the President of the Republic No 445 of 28 December 2000.

<sup>37</sup> Article 11(5) of Decree of the President of the Republic No 131 of 26 April 1986.

<sup>38</sup> Article 68(2) of Royal Decree No 1326 of 10 September 1914.

<sup>39</sup> See, e.g., *Corte di Cassazione*, judgment No 6093 of 12 March 2013.

<sup>40</sup> Pasqualis, 2002: 585 ff.

supplying the information – a key asset in this particular area of law. Furthermore, direct taking of evidence, pursuant to Article 17 of the Regulation, requires the prior acceptance of the Central Body designated by the requested State. The whole process may be lengthy and burdensome, and the degree of informality that might be required to achieve the best results cannot always be ensured. Incidentally, pursuant to Article 1(2), the Regulation is only applicable where a ‘court’ seeks evidence intended for use in ‘judicial proceedings’, either already commenced or contemplated. Bodies and agencies performing an administrative activity are thus precluded, as such, from benefiting from the Regulation.

### **3. A particular local situation studied in detail: Turin**

The authors have analysed the way in which issues arising in connection with the protection of adults are actually addressed by courts in one particular geographical area in Italy: the territorial jurisdiction of the *Tribunale* of the city of Turin (Torino), with a population of about 1 800 000 people, nearly 10% of whom are foreigners.<sup>41</sup> The analysis covered all cases of judicial protection of vulnerable adults involving foreign citizens, presently under the supervision of the Tribunal of Turin. Its purpose was to: (i) collect statistical data on the international protection of adults, albeit limited to one particular local experience and to the protection afforded by means of judicial intervention; (ii) identify, based on the examination of actual judicial files, the factual and legal issues that most frequently arise in practice in this area; and (iii) determine the ways in which the present unavailability of internationally uniform rules of private international law, including rules on cooperation among the authorities of different States, affects the exercise of the fundamental rights of vulnerable adults and the efficiency of their protection in cross-border cases.

As of 23 November 2015, the Tribunal of Turin was supervising 9 026 adults lacking capacity.<sup>42</sup> As a means to determine the number of cross-border, as opposed to purely internal, cases, a survey has been conducted for this study on the nationality of the adults concerned.<sup>43</sup> Since the electronic records do not include data on the nationality of the beneficiary, the analysis has been conducted first through a manual search on the electronic database based on the name and place of birth of the beneficiaries and then on direct analysis of the 128 court files thus selected. Around 82 cases have involved the judicial protection of adults possessing only a foreign citizenship.<sup>44</sup>

In a significant number of cases, the measures adopted with respect to foreigners take the form of full guardianship (*interdizione*). Support administration has been chosen in

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<sup>41</sup> Source: the Italian National Institute of Statistics (ISTAT); data elaborated by the authors. The proportion of foreigners in the area of Turin roughly corresponds to the proportion of foreigners in Italy as a whole (the population of Italy amounted, as of 1<sup>st</sup> January 2015, to 60 795 612, with foreigners accounting for 8.2% of this figure).

<sup>42</sup> This figure refers to a broad range of capacity-affecting measures, including measures that have nothing to do with the protection of *vulnerable* adults, such as measures involving a temporary deprivation of the legal capacity to act as a consequence of criminal convictions.

<sup>43</sup> It must be stressed, however, that the foreign nationality of the protected person is not the only element capable of conferring an international element to the protection of a vulnerable adult. The situation would equally be international in nature, *inter alia*, if the adult were an Italian resident abroad.

<sup>44</sup> There may be a slight overestimation here, since in 7 cases the issue of the nationality of the beneficiary was not finally settled.

relatively few cases, when compared to situations involving Italian nationals. Arguably, this reflects the fact that the situations of vulnerability experienced by foreigners are often brought to the attention of judicial authorities only when they have already become particularly serious, which frequently coincides with the moment in which the individual concerned is admitted to residential care.<sup>45</sup> This state of affairs underlies, in turn, the lack of family and friendship networks suffered by a considerable number of migrants. This appears to be confirmed by the fact that proceedings aimed at the protection of foreigners are frequently brought by the public prosecutor, not by a family member. And frequently, the legal representative chosen for foreigners is a public body, usually the councilor for social policies of the municipality, not a friend or a relative of the adult concerned.

Although Article 43 of the Italian PIL Statute, as explained above, uses nationality as a connecting factor, most judgments (75 out of 82) actually failed to apply the *lex patriae* of the beneficiary, and rather referred to Italian law as the law governing the substance of protection. Some of these judgments acknowledged that the law of the forum was applied merely for reasons of urgency, or because it proved impossible to determine the content of the relevant foreign rules. More often, however, the court remained silent on the reasons why the foreign applicable law was in fact disregarded, and simply applied Italian law as if the case had been purely domestic in nature (see further below, Chapter 3). This attitude, it is submitted, implicitly indicates a sort of discontent as to the practical implications of the conflict-of-law rules that presently apply in Italy to the protection of vulnerable adults.

### III - France

#### 1. Substantive law

The current rules on the protection of adults are the result of a line of reforms undertaken since 1968,<sup>46</sup> which reflect a growing concern for the fulfilment of an adult's best interests and respect for his or her autonomy, while underscoring the idea that protective measures should be tailored to the needs of the beneficiary.

The protection of a vulnerable adult may be organised under the following schemes: (i) *tutelle* (guardianship); (ii) *curatelle* (curatorship); (iii) *sauvegarde de justice* (judicial protection); (iv) *habilitation familiale* (family curatorship); (v) *mesure d'accompagnement social personnalisé* or *judiciaire* (tailor-made measure of social support); and (vi) *mandat de protection future* (mandate for future protection).

The first four schemes follow the civilian tradition and protect the adult through the judicial appointment of a representative. A common requirement is the adult's inability to provide for his or her own interests due to a medically assessed impairment (Article 425 of the French Civil Code). *Tutelle*, *curatelle* and *sauvegarde de justice* are ranked in reverse order of preferability, the first being meant to apply only to the most serious cases.

<sup>45</sup> Arguably, other factors may need to be considered. Economic immigration involves, to a large extent, persons who belong to age groups that are less exposed than others to some of the most recurrent factors of vulnerability, such as dementia.

<sup>46</sup> Act No 68-5 of 3 January 1968; Act No 308 of 5 March 2007; Order No 2015-1288 of 15 October 2015. An implementing decree should be adopted in the near future for the latter text.

*Tutelle* protects people who need to be represented on a continuous basis and results in the substitution of the ward in the performance of all acts.<sup>47</sup> The guardian performs ordinary acts, but needs the approval of the guardianship judge for acts of major importance (Article 505 ff). *Curatelle* is for people who need assistance in the performance of legal acts and involves substitute decision making only for acts of major importance (Article 467). Both the guardian and the curator can be chosen in advance by the prospective ward when he or she is still capable. Absent an advance designation, the appointment will be made by a court. The actual set up of a guardianship or curatorship must be recorded in the registers of civil status. Their maximum duration is five years (ten in exceptional cases, as far as *tutelle* is concerned), but this time limit can be extended.

The *sauvegarde de justice* concerns adults whose need for protection is temporary or limited to particular acts (Article 433). This scheme results in the designation of a person charged with representing the adult in the performance of specific acts, with the capacity of the adult remaining unaffected for all other matters (Article 435). *Sauvegarde de justice* may be activated, *inter alia*, through a statement addressed to the public prosecutor by the physician who is treating the person. The maximum duration is one year, renewable for one more year.

With *habilitation familiale*, which is effective from 1 January 2016, a court grants one or several family members the power to act on behalf of the adult in question (Article 494-1). The court can limit itself to specifying a list of acts that the adult is allowed to perform only through his or her representative. The adult retains the capacity to exercise his or her rights in respect of all other acts.

Under a *mesure d'accompagnement judiciaire*, persons who benefit from social support, but have failed to restore their autonomy in the management of their affairs, are judicially deprived of the legal capacity to manage the public allowances granted to them if their health and safety appear to be at risk (Article 495). The competent court appoints an agent (*mandataire judiciaire*) chosen from a list of suitable professionals, and charges him or her with collecting and managing all or part of the adult's benefits, with the aim of assisting the person concerned in restoring his or her autonomy in the administration of personal affairs. As for all other actions, the person remains legally capable of acting. The duration of the measure cannot exceed two years and can be extended only once.

Those wishing to make advance arrangements about how they want decisions to be made in the event that they should lose capacity may opt for a *mesure d'accompagnement social personnalisé* or a *mandat de protection future*. The aim of the former is to help adults whose health or security is at risk because of their inability to manage their affairs and social benefits (Articles L271-1 to L271-8 of the *Code de l'action sociale et des familles*). It is implemented through a specific agreement (*contrat d'accompagnement social personnalisé*) concluded with the local social services. The agreement can vest the social services with responsibility for collecting and managing all or part of the social benefits. The duration of the measure may go from six months to two years and can be extended up to four years.

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<sup>47</sup> Guardianship may be 'alleviated' by the court through an order allowing the adult to perform, alone or with the assistance of the guardian, one or more specific acts (Article 473).



The *mandat de protection future* allows any persons who are not subject to *tutelle* or *habilitation familiale*<sup>48</sup> to entrust one or several persons to represent them in the event that they are no longer able to provide for their interests (Article 477(1) of the French Civil Code). The *mandataire*, i.e., the attorney, can be an individual or a body. The mandate can be executed under private seal or through a notarial act in the form of an authentic deed.<sup>49</sup> It must be recorded in a special register and enters into effect as soon as it is established that the grantor is no longer able to look after his or her own interests. The *mandataire* must submit the instrument, together with a certificate issued by a physician, to the clerk's office of the competent *Tribunal d'instance*. The clerk then returns the original to the attorney with an official mention, whereby the power granted has come into effect.

Under the rules that govern contracts and obligations, the possibility exists for any capable person to grant an ordinary unilateral power of attorney (*procuration*) or enter into an agency agreement, thereby allowing a trusted person to perform legal acts in the adult's name and on their behalf (Articles 1984 to 2010 of the French Civil Code). These powers, however, are terminated under operation of law as soon as the principal is placed under guardianship (Article 2003) or is the object of other measures of protection affecting his or her capacity concerning the acts for which the powers have been granted.

## 2. Private international law

The Hague Adults Convention entered into force for France on 1 January 2009. However, in France, not all private international law issues arising in connection with the protection of adults are to be decided in accordance with the Convention. Domestic rules of private international law, as may be found in the French Civil Code or elaborated through case law, apply to issues and situations that the Convention refrains from regulating.

A distinction must be made among the provisions of the Convention. Some are 'universal' in nature and apply regardless of whether the situation is one involving a connection with a Contracting rather than a non-Contracting State. Where these provisions come into play, no room is left for the domestic rules of private international law that perform the same function. This is notably the case of the rules laid down in the Convention for determining the law applicable to the substance of protection, including the law applicable to powers of representation granted by the adult.<sup>50</sup>

Other rules of The Hague Adults Convention, by contrast, only apply to situations involving a particular connection with a Contracting State. This is the case, in particular, with the rules on the recognition of foreign measures of protection, which merely apply to the measures taken in a Contracting State under the rules of jurisdiction laid down by the

<sup>48</sup> A person under judicial guardianship may enter into a *mandat de protection future* solely with the assistance of his or her judicial guardian.

<sup>49</sup> According to one of the experts interviewed for this study, the frequency with which French notaries are involved in the conclusion of *mandats de protection future* remains rather limited.

<sup>50</sup> Pursuant to Article 18 of the Convention, the provisions of Chapter III, concerning the applicable law, 'apply even if the law designated by them is the law of a non-Contracting State'. The universal approach followed by the Convention involves, in practice, the need to determine whether *renvoi* should be taken into account, or not (i.e., whether, for the purpose of determining the law applicable to a cross-border situation, one should consider, in addition to the conflict-of-law provisions of the forum, the conflict-of-law provisions of the legal order specified by the latter). Article 19 of the Convention provides that this should not be the case.

Convention.<sup>51</sup> The recognition in France of foreign measures that do not fit into this picture is still governed by French rules of private international law.

## **2.1. Jurisdiction**

Under Article 5 of The Hague Adults Convention, French courts have jurisdiction to take measures directed to the protection of an adult's person or property if the habitual residence of the adult in question is in France.<sup>52</sup> If the habitual residence changes to another Contracting State, jurisdiction lies with the authorities of the new State.

French courts are also entitled to take measures aimed at protecting a vulnerable adult if he or she is a French national, no matter if they are habitually resident in France or elsewhere. However, pursuant to Article 7(1), if the adult in question is habitually resident in another Contracting State, French courts can claim jurisdiction on such grounds only 'if they consider that they are in a better position to assess the interests of the adult', and after advising the authorities of the other Contracting State. In any case, French courts cannot exercise their jurisdiction based on nationality if the authorities of the Contracting State of the adult's habitual residence have informed the French authorities 'that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them'.

Article 8 provides that where French courts possess jurisdiction on any of the grounds indicated above, they may, 'if they consider that such is in the interests of the adult', request the authorities of another contracting State to take measures for the protection of the person or property of the adult, (in other words, transfer the case to the latter authorities). The request may relate to all or some aspects of such protection, and can be addressed to the authorities of any of the following Contracting States: a State of which the adult is a national; the State of the preceding habitual residence of the adult; a State in which property of the adult is located; the State whose authorities have been chosen in writing by the adult to take protective measures; the State of the habitual residence of a person close to the adult prepared to undertake his or her protection; or the State in whose territory the adult is present, as regards the protection of his or her person.<sup>53</sup>

French courts can take measures of protection concerning property situated in France, even if the adult in question is neither habitually resident in France nor a French national. Under Article 9 of The Hague Adults Convention, however, measures adopted on these grounds must be compatible with those taken by the authorities of another Contracting State, in particular if the latter State is the State in which the adult habitually resides or is the State of which the adult is a national.

Finally, French authorities can take urgent measures that are necessary to protect an adult's person or property, if the adult in question or his or her property is present in France.

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<sup>51</sup> Article 22(1), the opening provision of Chapter IV, on the recognition and enforcement of measures, refers to measures 'taken by the authorities of a Contracting State' and their recognition 'in all other Contracting States'.

<sup>52</sup> As regards vulnerable adults who are refugees or internationally displaced persons, the jurisdiction of French courts exists, pursuant to Article 6, on the basis of their presence in France.

<sup>53</sup> French authorities may also, of course, *receive* a request submitted under Article 8 by the authorities of another Contracting State. In a declaration made pursuant to Article 42 of the Convention, France specified that such requests should be addressed to the public prosecutor at the *Tribunal de grande instance* for the place where the protective measure should be taken.

Article 10(2) of The Hague Adults Convention provides that if the adult is habitually resident in a Contracting State, the urgent measures will lapse as soon as the authorities which have jurisdiction under the Convention have taken measures as required by the situation.

## 2.2. Applicable law

According to Article 13 of The Hague Adults Convention, measures of protection issued by French courts in the exercise of their jurisdiction under the Convention are subject, as a rule, to French law. By way of exception, French authorities may apply or take into consideration the law of a different State with which the situation has a substantial connection, in so far as required for the protection of the adult.

French law also has a role to play when the protection of an adult, in France, is based on a foreign measure of protection. Under Article 14 of The Hague Adults Convention, the law governing the 'conditions of implementation' of a measure taken in a Contracting State is the law of the State in which the measure is to be implemented. Thus, for example, the implementation in France of a foreign measure analogous to *tutelle* and involving the performance of acts of particular importance will require prior judicial authorisation.

When an international element is present, the law applicable to powers of representation granted by an adult in contemplation of a loss of autonomy is to be determined, in France, in conformity with Article 15 of The Hague Adults Convention. This provides that the existence, extent, modification, and extinction of these powers must be assessed in accordance with the law of the State of the adult's habitual residence at the time when the powers were granted. Due to the universal character of the conflict-of-law provisions of the Convention, the law specified under Article 15 may also be the law of a non-Contracting State.<sup>54</sup>

A different law may be chosen by the adult (or by the parties, if the power is conferred under an agreement), provided that the choice is made 'expressly in writing', and that the chosen law is the law of one of the following States: a State of which the adult is a national; the State of a former habitual residence of the adult; or a State in which property of the adult is located, with respect to that property. If the mandate is subject to a foreign law but the powers granted thereunder are to be exercised in France, the manner of exercise of such powers is governed, pursuant to Article 15(3), by French law.

Pursuant to Article 16 of The Hague Adults Convention, where powers of representation granted by an adult 'are not exercised in a manner sufficient to guarantee the protection of the person or property' of the latter, they may be withdrawn or modified by measures taken by French courts, provided that the latter possess jurisdiction under the Convention. In withdrawing or modifying the powers, the law applicable to the mandate, as identified through Article 15, 'should be taken into consideration to the extent possible'.

Article 17 refers to the transactions entered into by a person acting as the adult's representative with a third party, at a time when the two are present on the territory of the same State. Its purpose is to safeguard the legitimate expectations of such a third party,

<sup>54</sup> See, for example, *Cour d'appel Rennes*, judgment of 15 October 2013 (case 13/02113), <http://legifrance.gouv.fr>, concerning the lasting powers of attorney granted under the Guardianship and Administration Act 1990 of Western Australia by a woman residing in Australia.

whenever the issue of the validity of the transaction arises. If the person acting as a representative would be entitled to act as such under the law of the State where the transaction has been concluded, the validity of the transaction cannot be contested, and the third party cannot be held liable, on the sole ground that the purported representative was not entitled to act as the adult's representative under the different law specified by the Convention. This holds true, 'unless the third party knew or should have known that such capacity was governed by the latter law'.

Safeguards are in place to avert the risk that the applicability of a foreign law, under the provisions described above, might infringe important French policies or contravene French rules that qualify as overriding, mandatory provisions (which may lay down, for example, specific forms of representation of the adult in medical matters).<sup>55</sup> Pursuant to Article 20 of The Hague Adults Convention, the designation of a foreign law does not prevent the application of the mandatory provisions of the Contracting State in which the adult is to be protected, insofar as the application of such provisions is mandatory, irrespective of which law would otherwise be applicable. According to the rule set forth in Article 21, the application of the foreign law designated under the Convention can be refused if (but only if) this would be 'manifestly contrary to public policy' (in other words, contrary to the fundamental principles of the French legal system).

### **2.3. Recognition and enforcement of foreign measures**

As indicated above, a distinction must be made as concerns the recognition and enforcement of foreign decisions, depending on whether or not the measure has been taken in a State party to The Hague Adults Convention, based on the rules of jurisdiction set forth in the Convention.

If it has been taken in a Contracting State under the jurisdictional rules of the Convention, recognition and enforcement follow the rules of the Convention. Otherwise, domestic rules of private international law apply instead.

Under Article 22(1) of The Hague Adults Convention, the measures taken by the authorities of a Contracting State are recognised in France 'by operation of law', (otherwise stated, without any special procedure being required). Recognition may only be refused if one of the grounds for refusal listed in Article 22(2) is present. The latter provision refers, *inter alia*, to measures taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard; this would be in violation of fundamental principles of procedure of the French legal system. Refusal of recognition may also occur if the measures are manifestly contrary to the French public policy, or conflict with a French overriding mandatory provision.<sup>56</sup>

The picture is slightly different for measures originating from a non-Contracting State. Under domestic rules, the recognition of foreign decisions relating to the status and capacity of natural persons, including decisions that appoint a guardian or administrator and entrust the latter with the power to represent or assist a vulnerable adult, are

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<sup>55</sup> Lagarde, 1999: 59 f.

<sup>56</sup> If recognition is contested, any interested person may seek a judicial declaration as to the recognition or non-recognition of a measure taken in another contracting State.

recognised in France by operation of law.<sup>57</sup> The following conditions must be satisfied for this purpose: (i) the competence of the court of origin must be assessed in light of French rules on jurisdiction: a decision regarding the protection of a vulnerable adult will only pass this test if it is established that a significant connection (*lien caractérisé*) existed between the situation in question and the court that rendered the decision;<sup>58</sup> and (ii) it must be ascertained that the foreign decision does not infringe public policy of France.<sup>59</sup>

Should a foreign measure require enforcement in France, in addition to recognition, the interested person will need to seek a declaration of enforceability (*exequatur*) in France, before the competent *Tribunal de grande instance* (Article R212-8 of the *Code de l'organisation judiciaire*). Pursuant to Article 25 of The Hague Adults Convention, the same requirement applies to the enforcement of measures taken in a Contracting State.

#### **2.4. Cooperation with foreign authorities**

Here, too, a distinction must be made depending on whether or not cooperation is sought by (or from) the authorities of a State party to The Hague Adults Convention. The Convention only applies to the former case.

Cooperation under The Hague Adults Convention fundamentally involves the Central Authorities designated by each Contracting State.<sup>60</sup> Under Articles 29 and 30, Central Authorities are required, in particular, to take appropriate steps 'to provide information as to the laws of, and services available in, their States', to 'facilitate communications ... between the competent authorities' and to 'provide ... assistance in discovering the whereabouts of an adult'. Article 32 of the Convention further provides that where a measure of protection is contemplated in a Contracting State, the authorities that possess jurisdiction under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.<sup>61</sup> The authorities of a Contracting State may also request the authorities of another Contracting State to assist in implementing measures of protection taken under the Convention.

<sup>57</sup> *Cour de Cassation*, judgment of 3 March 1930, *Hainard*. For an application regarding the protection of adults: *Cour d'appel Rennes*, judgment of 15 October 2013 (case 13/02113), <http://legifrance.gouv.fr>.

<sup>58</sup> A weak connection – and, for stronger reasons, one created through fraud – will result in recognition being denied.

<sup>59</sup> If the existence of the conditions for recognition is contested, the issue may be brought before a court. See, in this latter regard, albeit not with specific reference to judgments relating to the protection of adults, *Cour de Cassation*, judgment of 10 February 1971 (No 69-14277), *Bielski*, and *Cour de Cassation*, judgment of 3 January 1980 (No 78-14037), *Garino*, <http://legifrance.gouv.fr>.

<sup>60</sup> As indicated in the *Updated compilation of comments from delegations concerning the ratification/accession to the 2000 Hague Convention on the International Protection of Adults and the application thereof* drawn up for the Council (document No 5381/15), the French Central Authority designated for the purposes of the Hague Adults Convention had received 28 requests for cooperation based on this instrument since its entry into force and had requested assistance in 9 cases. In the course of 2015, according to information collected for this study, the French Central Authority has been involved in 8 more cases.

<sup>61</sup> France declared, pursuant to Article 32(2) of the Convention, that requests addressed to French authorities can only be communicated through the French Central Authority.

Article 33 provides for a consultation procedure in situations where an authority having jurisdiction under the Convention contemplates placing the adult in an establishment in another contracting State. The decision on the placement may not be made if the Central Authority of the requested State opposes to it 'within a reasonable time'.

Finally, Article 34 of The Hague Adults Convention, addresses cases where an adult is exposed to a serious danger. The competent authorities of the Contracting State where measures to protect the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, must inform the authorities of that other State about the danger involved and the measures taken or under consideration.

In cases falling outside the scope of The Hague Adults Convention, EU regulations and international conventions dealing with international judicial assistance may be used, under appropriate circumstances, to achieve some of the practical results envisaged by the Convention itself. For instance, a French court seised of the protection of an adult who habitually spends long periods in Portugal, may, in principle, make use of the European Taking of Evidence Regulation for the purpose of hearing, for example, the person or persons with whom the adult is in touch in Portugal, so as to assess whether they are capable and willing to provide the adult in question with the assistance that he or she may need. It should be considered, however, that the Regulation – when applied to the protection of vulnerable adults – suffers from the limitations illustrated above in respect of Italy.

## **2.5. Foreign, public documents**

In France, too, public documents executed abroad need, in principle, to be legalised. France, however, is a party to several bilateral and multilateral conventions regarding legalisation and equivalent formalities. The considerations set forth above with reference to Italy, namely those concerning The Hague Apostille Convention, the London Convention of 1968, the Brussels Convention of 1987, and the Athens Convention of 1977 equally apply to France.

The Hague Adults Convention further facilitates, within its scope of application, the international movement of public documents. Pursuant to Article 41, all documents 'forwarded or delivered' under the Convention, such as judicial decisions relating to the protection of an adult, 'shall be exempt from legalisation or any analogous formality'.

Public documents drawn up in a language other than French must be accompanied by an official translation.

As regards the substantive and evidentiary effects of a foreign public document, the foregoing observations regarding Italy apply, *mutatis mutandis*, to France.<sup>62</sup>

Where a foreign public document is to be produced in France for the purpose of providing evidence of the capacity and powers of the representative of an adult, either as a judicially appointed guardian or as an agent under a private mandate, the interested person may produce, instead of the public document in question, a Certificate under Article 38 of The Hague Adults Convention, delivered in the Contracting State in which the powers were

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<sup>62</sup> On the conflict-of-law issues surrounding foreign public documents see, generally, Callé (2004).

granted or the mandate was registered (if the powers emanate from a non-Contracting State, this option will not be available).

There are basically three advantages to producing an Article 38 Certificate *in lieu* of a public document: (i) Article 38 Certificates are exempted in all Contracting States, pursuant to Article 41, from legalisation and all equivalent formalities; (ii) Article 38 Certificates are drawn up either in French or in English, on a standard form,<sup>63</sup> and merely include essential data that is necessary to indicate the capacity and the powers of the representative: a translation, where still required, is thus almost effortless; and (iii) the capacity and powers indicated in Article 38 Certificates 'are presumed to be vested' in the designated representative 'as of the date of the certificate, in the absence of proof to the contrary': their evidentiary effects are thus to be assessed under internationally uniform standards, as opposed to what happens with foreign public documents.

## **IV - The United Kingdom**

### **1. Substantive law**

#### **1.1. England and Wales**

The substantive rules that govern the protection of vulnerable adults in England and Wales are set forth in the Mental Capacity Act 2005.

The protection of persons who lack capacity 'because of an impairment of, or a disturbance in the functioning of, the mind or brain' is mostly achieved through the use of 'lasting powers of attorney'. Under a lasting power of attorney, a capable adult (the 'donor') confers to one or more attorneys ('donees') the authority to make decisions on his or her behalf in circumstances where the donor no longer has capacity.

If two or more attorneys are appointed, it is for the donor to decide whether they will take decisions severally, jointly, or jointly in respect of some matters, and jointly and severally in respect of others. Failing an indication in this respect, the instrument is to be assumed to appoint the donees to act jointly.

Lasting powers of attorney can be granted for financial decisions and/or for health and care decisions. In the former case, powers may be exercised by the donee as soon as the instrument is registered with the Office of the Public Guardian, an executive Agency of the Ministry of Justice. By contrast, the donee can make decisions relating to the personal welfare and health of the donor only after such time as the donor is no longer able to make those decisions by him or herself.

The donor may cancel the lasting power of attorney if he or she no longer needs it or wants to make a new one. Courts may revoke the power of attorney if fraud or undue pressure was used to induce the donor to create a lasting power of attorney. The power of attorney may also be revoked if the donee has behaved, or is behaving, in a way that contravenes his or her authority or is not in the adult's best interests, or proposes to behave in such a way.

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<sup>63</sup> The Special Commission of a Diplomatic Character on the Protection of Adults convened for the adoption of the Hague Adults Convention elaborated a model form for this purpose and recommended its usage. The standard form is available on the website of the Hague Conference (<http://hcch.net>).

In practice, the lasting power of attorney removes the need for judicial protection. Only if an adult incapable of forming his or her own mind and to look after his or her own interests has not appointed an attorney will judicial proceedings be initiated before the Court of Protection to provide the necessary safeguards. The court will then directly make decisions on the person's behalf, or appoint a 'deputy' for this purpose. As a rule, court decisions are preferred to the appointment of a deputy. In any case, the powers conferred on a deputy must be as limited in scope and duration as is reasonably practicable in the circumstances.

Pursuant to the Mental Capacity Act, every capable adult can make, in writing, advance decisions that he or she consents to or refuses specific medical treatments if he or she, at the material time, lacks capacity to decide for himself or herself.

Under the law of England and Wales, anyone possessing capacity can grant 'ordinary' powers of attorney. These, however, will cease to be valid once the donor loses the mental capacity to ratify the attorney's actions.

### **1.2. Northern Ireland**

In Northern Ireland, the law regarding the protection of adults is currently being reformed. On 18 June 2015, the Minister of Health, Social Services and Public Safety introduced a Mental Capacity Bill to the Northern Ireland Assembly. The aim of the bill is to improve the present framework based on Part VIII of the Mental Health (Northern Ireland) Order 1986 and the Enduring Powers of Attorney (Northern Ireland) Order 1987, as well as to make provisions in connection with The Hague Adults Convention. The Bill was passed on 15 March 2015, and presently awaits Royal Assent.

Under current rules, anyone over 18 years of age and capable of understanding can choose an enduring power of attorney to appoint one or more persons to deal with his or her property and affairs (but not personal welfare) in the event of a future incapacity. This enduring power of attorney can take effect immediately, unless explicit restrictions are stated. In the event of a future incapacity of the grantor, the designated attorney applies to the Office of Care and Protection of the High Court for registration of the power of attorney. The court may cancel the latter at any time if the attorney is not acting in the interest of the grantor. As an alternative, a 'controller' may be appointed by a court to manage the vulnerable person's affairs.

In the view of scholars, the legislation 'is largely silent on what action can be lawfully taken by carers in looking after the day to day personal or health care' of vulnerable people.<sup>64</sup>

### **1.3. Scotland**

In Scotland, the Adults with Incapacity (Scotland) Act 2000 lays down a comprehensive system to protect people (aged 16 and over) who are incapable of acting, making decisions, communicating decisions, understanding decisions, or retaining the memory of decisions.

The instruments provided for the protection of adults include: continuing and welfare powers of attorney, access to funds, management of resident funds, intervention orders, and guardianship orders.

Continuing and welfare power of attorney are granted by a capable donor in anticipation of incapacity. They both need to be registered with the Office of the Public Guardian, a part

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<sup>64</sup> Graham, 2015: 265.



of the Scottish Court Service. The continuing power of attorney gives the attorney power over the grantor's property and affairs and can be effective immediately after the agreement is registered. The welfare power of attorney only covers welfare matters and comes into force once it is established that the grantor lacks capacity.

Intervention orders can be requested from a court by the vulnerable adult, as well as by local authorities, or by anyone who has an interest or concern about the adult. These intervention orders consist of judicial permission for specific decisions which the person concerned – someone who has not granted a power of attorney and is not placed under guardianship – does not have the capacity to make. The decisions may cover property, finance or personal welfare.

Guardianship orders protect adults who are no longer able to make decisions. They involve the appointment of a guardian charged with taking decisions on behalf of the ward in relation to property, affairs, welfare and health, as specified in the order. Anyone who has an interest or concern about the vulnerable person can bring the case to the court.

Under the 'access to funds' scheme, the Public Guardian allows family members and caregivers to have access to a vulnerable adult's accounts and funds. The Public Guardian must inform the adult and other persons with an interest that an application has been lodged, so that they can make comments. He can decide whether to issue a statutory certificate specifying the type of expenditure authorised. The Public Guardian also supervises those exercising financial powers and investigates complaints relating to their financial functions.

Under a 'management of resident's funds' system, managers of certain residential and care establishments can manage the finances of adults who reside there and who are incapable of looking after their own affairs (Adults with Incapacity (Scotland) Act 2000, sect. 35 ff).

Ordinary powers of attorney are always a possible option, but – similarly to what happens under the rules of other jurisdictions – only if the grantor remains fully capable.

## **2. Private international law**

As mentioned above, different regimes of private international law apply in the United Kingdom as regards the protection of adults. The Hague Adults Convention applies in Scotland, as implemented by Schedule 3 to the Adults with Incapacity (Scotland) Act 2000, while the other jurisdictions of the United Kingdom continue to follow their own domestic rules of private international law.

In reality, these domestic rules are built on the same principles as the Convention and actually coincide to a significant extent with the Convention's provisions. This holds true, in particular, for England and Wales, since Schedule 3 to the Mental Capacity Act 2005 is meant precisely to 'give effect' to the Convention in England and Wales.

Nevertheless, the distinction among situations to which The Hague Adults Convention applies in its own right as a source of international obligations, and situations that remained governed by domestic rules, albeit modelled on the Convention, continues to be important from a practical standpoint.

As a matter of fact, the potential of The Hague Adults Convention fully expresses itself only in the former situations, not in the latter. For example, the recognition in France,

Germany and all other Contracting States of a protective measure taken in Scotland benefits from the rules on recognition established in the Convention. This is not the case of measures of protection taken in England and Wales, irrespective of whether they might be based on rules on jurisdiction and conflicts of laws that do not substantially differ from those applicable in Scotland under the Convention. Likewise, Scottish authorities are entitled to obtain from the authorities of Austria, Finland and all other Contracting States the cooperation provided for under The Hague Adults Convention, while the authorities of England and Wales are precluded from doing the same.

Finally, before analysing the rules in force in the various jurisdictions of the United Kingdom, it is worth clarifying that England and Wales, Scotland and Northern Ireland count in mutual relations as three foreign legal systems. Thus, for example, a power of attorney granted in contemplation of a loss of autonomy by a person whose habitual residence is in Birmingham would be considered to raise, if regarded from the standpoint of the Office of the Public Guardian in Scotland, a conflict-of-law issue as if it had been granted from someone outside the United Kingdom.

### **2.1. England and Wales: Jurisdiction**

Under Paragraph 7 of Schedule 3 to the Mental Capacity Act, the courts of England and Wales may exercise their functions under the Act in relation to: (i) an adult habitually resident in England and Wales;<sup>65</sup> (ii) an adult's property in England and Wales; (iii) an adult present in England and Wales or who has property there, if the matter is urgent; or (iv) an adult present in England and Wales, if a protective measure, which is temporary and limited in its effect to England and Wales, is proposed in relation to him or her.<sup>66</sup> These grounds of jurisdiction substantially correspond to those provided for under Articles 5, 6, 9, 10 and 11 of The Hague Adults Convention. Jurisdiction equally lies with the courts of England and Wales if the adult is a British citizen and has a closer connection with England and Wales than with Scotland or Northern Ireland, provided that the conditions in Article 7 of The Hague Adults Convention are satisfied. Namely, the courts of England and Wales must believe that they are in a better position to assess the interests of the adult. Pursuant to Paragraph 9 of Schedule 3 to the Act, if the matter involves a Contracting State of The Hague Adults Convention, the courts of England and Wales must comply with the duties provided for under the Convention in respect of jurisdiction. Examples of the duties included are: the duty to advise the authorities of a given contracting States under certain circumstances; or the duty not to exercise their jurisdiction if the authorities of a particular contracting State have informed the court that they have taken the measures required by the situation or have decided that no measures should be taken).

### **2.2. England and Wales: Applicable law**

Consistent with Article 13 of The Hague Adults Convention, the courts of England and Wales, in exercising their jurisdiction under the rules illustrated above, apply English law. However, pursuant to Paragraph 11 of Schedule 3 of the Mental Capacity Act, if the matter has 'a substantial connection with a country other than England and Wales', the court may apply the law of that other country.

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<sup>65</sup> If the adult concerned is a refugee or an internationally displaced person, his or her presence in England and Wales will count as habitual residence for the purposes of this rule.

<sup>66</sup> See, for an application, *Re MN* [2010] EWHC 1926 (Fam).

The conflict-of-law rules regarding private mandates substantially correspond to those set forth in Article 15 of The Hague Adults Convention, with few exceptions. If the donor of a lasting power of attorney, or power of like effect, is habitually resident in England and Wales at the time of granting that power, the law applicable to the existence, extent, modification or extinction of the power is the law of England and Wales. This law applies unless the donor specifies in writing, for that purpose, the law of a 'connected country', such as the country of nationality of the donor. If, at the material time, the donor was habitually resident in a country other than England and Wales, but England and Wales may be considered a connected country within the meaning indicated above, the governing law will be the law of such other country. The law of England and Wales, however, will apply if the donor chooses English law. The choice of a different law, made by a donor residing outside England and Wales, will not be upheld.<sup>67</sup>

The law of the country where a lasting power is exercised governs its manner of exercise.

As provided in Article 16 of The Hague Adults Convention, where a lasting power of attorney is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising its jurisdiction under the provisions illustrated above, may decline to apply or modify the power.

Regarding the validity of transactions entered into by a person in purported exercise of an authority to act on behalf of an adult, Paragraph 16 of Schedule 3 provides for a rule that substantially corresponds to Article 17 of The Hague Adults Convention.

In all cases where jurisdiction exists with the courts of England and Wales, English overriding mandatory provisions apply, regardless of any system of law which would otherwise apply in relation to the matter. In no case may the application of a provision of the law of another country be required or enabled in England and Wales if its application would be manifestly contrary to public policy.

### **2.3. England and Wales: Recognition and enforcement of foreign measures**

Pursuant to Paragraph 19 of Schedule 3 to the Mental Capacity Act, protective measures taken under the law of a country other than England and Wales are recognised in England and Wales if they were taken on the grounds that the adult was habitually resident in that other country. However, measures taken in a Contracting State of The Hague Adults Convention are recognised in England and Wales, if they were taken on any of the grounds of jurisdiction mentioned in the Convention.

Recognition may be refused if the adult, except in a case of urgency, was not given an opportunity to be heard in the foreign proceedings, and the omission amounted to a breach of natural justice. Recognition may equally be denied in England and Wales if such recognition would be manifestly contrary to public policy,<sup>68</sup> if the measure would be

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<sup>67</sup> If the issue were to be decided in accordance with the Hague Adults Convention, the choice would be regarded as valid insofar as the chosen law is among those listed in Article 15(2) of the Convention.

<sup>68</sup> See, in this connection, *Re M EWHC 3590 (COP)*, regarding the recognition of an Irish order to transfer three Irish citizens residing in Ireland to an English psychiatric hospital for treatment. The Court of Protection concluded that the individuals had been given a proper opportunity to be heard, that the relevant criteria for detention were satisfied in the circumstances,

inconsistent with an Anglo-Welsh, mandatory provision, or if the measure conflicts with a measure subsequently taken, or recognised, in England and Wales in relation to the adult.<sup>69</sup>

The enforcement in England and Wales of a foreign measure of protection, which is enforceable under the law of its country of origin, requires a prior declaration of enforceability in England and Wales.

#### **2.4. England and Wales: Cooperation with foreign authorities**

A consultation procedure is provided for under Paragraph 25 of Schedule 3 to the Mental Capacity Act for cases where a public authority in England and Wales proposes to place an adult in an establishment in a Contracting State of The Hague Adults Convention. If the appropriate authority in the other country opposes the proposed placement within a reasonable time, it may not take place. Proposals received by a public authority of a Contracting State, pursuant to Article 33 of the Convention, are to proceed, unless the authority opposes it within a reasonable time.

The Mental Capacity Act makes no provisions as to cooperation with authorities of countries others than the Contracting States of the Convention. As seen with reference to Italy and France, however, the possibility exists of exploiting, under appropriate circumstances (and subject to the limitations explained above, in respect of Italy), the opportunities afforded by the European Taking of Evidence Regulation.

#### **2.5. England and Wales: Foreign Public Documents**

There is no general requirement for the legalisation of foreign documents by diplomatic or consular officers of the United Kingdom in order for these documents to be produced before the judicial or administrative authorities of England and Wales. An affidavit by a qualified lawyer of the country of origin of the document may be required, however, to provide evidence of the nature and purported effects of the document.

The United Kingdom is nevertheless a party to some international conventions on legalisation and equivalent formalities. Some of the conventions mentioned earlier in this study with reference to Italy and France – namely The Hague Apostille Convention and the London Convention of 1968 – are also in force for the United Kingdom.

As a rule, a translation in English is required for all documents drawn up in a foreign language, prior to their production before a judicial or administrative authority of the United Kingdom.

Pursuant to Article 30 of Schedule 3 to the Mental Capacity Act, a Certificate given under Article 38 in a Contracting State of The Hague Adults Convention is, unless the contrary is shown, proof of the matters contained in it. Since The Hague Adults Convention only applies in respect of Scotland, a document issued in England to perform substantially the same functions as a Certificate under Article 38 of the Convention will not bear with it, in the Contracting States, the effects contemplated in Article 41 of the Convention.

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that under the Irish order each individual would be afforded a regular right of review of his or her detention and that the measures could not be said to be manifestly contrary to English public policy.

<sup>69</sup> An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.

## 2.6. Northern Ireland

The above-mentioned Mental Capacity Bill aims, *inter alia*, to give effect to The Hague Adults Convention.

As long as the law remains unchanged, the rules of private international law that apply in Northern Ireland to the protection of vulnerable adults may be described as follows.<sup>70</sup>

The courts of Northern Ireland may claim jurisdiction based on the physical presence of the adult in Northern Ireland. The Office of Care and Protection of the High Court also retains jurisdiction if properties are located in Northern Ireland, regardless of the person's domicile or nationality. Measures of protection are governed, as to substance, by the law of Northern Ireland. Foreign decisions that provide for the appointment of an attorney or curator in financial and property-related matters are recognised in Northern Ireland if the representative of the adult has been authorised to act outside the country of origin and provided that a sufficient connection exists between the adult and the State in which the decision was rendered. Nevertheless, the representative may be required to obtain an authorisation in Northern Ireland prior to performing particular acts in connection with the adult's affairs. Foreign judgments vesting the representative with the power to make decisions in respect of the health and care of the adult are normally denied recognition. For this kind of decisions, the authorisation of a court in Northern Ireland is always required. Finally, no provision exists at this stage dealing specifically with cooperation with or from foreign authorities as regards the protection of adults.

## 2.7. Scotland

Jurisdiction over matters relating to the protection of adults and issues in respect of the law applicable thereto are governed, in Scotland, by The Hague Adults Convention, as implemented by Schedule 3 to the Adults with Incapacity (Scotland) Act 2000. Accordingly, the rules of the Convention, which have been illustrated above with reference to France, apply with the necessary adaptations to cross-border cases brought before the judicial and other authorities of Scotland.

As with France, a distinction must be made concerning the recognition and enforcement of foreign measures, depending on whether or not the measure in question has been taken in a Contracting State of The Hague Adults Convention (and on grounds of jurisdiction provided therein). The Hague Adults Convention, as implemented by the Adults with Incapacity (Scotland) Act 2000, will apply in the former case. Here, again, reference may be made to the illustration provided above in respect of France. As for measures of protection emanating from a State that is not party to The Hague Adults Convention, Section 7 of Schedule 3 to the Adults with Incapacity (Scotland) Act provides that recognition in Scotland is accorded if the jurisdiction of the authority in the foreign country was based on the adult's habitual residence there. The recognition of protective measures coming from a State that is not a party to The Hague Adults Convention may be refused on substantially the same grounds as those in the Convention.

Regarding cooperation with foreign authorities, the remarks made earlier with reference to the situation in France apply, *mutatis mutandis*, to Scotland.<sup>71</sup>

<sup>70</sup> See further Graham, 2015: 267

<sup>71</sup> The Scottish Central Authority for The Hague Adults Convention dealt with 5 cases from 2009 to 2013 and none in 2014 and 2015. In several instances, however, according to information

### 3. The difficulties experienced in the selected Member States and the added value of The Hague Adults Convention

This section illustrates and discusses the main difficulties that courts and practitioners in the selected Member States experience, or expect to experience, when dealing with the protection of vulnerable adults in cross-border scenarios.

For the purpose of assessing the added value of The Hague Convention for the protection of adults in the EU, the study begins by inquiring into whether the described situation would improve: (i) in Italy, the only selected Member State that has not yet become a party to the Convention, if the Convention were in force in that State, instead of the currently applicable domestic rules of private international law; and (ii) in France and in the United Kingdom, the selected Member States that already apply the Hague Adults Convention or have unilaterally decided to give effect to its provisions, if these States could rely on the Convention in their relations with all other Member States.

The study then moves on to assess whether the entry into force of The Hague Adults Convention for all Member States, if indeed desirable, would be enough to make the situation in the EU entirely satisfactory.

#### Key findings

- Practical difficulties are being experienced both in EU Member States that are parties to The Hague Adults Convention and in Member States that are not.
- In reality, in the Member States that are already a party to the Convention, the main difficulties relate to cases involving States that are *not* parties to the Convention, and, particularly, cases in which the authorities of the former State are precluded for that reason from enjoying the advantages of a clear and comprehensive set of rules on international cooperation.
- The entry into force of The Hague Adults Convention for all EU Member States would significantly improve the protection of adults in cross-border situations throughout Europe.
- However, The Hague Adults Convention, too, has some weaknesses.

#### I - Italy

According to the majority of the Italian experts interviewed for this study, the current situation in Italy as regards the protection of adults in cross-border situations is largely unsatisfactory. Practitioners complain that, under the present rules, their activity lacks the desired degree of efficiency and the protection of the adults is not always effective. Three main problems have been observed in this area.

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collected for this study, the Scottish Central Authority was unable to assist enquirers due to the fact that the foreign country concerned was not a party to The Hague Adults Convention.

## 1. The possibly frequent designation of a foreign law to govern the substance of an adult's protection

### 1.1. The problem stated

By submitting the protection of vulnerable adults to the law of nationality of the adult concerned, Article 43 of the Italian PIL Statute is likely to result in the designation of a law other than Italian law in a relatively significant number of cross-border cases.

The application of foreign law may be a source of practical difficulties. Identifying the relevant foreign provisions and determining their correct interpretation (in light, *inter alia*, of the case law of the country in question)<sup>72</sup> may adversely affect the ability of the competent authorities to provide the protection required in a timely fashion, in addition to involving extra costs.<sup>73</sup>

It appears that, in an attempt to avoid these difficulties, Italian courts sometimes disregard the foreign nationality of the adult concerned, and apply Italian law as if the situation was a purely domestic one. The survey covering the decisions rendered by the *Tribunale* of Turin suggests that this approach is followed in around six out of seven cases in which the foreign nationality of the adult is explicitly mentioned in the court file or in the decision itself.<sup>74</sup>

Some courts achieve almost the same result by relying on Article 14(2) of the Italian PIL Statute. This provision enables Italian courts to apply Italian law in those cases where, despite all reasonable efforts and the cooperation of the parties, and more particularly in urgent cases, they are not in a position to determine the content of the otherwise applicable foreign law.<sup>75</sup>

### 1.2. The added value of The Hague Adults Convention

The situation would improve if The Hague Adults Convention were in force for Italy. Pursuant to Article 13(1) of the Convention, the Italian authorities, when asked to decide on a matter for which they have jurisdiction under the Convention, would apply Italian law. Only by way of exception, pursuant to Article 13(2), would a different law be applied or taken into consideration. As this exception applies only if the interests of the adult so require, Article 13(2) would call for such consideration only where the court has already succeeded in ascertaining the contents of the relevant foreign law, either through the cooperation of the parties or on its own initiative.

<sup>72</sup> According to Article 15 of the Italian PIL Statute, the provisions laid down in the foreign law specified by a conflict-of-law rule must be interpreted and applied in the same manner as those provisions are interpreted and applied in their own legal system.

<sup>73</sup> The fact that, in some cases, Italian law might ultimately be applicable to the situation at stake by virtue of a first-degree *renvoi*, does not really change the picture. Apart from the inherent intricacy of this technique, *renvoi* itself involves, in its initial stage, the need to retrieve and understand the relevant foreign provisions (those in charge of determining the law applicable to the substance of protection).

<sup>74</sup> Information collected in other courts confirms that the same approach is followed elsewhere in the country.

<sup>75</sup> See, for example, *Tribunale Verona*, decree of 11 March 2011, 19 *Famiglia e diritto* (2012), 191.

**Box 2 - Foreign law as the law governing the substance of protection**

Guillermo, a Spaniard living in Florence, suffers from severe alcohol addiction and experiences social marginalisation. The Tribunal of Florence is requested by the social-services department of the Municipality of Florence to appoint an administrator for Guillermo and charge such administrator with defining and supervising a rehabilitation programme. Pursuant to Article 43 of the Italian PIL Statute, the substance of Guillermo's protection is governed by the latter's *lex patriae*, (in other words, Spanish law). As this is a non-*renvoi* case (Article 9 of the Spanish Civil Code equally provides for the application of the law of the country of nationality of the adult in question), the Tribunal will need to refer to Spanish legislation, as interpreted by Spanish courts, to assess the admissibility of the envisaged regime of protection and to shape the content and organisation of the protection. In discharging his duties, the administrator may have to refer to Spanish law on an on-going basis, as the lawfulness of his action will ultimately be scrutinised against the prescriptions of Spanish law. All those involved in Guillermo's rehabilitation – doctors, caregivers, social-service officials etc. – may similarly need to conform their conduct to one or more specific provisions of Spanish law. *If the matter were dealt with under The Hague Adults Convention*, the Tribunal would normally apply the law of the forum, which in this examples is Italian law; Italian law would also apply to Guillermo's administrator and those taking part in the programme.

## **2. The lack of conflict-of-law provisions specifically dealing with powers of attorney**

### **2.1. The problem stated**

In determining the law applicable to the protection of vulnerable adults, Article 43 of the Italian PIL Statute does not distinguish between protection involving court-appointed administrators and protection based on powers of representation granted by the individual concerned. Actually, it seems that, back in 1995, the drafters of the Statute had only the former scenario in mind.

Against this backdrop, doubts have been expressed as to which conflict-of-law rule, among those currently applicable in Italy, should be adopted when it comes to determining the law applicable to such powers of representation. No precedent can be found in the case law of Italian courts. Scholars agree that Article 43 of the Italian PIL Statute, failing any better solution, should apply to any issue arising in connection with the protection of vulnerable adults, including issues in respect of private mandates.<sup>76</sup> The solution, apart from being uncertain, remains largely unsatisfactory, due to the lack of flexibility of Article 43 of the Statute, which leaves no alternative to the designation of the *lex patriae* of the grantor.<sup>77</sup> In practice, adults possessing the nationality of a country whose legislation does not explicitly contemplate these kinds of arrangements, will ultimately be barred from

<sup>76</sup> Ubertaini, 2006: 200 f; Franzina, 2012: 192.

<sup>77</sup> According to some of those interviewed for this study, the rigidity of Article 43 and the legal uncertainty surrounding its applicability to private mandates are the main reasons why Italian practitioners currently have developed almost no practical experience of lasting powers of attorneys and similar instruments, including in respect of situations featuring strong connections with one or more countries in which legislation exists concerning these powers. The lack of legal certainty not only deters interested adults from seeking the assistance of Italian lawyers and public notaries for the granting of such powers, but apparently also discourages those wishing to rely on powers that have been validly granted under a law permitting these arrangements from actually exercising such powers in Italy. 'Institutional' protection, i.e., through a judicially appointed administrator, is likely to be sought in Italy in these situations, instead of the enforcement of the existing powers of attorney, if one or more acts have to be performed in the country.



relying in Italy upon the effects of powers they might have granted in conformity with the law of a country with which they have a strong and effective connection.

## 2.2. The added value of The Hague Adults Convention

The problems would disappear if The Hague Adults Convention were in force for Italy, since conflict-of-law issues in connection with private mandates would be governed by the detailed and reasonably flexible provisions laid down in Article 15 of the Convention.

### Box 3 - The law applicable to powers granted in contemplation of a lack of capacity

Dominika is a Polish actress. She has been living in Paris almost all her life. While in Rome for the shooting of a TV serial, she suffers from a stroke which involves aphasia and memory loss. Kasia, a lifelong friend, joins her there. In order to provide Dominika with the personal care she requires, Kasia decides to make use of the money deposited with an Italian bank account that Dominika has opened for the time of the shooting. To this end, she seeks to enforce the *mandat de protection future* whereby, a few years earlier, Dominika, acting under the French Civil Code, had charged Kasia with the administration of her assets. The bank manager, relying on Article 43 of the Italian PIL Statute, will come to the conclusion that, since Polish law does not allow for powers of attorney granted in contemplation of a loss of autonomy, Kasia is not entitled to act on behalf of Dominika in respect of the account. *If The Hague Adults Convention were applicable in Italy*, the bank manager would consider that the existence and scope of Kasia's powers of representation must be assessed in conformity with French law, pursuant to Article 15 of the Convention, and would accordingly enforce the *mandat* to the extent to which the latter is valid and effective under French rules.

## 3. The broad reach of the jurisdiction of Italian courts and the ensuing risk of positive conflicts of jurisdiction

### 3.1. The problem stated

Under Article 44 of the Italian PIL Statute, Italian courts are entitled to take measures aimed at protecting the person and property of a vulnerable adult in a wide range of situations. This is often likely to lead to 'positive conflicts of jurisdictions', in other words, situations in which the courts of one or more other States concurrently claim jurisdiction over the protection of the same adult. Such other States may be, *inter alia*, the State where the adult has his or her habitual residence (if Italian jurisdiction has been asserted on the ground of the Italian nationality of the person concerned), or the State of nationality of the adult (if the concerned person is a national of different countries or if Italian courts relied on the residence of the adult in Italy to declare that they possess jurisdiction).

When a positive conflict of jurisdiction arises, the adult and those involved in his or her protection run the risk of being faced with conflicting decisions. This would undermine the efficiency of the protection (due to the rules on the recognition of judgments, insofar as the recognition of a foreign decision is denied if it is irreconcilable with a local one). Conflicting decisions frequently result in extra costs for the adult and those taking care of them. Secondly, the concurrent availability of multiple fora may end up incentivising abusive litigation (for example, when two relatives of the adult seek, with separate proceedings, to be appointed the exclusive guardian of the adult). Finally, where the protection of the same adult is administered and supervised by the courts of two or more countries, the risk of inefficient use of public resources exists, regardless of any contradiction among decisions: having two magistrates and two medical experts carrying out a job that a single magistrate and a single expert would conveniently complete alone would not enhance the quality of an adult's protection.

### 3.2. The added value of The Hague Adults Convention

As discussed above, the Italian PIL Statute fails to ensure the coordination of Italian and foreign proceedings in this field.<sup>78</sup> On the other hand, The Hague Adults Convention – in addition to simplifying the legal landscape by laying down an internationally uniform body of rules to govern jurisdiction in the Contracting States – is particularly effective in ensuring the coordination of parallel proceedings (in a variety of ways, under Articles 5 to 12), provided that these are pending before the authorities of two or more *Contracting States*.

Put otherwise, the possibility would still exist under the Convention of having the courts of two or more States concurrently in charge of the protection of the same adult. However, the Convention comes with tools that enable the situation to be ‘managed’, so as not to jeopardise the efficiency of the protection.

## II - France

According to the French practitioners interviewed for this study, the entry into force of The Hague Adults Convention for France has significantly changed, for the better, the way in which vulnerable adults are protected in France in cross-border cases.

The Convention has brought about three major improvements: (i) the frequency with which French authorities are faced with the need to apply foreign rules in this area of law has drastically decreased: when dealing with the protection of a foreign adult in a situation for which their jurisdiction may be asserted on the ground of the Convention, they no longer apply the *lex patriae*, as provided under Article 3 of the French Civil Code, but rather apply French law, pursuant to Article 13(1) of the Convention; (ii) the protection of vulnerable adults has become significantly more efficient in cases where the personal and/or economic interests of the adult in question are located in more than one country, or happen to move, over time, from one State to another: this is chiefly due to the opportunity that the Convention offers to French authorities to set up a contact with the authorities of other countries (through the French Central Authority) and achieve their cooperation; and (iii) the protection of adults in cross-border cases under the Hague Adults Convention is in full accord with the general principles, outlined above, that govern the protection of persons with disabilities: by making the habitual residence of the adult the main connecting factor in this area, the Convention facilitates the social inclusion of the adult concerned and helps to prevent discrimination; at the same time, by addressing the issue of the law applicable to private mandates with a balanced mix of flexibility and public safeguards, the Convention corroborates the right of the interested persons to responsible self-determination.

Problems remain, in the view of those interviewed, but these essentially relate to the fact that the number of countries for which The Hague Adults Convention is in force is still limited. Where practitioners complain about the current state of affairs, they do not refer to situations where the Convention applies, but rather to situations where the advantages

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<sup>78</sup> The Italian PIL Statute includes a rule on *lis pendens* (Article 7), but this provision is of little or no avail as regards the protection of adults (Franzina, 2012: 153 ff).

of the Convention cannot be exploited, due to the fact that the other country involved (or likely to be involved) in the protection of the adult is not a party to the Convention.<sup>79</sup>

## **1. The placement of an adult in an establishment situated in a State that is not a party to The Hague Adults Convention**

### **1.1. The problem stated**

The protection of a vulnerable adult may involve his or her placement in an establishment, or another place where protection may be provided, on an on-going basis. Several factors are likely to affect the choice of a care facility, including the preferences of the person concerned and the possibility for relatives and friends to keep their relationship with the latter alive. If a French court selects an establishment situated outside French territory for these purposes, the need arises, in practice, for consultation and cooperation with the judicial and/or administrative authorities of the country in question. A dialogue will prove necessary, at the outset, to make sure that the adult is actually allowed to enter the facility and benefit from its services. At a later stage, appropriate coordination will help the court to exercise effectively its supervisory authority (if the stay is meant to be temporary, albeit not necessarily short), or pave the way to a smooth transfer of the case to the authorities of the country in which the adult permanently settles.

Evidence gathered for this study indicates that, where the placement is envisaged in a country that is not a party to The Hague Adults Convention, communication – let alone coordination – with that country's authorities may be difficult to achieve and lack the desired degree of efficiency.<sup>80</sup>

### **1.2. The added value of The Hague Adults Convention**

Communication and coordination would prove easy to achieve if The Hague Adults Convention were in force for the country where the establishment is situated. Apart from the consultation procedure envisaged in Article 33(1) for this purpose, the French authorities, as long as they retain jurisdiction over the case, would be able to request the authorities of the other State, pursuant to Article 33(3), to assist in the implementation of the relevant measures. Where the conditions in Article 8 are met, French authorities can even request the authorities of the other country to take measures for the protection of the adult, thereby transferring to such authorities all or some aspects of the case.

The Hague Adults Convention would provide, in the described scenario, further opportunities for the authorities of the States involved to achieve sound and practical arrangements for the protection of the adult in question. If the stay in the care facility does not involve a change in the adult's habitual residence, the authorities of the State where the establishment is located are exceptionally entitled, under Article 11(1) of The Hague Adults Convention, to take 'measures of a temporary character for the protection of the person of the adult which have a territorial effect limited to the State in question', in so far as such measures are compatible with those already taken in the sending State. These temporary measures will lapse, according to Article 11(2), as soon as the authorities of the

<sup>79</sup> The above remarks have been made, in particular, by the French Central Authority designated for the purposes of The Hague Adults Convention.

<sup>80</sup> According to the French Central Authority, French magistrates often find themselves hindered when the protected adult moves to a country which is not party to the Convention. In these situations, the continuity and effectiveness of protective measures is not guaranteed.

latter country 'have taken a decision in respect of the measures of protection which may be required by the situation'.

#### **Box 4 - The placement of an adult in a foreign establishment**

Jean-Jacques, a 26-year-old Frenchman, lives in Amiens. He suffers from personality disorders and learning disabilities. On various occasions he has successfully undergone milieu therapy at an establishment in France, while spending the rest of his time with his sister Sarah, who is also his curator. As Sarah is planning to move to Belgium as a posted worker for one or two years, the possibility is envisaged of placing Jean-Jacques in an establishment there, to join a new therapeutic community. Since Belgium is not a party to The Hague Adults Convention, difficulties may be experienced by the French authorities – the court supervising Jean-Jacque's protection and the relevant administrative authorities – in organising the transfer and, more generally, in coordinating with the Belgian authorities. *If The Hague Adults Convention were also in force for Belgium*, the French court supervising Jean-Jacque's protection would address the Belgian Central Authority for the purposes of the consultation process provided for under Article 33(1). The necessary arrangements could then be made between the authorities of the countries on the basis of the report prepared to this end by the French authorities. The French authorities could also rely on Article 33(1) of the Convention to request the Belgian authorities to assist in implementing the measures of protection taken in France, and, if necessary, on Article 8 to transfer some aspects of the case.

## **2. The exercise of supervisory functions over representatives acting in a State that is not a party to The Hague Adults Convention**

### **2.1. The problem stated**

The person charged with representing or assisting a vulnerable adult, either under a measure of protection taken by French courts or under a *mandat de protection future*, may have to, or have the option to, discharge his or her duties in a country other than France. Under appropriate circumstances, the person in question may even perform his or her functions in another country on a permanent basis (for example, where a regime of protection is instituted solely for the purpose of managing the affairs of an adult who habitually resides in France, but his financial interests are almost entirely located abroad). The evidence collected by the authors of this study indicates that in such situations French authorities may be faced with major difficulties in performing their supervisory functions if the appointed person carries out all or part of his or her activity in a State that is not a party to The Hague Adults Convention. These difficulties may take two forms. On the one hand, it may prove impossible for the supervising authority to obtain information from anyone other than the appointed person as to the way in which the latter actually discharges his or her functions. For example, the police and the revenue authorities of the country where the appointed person actually manages the adult's affairs will normally not be bound to obtain information on behalf of the supervising authority regarding the appointed person's actual use of the funds belonging to the represented adult. On the other hand, if the supervising authority, within the framework of the measure of protection taken in respect of that adult, issues an enforceable order directed at, or otherwise involving, the representative of the adult, the actual enforcement of the order in question in a State that is not a party to The Hague Adults Convention may in fact require lengthy *exequatur* proceedings. This scenario could undermine the effectiveness of the protection that the order itself is meant to secure. In addition, since recognition and enforcement would in this case be governed by the rules of private international law of the State of enforcement, the

enforcement of the order may require a different approach depending on the country in which enforcement is sought in the circumstances.

## **2.2. The added value of The Hague Adults Convention**

Both kinds of difficulties would almost cease to exist if The Hague Adults Convention were also in force for the country where the representative of the adult discharges his or her duties. The French court in charge of supervising the protection could rely on Articles 29 and 30 of the Convention to obtain the cooperation of the Central Authority of the country in question. Pursuant to Article 32(3), the French court could also request the authorities of the Contracting State concerned to assist in the implementation of the relevant measures.

As illustrated above, Article 25 of The Hague Adults Convention lays down a set of uniform rules on the enforcement of measures. While the procedural aspects of an *exequatur* are left up to the law of the State of enforcement, all Contracting States are under an obligation to apply to the declaration of enforceability 'a simple and rapid procedure'. In addition, according to Article 25(3), a declaration of enforceability may be refused only for one of the reasons enumerated in Article 22(2) as grounds justifying a denial of recognition.

## **III - The United Kingdom**

The practical difficulties experienced by Scottish authorities do not differ, in substance, from those experienced in France. The survey shows that, in Scotland, too, problems essentially arise in cases involving non-Contracting States (in other words, in cases for which the Convention, as explained above, is in fact prevented from expressing its potential in full).

The picture is slightly different in England and Wales and in Northern Ireland. The survey shows that, here, too, the shortcomings of the current legal framework are perceived in some circumstances. For instance, the shortcomings are apparent when the need arises to seek the cooperation of foreign authorities, to coordinate the effects of a local judicial measure of protection, or to enforce a lasting power of attorney abroad. As The Hague Adults Convention is not internationally in force for the United Kingdom, other than with respect to Scotland, the latter situations fall outside the scope of the Convention and do not benefit, even in Contracting States, from the provisions laid down in the Convention itself.

## **1. The cooperation with the authorities of a foreign country with which the adult is closely connected**

### **1.1. The problem stated**

Cases exist in which the authorities of the United Kingdom would need to seek information from the authorities of another country, in particular if the interest of the adult so requires. Such information might include, *inter alia*, information necessary or useful for interpreting the wishes, preferences or personality of the adult, information as to the existence of persons who may be willing (and able) to take care of the adult, or information relating to the presence of assets belonging to the adult. In practice, information of this kind can be obtained in Scotland under The Hague Adults Convention if the other country in question is a Contracting State of that Convention; this opportunity is not available to the authorities of England and Wales and Northern Ireland. As observed above with reference to Italy and France, the European Taking of Evidence Regulation could in principle be used to obtain

some of the information sought. However, for the reasons explained with reference to the situation in Italy, the functioning of the Regulation may not be entirely satisfactory, when applied to the protection of adults. For instance, the applicability of the Regulation would be excluded altogether, pursuant to Article 1(2), where evidence was needed by an executive body, such as the Office of the Public Guardian, for performing its non-judicial duties.

This state of affairs is likely to jeopardise the efficient performance of the functions entrusted to judicial and administrative authorities in the United Kingdom in connection with the protection of adults. There is, in fact, a risk in some cases that the measures taken will reflect only part of the relevant evidence, that the interests of the adult are not assessed satisfactorily, or their interests are not served as thoroughly as they could be.

### **1.2. The added value of The Hague Adult Convention**

If it were applicable in the relations between the States concerned, The Hague Adult Convention would provide a suitable, legal framework for the kind of exchanges that the above-described situations require, either with the mediation of the Central Authorities of the countries in question or (where possible and appropriate) by means of direct communications. All competent authorities of the United Kingdom, judicial and administrative, would be entitled to seek the cooperation provided for under the Convention. Cooperation, as seen with reference to France, could then go as far as implying, under appropriate circumstances, the transfer of the case to the authorities of another Contracting State, if the interests of the adult so require.

## **2. The use of lasting powers of attorney abroad**

### **2.1. The problem stated**

Practical obstacles may appear where the powers granted by an adult in contemplation of a loss of capacity are to be used by the donee outside the United Kingdom (for example, in the country where the attorney is asked to purchase or sell property on behalf of the donor). These obstacles consist, in particular, of the time and money needed to satisfy the formalities required to produce the instrument and any associated documents before the authorities of the foreign country (including a notary), and to obtain an official translation of such documents.

### **2.2. The added value of The Hague Adult Convention**

If The Hague Adults Convention were in force for both the country in which the power of attorney has been granted or registered, and the country in which the donee is to rely upon such powers, the donee would be able to invoke his or her status and to exercise his or her powers in the latter State by producing nothing more than a Certificate delivered in the former country, pursuant to Article 38 of the Convention. This would be exempted from legalisation and equivalent formalities, in accordance with Article 41 of the Convention. As the Certificate is confined to providing a limited amount of data, its translation would normally be simple, rapid and inexpensive.

**Box 5 - The exercise abroad of powers granted under a private mandate**

Under a lasting power of attorney governed by English law, Oliver, a British citizen, grants his brother, Noah, the power to manage his affairs in the event of incapacity. The power of attorney comes into effect and Noah decides to sell, on behalf of his brother, a crashed car that the latter, once an amateur restorer of Alfa Romeo cars, had purchased in Italy a few months earlier. He negotiates a sale price of 1,000 Euros. In order to complete the formalities of the transaction, including the entry of the change of ownership in the Italian vehicle register, Noah will need to provide appropriate evidence of his powers, such as a stamped, attested copy of Oliver's registered power of attorney. The Italian vehicle register office will require a certified translation of Oliver's instrument, with the apostille required under The Hague Apostille Convention. As the translation will need to be made of the instrument in its entirety, the preceding requirements could ultimately involve expenses amounting to no less than 500 Euros. In addition, the register office may defer the registration of the change of ownership until such time as it is established that – in light of the relevant English provisions – the documents produced actually provide proper evidence of the validity and scope of Oliver's power of attorney. *If The Hague Adults Convention were in force both for the United Kingdom, as regards England, and for Italy*, Noah would be able to provide evidence of his powers simply by producing a Certificate issued in England, pursuant to Article 38 of the Convention. No formalities would be required and the costs incurred in connection with the official translation of the Certificate would presumably not exceed 75 Euros.

#### **IV - Would the mere entry into force of the Convention for all Member States be sufficient to make the situation in Europe entirely satisfactory?**

As shown in the previous paragraphs, the entry into force of The Hague Adults Convention for all Member States would significantly improve the protection of vulnerable adults in Europe. Actually, a widespread consensus exists among experts that the Convention is a balanced and properly drafted text. In general, its rules effectively address the main issues that arise in this area whenever a cross-border element is present. Some experts, however, warned that the Convention, too, has its weaknesses, or at least that the operation of some of its provisions could be improved in some respects. A distinction may be made among the alleged shortcomings of The Hague Adults Convention: (i) some are imperfections of limited practical importance or correspond to choices that, in the opinion of the authors of this study, do not really warrant criticism; while (ii) a few other weaknesses are real and of some practical importance, and would actually need to be fixed.

##### **1. Minor defects and choices that do not really warrant criticism**

###### **1.1. The non-exhaustive character of the Convention's jurisdictional regime**

Only one imperfection of limited practical impact deserves to be mentioned in this study. The jurisdictional regime of The Hague Adults Convention does not rule out the relevance of domestic provisions on jurisdiction that may be force in the individual Contracting States. These provisions may still have a role to play, albeit only in respect of few marginal situations.

Identifying these situations is not always easy. Generally speaking, as far as jurisdiction is concerned, the Convention applies whenever the authorities of a Contracting State are tasked with the protection of an adult who habitually resides in another Contracting

State.<sup>81</sup> Yet the overall picture is rather complex, as the Convention fails to set out a single, general condition of applicability for the whole set of jurisdictional rules that it lays down.

Specifically: (i) the authorities of a Contracting State responsible for the protection of an adult whose habitual residence is in a Contracting State may assess their jurisdiction only in accordance with the provisions of the Convention: domestic rules can neither be relied upon to assert jurisdiction where this would be lacking under the Convention, nor to dismiss a case if the latter is considered by the Convention to come within the jurisdictional reach of the Contracting State in question; (ii) if the adult is not habitually resident in a Contracting State (or, in the case of a refugee or a person whose residence cannot be determined, if he or she is not present in the territory of such a State), the authorities of each Contracting State may still rely on Article 7 and 9 of the Convention, which respectively provide for jurisdiction based on the nationality of the adult and on the presence of the adult's property; authorities may assert an 'unlimited' jurisdiction based on these provisions, since the rules provided therein to ensure coordination with the courts of the State of habitual residence of the adult or the courts of the State in whose territory the adult is present, only apply where the latter States, too, are bound by the Convention; and (iii) again, if the adult does not habitually reside in a Contracting State (or if he or she is not present in the territory of such a State in the situations described above), the Convention allows the authorities of a Contracting State to resort to Article 10 and 11 (regarding respectively the adoption of urgent measures and the adoption, by way of exception, of measures of a temporary character), but does not prevent those authorities from asserting their jurisdiction on a ground, other than those provided for by the Convention itself, namely on a ground provided for by the domestic rules of jurisdiction of the State in question.<sup>82</sup>

The above scheme is not entirely satisfactory. Legal security would be better served if a fully uniform, jurisdictional regime were in force in this area, leaving no room, within its material scope, to the application of domestic provisions. In comparison, EU legislation in the field of private international law, especially in its most recent expressions, tends to follow precisely this approach and establishes, in their respective fields, an exhaustive regime of adjudicatory jurisdiction.<sup>83</sup>

## **1.2. The notion of habitual residence**

One alleged weakness, which the authors of this study do not think deserve to be labelled as such, concerns the notion of 'habitual residence'. As seen in the previous paragraphs, this is a key notion in the Convention, since the habitual residence of the adult determines, in particular, the Contracting State whose authorities possess jurisdiction to protect the adult in question and, by implication, under Article 13(1), the law applicable to the substance of protection.

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<sup>81</sup> Lagarde, 1999: 51 f.

<sup>82</sup> Franzina, 2015: 784 ff.

<sup>83</sup> Actually, several EU legislative measures in the field of judicial cooperation in civil matters, including the European Succession Regulation and the European Maintenance Regulation, work as a one-stop-shop as regards jurisdiction, as they claim to apply to all situations falling within their material scope of application, regardless of their remoteness from the EU.



According to one distinguished expert, this notion does not necessarily bear the same meaning in all EU Member States and actually may, failing further guidance as to the relevant criteria, give rise to practical difficulties.<sup>84</sup>

Habitual residence is, by its nature, a flexible concept. It is true that hesitations may be observed in some cases when it comes to identifying the habitual residence of a person. It is also true that such identification may prove particularly problematic where the person in question lacks capacity, since the indicia that are normally used to determine the habitual residence of a person may not bear the same relevance where a particular vulnerable adult is concerned, or may need to be accompanied in such cases by appropriate precautions. For example, precautions may be measures aimed at averting the risk of undue influence on the part of those taking care of the adult concerned, when his or her preferences and feelings are assessed, and taken as a means to determine the centre of the adult's interest.

However, practice shows that the number of 'hard' cases is rather limited. Furthermore, courts and other authorities in the EU are becoming increasingly familiar with the notion of habitual residence as construed in EU legislation and in international conventions in the field of private international law. Generally speaking, these authorities seem capable of managing difficult cases in a sensitive and persuasive way.

It is worth adding that some guidance as to the way in which the habitual residence of a vulnerable adult should be identified for the purposes of the Convention might come, one day, from The Hague Conference on Private International Law, itself. As a matter of fact, a well-established practice exists within the Conference that consists in convening 'special commissions' to discuss the practical problems observed in connection with one or more particular Hague instruments. These special commissions normally result in the adoption of 'conclusions and recommendations' that, in spite of their non-binding character, prove very useful to practitioners when they address recurrent interpretive issues.<sup>85</sup>

## **2. The actual weaknesses of The Hague Adults Convention**

Five real shortcomings of the Convention will be analysed here in some detail. As practice is still limited in this area of law, the authors of this study and the interviewed experts have been unable to refer to actual situations in which the weaknesses in question have been actually experienced. In fact, these are problems that some practitioners expect to experience in the application of The Hague Adults Convention, based on their involvement in cases governed by other rules relating to the protection of adults and/or their knowledge of normative texts that address similar issues.

More importantly, it should be underlined that none of these shortcomings may be treated as a major problem. While they are not negligible, they do not undermine the globally

<sup>84</sup> Frimston, 2012: 20.

<sup>85</sup> For example, three special commissions have been convened between 2003 and 2014 to review the practical operation of The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, four special commissions have been convened between 1989 and 2001 to discuss the difficulties experienced with The Hague Child Abduction and three have been convened between 2003 and 2012 as regards The Hague Apostille Convention.

positive evaluation of The Hague Adults Convention and its added value to the protection of vulnerable adults in Europe. With this in mind, the most appropriate way to illustrate these weaknesses is to present them as aspects of the Convention that can be improved in some respect.

### **2.1. Cooperation and communication among the authorities of different States could be further improved**

Although the very existence of rules on cooperation and communication among authorities of different States is rightly regarded as one of the assets of the Hague Adults Convention, their design and operation is not always entirely satisfactory. Their design and operation is especially problematic if assessed in light of the developments that have occurred in the area of international judicial communications since the time of the adoption of the Convention, especially as regards 'direct' communications<sup>86</sup>, and the tasks entrusted with Central Authorities.

The Hague Adults Convention provides for cooperation to be mostly channelled through the Central Authorities designated by the various Contracting States. The Convention only suggests that the authorities of one State 'may' get in touch with the authorities of another State for the purpose of discharging their duties under the Convention.<sup>87</sup> 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. It should also be ensured that Central Authorities are provided appropriate resources for the purpose of discharging their duties, in terms of staff, technology etc. (nothing is stated explicitly in this respect in the Hague Adults Convention).

### **2.2. The enforcement of foreign protective measures could be further facilitated**

Pursuant to Article 25 of The Hague Adults Convention, as seen above, measures adopted in one Contracting State, while being entitled to automatic recognition, must be declared enforceable as a prerequisite for their actual enforcement in another Contracting State. The steps that need to be taken to this end may prove expensive and time-consuming. In

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<sup>86</sup> See, generally, on the development of direct communications among authorities of different countries, the contributions collected in the special issue devoted to *Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks*, in 15 *The Judges' Newsletter* (2009), 8. Domestic legislation in some countries equally displays an open attitude towards direct judicial communications: see, in particular, Article 4 of the Spanish Law No 29/2015 of 30 July 2015 on international judicial cooperation in civil matters (*Ley de cooperación jurídica internacional en materia civil*).

<sup>87</sup> According to Article 32 of the Convention, where a measure of protection is contemplated, the authorities that possess jurisdiction under the Convention 'may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information'. However, some Contracting States – namely Estonia, France, and the United Kingdom, with respect to Scotland – have availed themselves of the option of declaring, pursuant to Article 32(2), that the above communications must be transmitted to its authorities only through their Central Authority.

addition, the relevant, procedural rules are not set forth in the Convention itself and vary from one country to another.

This state of affairs may adversely affect the protection of a vulnerable adult. In particular, the person charged with representing and assisting the adult in question may be prevented, pending the proceedings aimed at obtaining the *exequatur* of the foreign measure, from timely and effectively exercising some of their powers.<sup>88</sup>

#### **Box 6 - The enforcement of foreign protective measures**

The *Amtsgericht* of Munich has appointed Matthias the guardian of his wife Viktoria. She suffers from Alzheimer's disease. A Bulgarian national, Viktoria spends her summer holidays in Varna together with her sisters. When the planned holidays are over, Viktoria's sisters refuse to allow Matthias to take Viktoria back to Germany with him, claiming that Matthias is unable to assist her properly and that Viktoria would be better cared for by them. Under The Hague Adults Convention (supposing that the Convention was also in force for Bulgaria), the enforcement of the German order authorising Matthias to bring his wife back home, with the intervention of the social-services agents and local police, if necessary, would only be enforced in Bulgaria once declared enforceable there.

#### **2.3. The means by which evidence of the powers granted to the adult's representative are to be provided abroad may be further enhanced**

As observed above, Article 38 of The Hague Adults Convention makes provisions for a Certificate. This Certificate is designed to allow those charged with representing or assisting the adult, either under a private power of attorney or a judicial measure, to provide evidence of their capacity as a representative in a State other than the State in which the power of attorney has been registered or the judicial measure has been taken. The Convention, however, leaves the task of determining the procedural rules under which the Certificate is to be delivered up to individual, Contracting States. While experts agree on the usefulness of an instrument of this kind, the evidence collected indicates that Article 38 Certificates are, in fact, very rarely issued in practice. Moreover, apart from a few notable exceptions, practitioners seem to have little or no familiarity with their use.

#### **2.4 The adult could be allowed to choose in advance the State whose authorities should have jurisdiction over his or her protection**

The Hague Adults Convention only grants a limited relevance to the will and preferences of the adult as far as jurisdiction is concerned. As a matter of fact, the Convention does not make provisions for a choice of court by the individual concerned. The Convention actually refers, in Article 8(2)(d), to 'the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection', but only to clarify that these authorities are included in the list of authorities to which a request may be addressed whenever the transfer of the case is envisaged. Put otherwise, the authorities chosen by the adult to take protective measures in the event of his or her incapacity cannot claim jurisdiction merely on the ground of that choice. Rather, they may be enabled to deal with all or some aspects of the adult's protection if the authorities that possess jurisdiction

<sup>88</sup> The problem is exacerbated by the difficulties experienced by guardians and administrators in providing evidence of their powers abroad (on which, see further immediately below). For example, according to the French Central Authority, several *mandataires* have reported difficulties in gaining recognition abroad of their powers and are therefore often forced to ask for an *exequatur* of the French decision designating them as guardians.

pursuant to Article 5 or Article 6 of the Convention so determine, based on their assessment of the interests of the adult.

The current State of affairs is not entirely satisfactory. Where an adult has granted powers of attorney in contemplation of incapacity, he or she is currently prevented from determining, at the same time, the Contracting State whose authorities should have jurisdiction to supervise the representative or to take such measures as may be required to complement, modify, or replace the instructions given to the latter.

In these circumstances, the country whose authorities possess jurisdiction over the protection of the adult may not be the same country whose law is applicable to the substance of the powers of representation. The drafters of The Hague Adults Convention were apparently aware of the fact that this divergence could cause some practical difficulties. The impact of these difficulties may in fact be reduced under the final sentence of Article 16 of the Convention. Article 16 provides that, where powers of representation are withdrawn or modified by a court possessing jurisdiction under the Convention, the court in question – which would normally apply the *lex fori*, pursuant to Article 13 – should nevertheless ‘[take] into consideration to the extent possible’ the law referred to in Article 15 of the Convention, i.e., the law governing the substance of the power of attorney. This approach may lead to sensible results in appropriate circumstances, but it leaves a significant degree of discretion to the authority in charge of supervising the attorney, which might ultimately run counter the need of predictability.

## **2.5. The lack of rules providing for the ‘continuing jurisdiction’ of the authorities of the State of former habitual residence of the adult**

Under Article 5(2) of The Hague Adults Convention, a change of the adult’s habitual residence from one Contracting State to another Contracting State requires that an immediate shift of jurisdiction to protect the adult to the State of the new habitual residence. The risk that the shift might result in a temporary gap in the protection of the adult in question is countered by Article 12, pursuant to which the measures taken in application of Article 5 ‘[r]emain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures’.

However, situations may arise in which, notwithstanding Article 12, the application of Article 5(2) might prevent the adult from enjoying a timely protection. Let us suppose that the guardian of an adult becomes aware of the change of the adult’s habitual residence only after the change has occurred (such as in a situation where the adult retains a good degree of autonomy and has freely chosen to move to the new country). In this scenario, the measures adopted in the country of the former habitual residence of the adult would still be effective, according to Article 12. However, if these measures needed to be modified in view of the new situation, the guardian or any other interested person would be prevented from seeking the intervention of the authorities of the former country, as these no longer possess jurisdiction, as provided in Article 5(2). Indeed, the authorities of the country to which the adult has moved could be appealed to instead. However, these new authorities may need time to make an informed decision, whereas the authorities of the country of former, habitual residence may be familiar with the file, and accordingly may be prepared to act as rapidly as the situation requires.

## 4. The possible steps forward

The purpose of this section is to determine, in light of the previously described survey, what steps may be taken at the EU level to enhance the protection of vulnerable adults in cross-border situations.

Three issues will be discussed in turn: (i) whether, and under which policy considerations, should the EU address the problem of the protection of vulnerable adults in cross-border cases; (ii) whether, and by which means, The Hague Adults Convention should provide the basic set of uniform rules governing the international protection of adults in the EU; and (iii) if the answer to the previous question is in the affirmative, what should be the form and content of a EU action aimed at improving the operation of The Hague Adults Convention between Member States.

### Key findings

- Vulnerable adults would enjoy a better protection in the Member States if the EU made use of its 'external' competence to authorise (and actually request) all Member States that have not yet done so to ratify, or accede to, The Hague Adults Convention in the interest of the EU itself.
- The situation would further improve if EU legislation were enacted, based on Article 81(2) of the TFEU, to enhance the operation of the Convention as regards the few aspects for which it is not entirely satisfactory, and to ensure the coordination of the Convention itself with the existing EU legislation dealing with neighbouring issues.

### I - The cross-border protection of adults: a concern for the EU

The research carried out for the drafting of this report shows that the absence of uniform private international law is likely to undermine the protection of the fundamental rights of vulnerable adults. As mentioned earlier, these adults are ultimately faced with the risk of experiencing, in cross-border cases, a sort of double vulnerability.

In the absence of an internationally uniform and properly designed set of rules, legal security is at stake. An adult, namely one wishing to make advance arrangements as to his or her future protection, may be hindered in exercising his or her right to self-determination. State authorities, too, are likely to experience practical difficulties in performing their functions and the safeguards provided under the measures adopted by these authorities may fail to provide the required degree of efficiency. In addition, since the adult and those charged with his or her protection may find themselves exposed to divergent rules, they could ultimately be deterred from availing themselves of the opportunity offered under EU law to move across Member States.

As the lack of uniform and properly designed rules of private international law is likely to affect adversely the protection and actual exercise of fundamental rights, the fact that cross-border issues concerning vulnerable adults arise in a relatively limited number of cases<sup>89</sup> should be regarded as an argument bearing little or no relevance.

<sup>89</sup> See the Turin data mentioned in Chapter 2, para. II.2.

As a matter of fact, the EU is committed to protecting the fundamental rights of vulnerable persons, both internationally – as a party to the UN CRPD – and under its own rules of primary law.<sup>90</sup> The adoption of modern and efficient rules of private international law under the principles of autonomy, non-discrimination, and social inclusion outlined above would be a key to ensuring better protection of those rights.

## **II - Making The Hague Adults Convention the basic set of uniform rules governing the international protection of adults in the EU**

It has been shown that the protection of vulnerable adults in Europe would generally be more effective and efficient if The Hague Adults Convention were applicable in all EU Member States, not only in the seven Member States for which it is currently in force. This suggests that were the EU to address the issue of the international protection of adults, the most obvious option would be to do so along the lines of The Hague Adults Convention.

The EU, it is submitted, cannot itself become a party to The Hague Adults Convention. The wording of Articles 53 and 54 makes clear that the Convention is only open to ‘States’, not to international organisations. Actually, the EU did not ratify any of The Hague conventions that use a similar wording, including The Hague Child Protection Convention, which served as a model for The Hague Adults Convention and addresses the issue of ratification and accession in precisely the same way as the latter Convention does. The EU acknowledged that it could not become, as such, a party to The Hague Child Protection Convention and, when it decided to join that regime, it found that it could only do so by authorising Member States to ratify, or accede to, that Convention ‘in the interest of the Union’.<sup>91</sup> Indeed, only since the elaboration of the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, the conventions negotiated within The Hague Conference explicitly envisage the possibility of ratification by Regional Economic Integration Organisations (REIOs), such as the EU.<sup>92</sup>

There are, in principle, two ways in which the EU could get around this obstacle. The first option (which will be referred to here as the ‘Brussels Option’) would consist in enacting EU legislation, on the basis of Article 81 of the TFEU, that would replicate, or draw inspiration from, the provisions of The Hague Adults Convention.

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<sup>90</sup> Reference is being made here to Article 6(4) of the TEU, whereby fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States (see above, 2(I)), ‘constitute general principles of the Union’s law’, and to the Charter of Fundamental Rights of the EU, which includes several provisions that relate directly or indirectly to vulnerability (namely, Articles 7, 21, 25, 26, and 47) and must generally be interpreted, according to Article 52(3), in such a way as to ensure consistency with the corresponding provisions of the ECHR.

<sup>91</sup> Decision 2008/431/EC (see, specifically, Recital 7).

<sup>92</sup> See Article 18 of the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities; Article 29 of The Hague Convention of 30 June 2005 on Choice of Court Agreements; Article 24 of The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, and Article 59 of The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. The EU actually took advantage of these clauses by becoming a party to the 2005 Choice-of-Court Convention and the 2007 Convention and Protocol on Maintenance.

The second option (the ‘Hague Option’) would be for the EU to rely on its ‘external’ competence under the combined operation of Article 81 and Article 216(1) of the TFEU (in other words, the competence of the EU to become a party to an international agreement) to authorise (and actually request) the Member States that have not already done so, to ratify, or accede to,<sup>93</sup> The Hague Adults Convention ‘in the interest of the EU’, as occurred, *mutatis mutandis*, with the Hague Children Protection Convention under Council Decision 2008/431/EC of 5 June 2008.<sup>94</sup>

While in some respects the two options may be regarded as equivalent, the second alternative should ultimately be preferred.

Indeed, the findings of this survey provide one key reason for choosing the Hague Option. The entry into force of The Hague Adults Convention for all EU Member States would allow the authorities of the Member States to benefit from the mechanisms of the Convention in their relations with such third countries as are, or may have become at the material time, a party to the Convention. Member States would benefit from the same rules (or *basically* the same rules, as will be seen below) that would apply in the relations among Member States. Thus, if the Brussels Option were to be chosen, the Member States that are not a party to The Hague Adults Convention would be precluded from enjoying this advantage. The consequence would be that, where the personal or economic interests of the adult are connected with a Contracting State that is not an EU Member State, the protection of the adult in question would benefit from the Convention only in those Member States that are themselves a party to The Hague Adults Convention, and not in the others.

### **III - Enacting EU legislation to improve further the protection of vulnerable adults among Member States, based on The Hague Adults Convention**

If the ‘Hague Option’ were to be followed, as suggested in the previous paragraph, the EU should nevertheless consider the possibility of adopting a legislative measure aimed at

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<sup>93</sup> Both ‘ratification’ and ‘accession’ refer to an international act whereby a State establishes its consent to be bound by a treaty on an international level. However, according to Article 53 of The Hague Adults Convention, the Convention may be ‘ratified’ by those States for which the Convention has been opened for signature, i.e., ‘the States which were Members of the Hague Conference on Private International Law on 2 October 1999’; according to Article 54(1), any other State may ‘accede’ to the Convention. The practical relevance of the distinction lies in the fact that, pursuant to Article 54(3), each Contracting State is entitled to object to accessions, as opposed to ratifications, thereby preventing the Convention from entering into force in their relations with the acceding State. All EU Member States, with the exception of Lithuania, were members of The Hague Conference at the above-mentioned date. Lithuania joined the Conference on 23 October 2001 and is thus the only EU Member State whose consent to be bound by The Hague Adults Convention would need to be expressed in the form of accession instead of ratification.

<sup>94</sup> It is beyond the scope of this study to discuss more precisely the conditions under which the EU could exercise its external competence in the field of the protection of adults, and the way in which these conditions differ from those that enabled the EU to take measures relating to the ratification of, or accession to, The Hague Child Protection Convention by Member States. For the purposes of this study, the assumption is made that these conditions are, or can be, satisfied.

enhancing the operation of The Hague Adults Convention in the relations between Member States, within the framework of the Convention itself.

This approach would actually allow the EU to benefit from the advantages of the Convention, while fixing the few weaknesses that have been discussed in the previous section of this study.

It is contended that the adoption of EU legislation consistent with The Hague Adults Convention: (i) would not amount to an infringement of The Hague Adults Convention; (ii) would reflect a line of conduct that has already been experienced – and proved useful – in other areas of EU private international law; (iii) would require relatively limited legislative efforts, not only because the issues that would need to be dealt with are, arguably, not numerous, but also because the European legislature may, in part, take existing, EU legislation as a reference; (iv) would find an appropriate, and arguably sufficient, legal basis in Article 81 of the TFEU; and (v) would provide the opportunity of coordinating The Hague Adults Convention with such existing EU rules of private international law that may need to be considered in cases involving a protected adult.

### **1. The Hague Adults Convention does not prevent Contracting States from furthering their mutual cooperation within the framework of the Convention itself**

The adoption of EU legislative measures of the kind envisaged above would not hinder the ability of Member States to fulfil the international obligations that they have undertaken, or may undertake, under The Hague Adults Convention. As a matter of fact, the Convention does not prevent Contracting States from furthering their cooperation in the field of the protection of adults beyond the provisions of the Convention itself or even departing from its rules in their mutual relations.

Specifically, as stated in Article 49(2) and (4), The Hague Adult Convention does not affect the possibility for one or more Contracting States to conclude agreements or ‘uniform laws based on special ties of a regional nature’ which contain, ‘in respect of adults habitually resident in any of the States Parties to such agreements’, or subject to such uniform laws, ‘provisions on matters governed by [the] Convention’. Article 49(3) clarifies that the said agreements or uniform laws ‘do not affect, in the relationship of such States with other Contracting States, the application of the provisions of [the] Convention’.

If the EU decided to avail itself of the opportunity of fostering the cooperation provided for under The Hague Adults Convention, in addition to the cooperation already in place among EU Member States, the protection of vulnerable adults in cross-border situations would ultimately be ensured by a coordinated set of uniform rules. These uniform rules would be organised on two levels: (i) The Hague Adults Convention would provide the general legal framework and would apply, as such, to the relations with third countries that are bound by the Convention at the material time; and (ii) The Hague Adults Convention would equally apply between EU Member States, except that in intra-EU cases (cases involving the protection of the person or property of an adult whose habitual residence is in a Member State) the Convention would be supplemented (and possibly derogated from, in part) by a specific EU legislative measure.



## **2. The combined operation of legislation and exercise of external competence has already been successfully tested in contiguous areas of EU law**

The scheme outlined above, based on a combination of legislation and external action (in other words, the exercise of an external competence of the EU in the form of a decision authorising Member States to ratify, or accede to, The Hague Adults Convention in the interest of the EU), does not substantially differ from the course of action successfully followed by the EU legislature in other areas of judicial cooperation in civil matters. For example, the provisions laid down in the Brussels IIa Regulation to deal with the return of a child in the event of wrongful removal or retention are meant to 'complement' The Hague Child Abduction Convention in cross-border cases involving Member States.

As regards the protection of adults, this line of conduct would allow the EU to benefit from the advantages of joining an open, international, legal framework, such as The Hague Adults Convention, without giving up its right to adopt, as far as regional cases are concerned, solutions that are more detailed, more effective and more aligned with the actual situation in EU Member States and the needs relating to their mutual relations.

## **3. EU legislation would need to address relatively few issues and could use existing EU measures as a reference**

A legislative measure aimed at improving the functioning of The Hague Adults Convention should essentially address this Convention's five shortcomings, illustrated in the previous section of this study.<sup>95</sup>

### **3.1. Enhancing cooperation and communication between the authorities of EU Member States**

Three possible improvements should be considered in this connection. First, direct communications between the authorities of EU Member States should be resorted to as frequently and systematically as possible, following, with the necessary adaptations, the approach that underlies, among other instruments, the European Taking of Evidence Regulation. Secondly, communication between authorities would prove more effective if there were rules that obliged the responsible authority to supply the requested information within a clearly stated and reasonably short time period. Finally, the tasks of Central Authorities should be clarified and specified, in light of the experience developed under existing EU measures in other areas, including, *mutatis mutandis*, under Articles 55 and 57 of the Brussels IIa Regulation.

Such innovations may require significant efforts in terms of organisation (for example, through the elaboration of communication protocols and standard forms) and training. However, based on some of the interviews carried out for this study, it is submitted that the prompt availability of information as to the whereabouts and the personal conditions of the person concerned would greatly enhance the protection of vulnerable adults. Specifically, enhanced communication could prove particularly useful in 'elder abduction cases', where a vulnerable adult is transferred from one country to another, often by a relative. These cases occur either in breach of the protective measures taken in the former

<sup>95</sup> See above, Chapter 3, para. IV.3.

country, or without due consideration of the wishes and preferences of the adult, and of his or her personal needs and social ties.

### **3.2. Abolishing the requirement of *exequatur* for measures of protection taken in a Member State**

A trend exists in EU private international law towards the abolition of the requirement of *exequatur* among EU Member States. This trend is reflected, *inter alia*, in Article 39 of the Brussels Ia Regulation.

Against this background, it is contended that a similarly liberal regime could be put in place, with appropriate safeguards, in the field of the protection of adults. This step would enhance the effectiveness of the measures of protection rendered in a Member State, based on the high degree of mutual trust between Member States.

Various EU legislative measures, including the European Account Preservation Order Regulation, might serve as a source of inspiration here, although the solutions adopted in existing legislation might need to undergo extensive adaptation before being transposed into a rather peculiar area of law such as the protection of adults.

### **3.3. Creating a ‘European Certificate of Powers Granted for the Protection of an Adult’**

The authors of this study contend, based on their survey, that the limited success of Article 38 Certificates is due in part to the fact that The Hague Adults Convention fails to provide a comprehensive legal framework for the procedures whereby these Certificates may be issued, rectified or challenged.

Under these circumstances, it might be worthwhile to consider the possibility of creating, through EU legislation, a ‘European Certificate of Powers Granted for the Protection of an Adult’, to replace Article 38 Certificates among Member States. The obvious source of inspiration for a similar development would be the European Certificate of Succession, as instituted under the European Succession Regulation.

On a more general note, it would be useful to study the possibility of facilitating, between EU Member States, the movement of public documents relating to the incapacity of an adult and/or the measures taken regarding these adults in the Member States.<sup>96</sup>

### **3.4. Enabling the adult to choose the Member State whose courts should be deemed to possess jurisdiction to take measures directed at his or her protection**

It is contended that, based on the high degree of mutual trust among EU Member States, EU legislation aimed at improving the operation of The Hague Adults Convention should enable the adult, under appropriate circumstances, to confer jurisdiction on the authorities of a given Member State, specifically the authorities of the State whose law has been chosen

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<sup>96</sup> Public documents relating to incapacity and/or measures directed at the protection of the person or property of a vulnerable adult are not included, as such, in the list of public documents to which Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union applies, pursuant to Article 2(1) thereof. Actually, the issue of capacity is only considered in Article 2(1)(e) and (g) of the Regulation, where reference is made to public documents relating, respectively, to ‘marriage, including capacity to marry and marital status’, and ‘registered partnership, including capacity to enter into a registered partnership and registered partnership status’.

to govern the existence, extent, modification and extinction of the powers of representation granted by the adult.

A convergence of jurisdiction and applicable law as regards lasting powers of attorney would ultimately strengthen the autonomy of the individual and enhance legal security. The adult would no longer have to fear that his or her instructions, valid and enforceable under the law that he or she has chosen pursuant to The Hague Adults Convention, might be considered at variance with the public policy of the forum, and accordingly be disregarded (in whole or in part) by the authorities involved with his or her protection.

Particular safeguards would need to be put in place to make sure that the choice genuinely reflects the informed will of the adult. In addition, the possibility could be considered of disregarding, in exceptional cases, the choice made by the adult, where his or her interests so require.

### **3.5. Providing for the 'continuing' jurisdiction of the courts of the Member State of the former habitual residence of the adult**

In order to fix the shortcomings illustrated above with reference to Article 5(2) of The Hague Adults Convention, EU legislation could introduce a provision modelled on Article 9 of the Brussels IIa Regulation. This would allow the authorities of the State of the adult's former habitual residence, by way of exception to Article 5, to retain jurisdiction for some time following the transfer of the adult from one Member State to another, for the purpose of modifying the existing measures, provided that the representative of the adult still resides in the former State.

## **4. Article 81 of the TFEU would provide a suitable legal basis for the envisaged legislative measures**

Article 81(1) of the TFEU enables the Union to 'develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases'. The kind of measures that can be adopted on this basis are listed in Article 81(2).

The legislative measures that, based on the previous findings, the Union should consider adopting in order to improve the operation of the Hague Adults Convention in the relations between Member States, appear to fit squarely in the latter provision. As a matter of fact, the suggested legislative measures are basically aimed at ensuring 'the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases' (Article 81(2)(a)), 'the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction' (Article 81(2)(c)), 'cooperation in the taking of evidence' (Article 81(2)(e)) and 'effective access to justice' (Article 81(2)(e)). The legislative measures in question would also possibly involve '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' (Article 81(2)(f)).

## **5. EU legislation would also provide an opportunity to coordinate The Hague Adults Convention with existing EU legislation in the field of private international law**

Situations exist where issues relating to the protection of vulnerable adults are relevant to the operation of rules that govern other legal concerns or neighbouring issues. For example, the fact that an adult is placed under a certain measure of protection may result in the invalidity of a contract into which the adult in question has entered. Coordination may be required, or desirable, in such circumstances in order to clarify which issues must be deemed to be governed by The Hague Adults Convention rather than other rules. Coordination may also be necessary to make sure that the solutions adopted in neighbouring areas of law possess the required degree of consistency.

It is beyond the scope of this study to discuss these issues of coordination in detail. It is sufficient to note that, generally speaking, coordination should, among other things, have the result of: (i) bringing consistency among the different rules of private international law that address the issue of capacity to act in various areas of private law, whenever the capacity of the natural person in question is affected by measures of protection taken on account of his or her vulnerability: several EU legislative texts deal with these issues, in particular as regards the capacity to enter into a contract,<sup>97</sup> to make a disposition of property upon death,<sup>98</sup> or to incur liability in tort;<sup>99</sup> (ii) bringing consistency to the rules that govern the various forms of agency and representation, i.e., powers granted in contemplation of a loss of capacity, and 'ordinary' powers of representation, in particular where one and the same instrument is used to grant both kinds of powers; it should be noted, however, that 'ordinary' agency and representation currently fall outside the scope of existing EU legislation in the field of private international law, at least as far as conflicts of laws are concerned: the Rome I Regulation, as stated in Article 1(2)(g), excludes from its scope of application 'the question whether an agent is able to bind a principal ... in relation to a third party'; and (iii) complementing existing texts with such special provisions as would address, where appropriate, situations involving a protected adult, such as the non-contractual obligations incurred by a negligent or fraudulent guardian towards the ward, whose governing law is to be determined in accordance with the Rome II Regulation.

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<sup>97</sup> Article 13 of the Rome I Regulation.

<sup>98</sup> Articles 24 and 25 of the EU Succession Regulation, under the clarification provided in Article 26(1)(a).

<sup>99</sup> Article 15(a) of the Rome II Regulation, under the clarification provided in Recital 12.

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Italy	<p><i>Regio decreto 10 settembre 1914 n. 1326 – Approvazione del regolamento per l'esecuzione della legge 16 febbraio 1913, n. 89, riguardante l'ordinamento del notariato e degli archivi notarili</i> [Royal Decree No 1326 of 10 September 1914, implementing the General Law on Notaries and notarial archives].</p> <p><i>Codice civile</i> [Civil Code].</p> <p><i>Codice di procedura civile</i> [Code of Civil Procedure].</p> <p><i>Decreto del Presidente della Repubblica 18 aprile 1986 n. 131 – Approvazione del Testo unico delle disposizioni concernenti l'imposta di registro</i> [Decree of the President of the Republic No 131 of 26 April 1986 on register fees].</p> <p><i>Legge 31 maggio 1995 n. 218 – Riforma del sistema italiano di diritto internazionale privato</i> [Law of 31 May 1995 No 218 – Reform of the Italian system of private international law].</p> <p><i>Decreto del Presidente della Repubblica 28 dicembre 2000 n. 445 – Disposizioni legislative in materia di documentazione amministrativa</i> [Decree of the President of the Republic No 445 of 28 December 2000 on administrative documents].</p> <p><i>Decreto legislativo 3 febbraio 2011 n. 71 – Ordinamento e funzioni degli uffici consolari, ai sensi dell'articolo 14, comma 18, della legge 28 novembre 2005, n. 246</i> [Legislative Decree No. 71 of 3 February 2011 on consular services].</p>
Scotland	Adults with Incapacity (Scotland) Act 2000

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While benefiting from the freedom of movement and residence in the European Union (EU), vulnerable adults often face legal difficulties when in a cross-border situation as a result of the lack of solid legal protection. This is due to the different protection schemes operating in the EU Member States, and the incomplete international legal framework, creating legal uncertainties in the Europe-wide protection of vulnerable adults. This European Added Value Assessment identifies weaknesses in the existing legal framework for the protection of vulnerable adults in cross-border situations, focusing on the most important international legal instrument in the field: the Hague Adult Protection Convention of 13 January 2000. The Assessment goes on to outline potential legal measures which could be taken at the EU level and which would generate European added value through simplification and transparency of the legal framework in this area.

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