The protection of vulnerable adults in cross-border situations

OVERVIEW

As the mobility of people in the EU’s ageing societies increases, so does the need to protect a particular group – vulnerable adults. Because of an impairment or insufficiency in their personal faculties, these adults are unable to protect their interests and have to rely on support from others. While all EU Member States have established legal provisions and practices addressing these people’s needs, they are highly divergent, for example, as regards powers of representation. Besides these national differences, additional obstacles arise across borders in relation to the determination of the jurisdiction and law to be applied; the recognition of decisions issued by other Member States; and international cooperation among competent national authorities.

To remove or mitigate these obstacles, an international private law instrument – the Hague Convention on the International Protection of Adults – was adopted in 2000, but has so far only been ratified by 12 Member States. To secure ratification by all Member States but also to complement the Hague Convention, the European Commission has adopted a proposal for a regulation along with a proposal for a Council decision authorising Member States to become party to the convention. Within the Parliament, the Committee on Legal Affairs (JURI) is handling the file.

(A) Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults

(B) Proposal for a Council Decision authorising Member States to become or remain parties, in the interest of the European Union, to the Convention of 13 January 2000 on the International Protection of Adults

Committee responsible: Legal Affairs (JURI)

Rapporteur: Yana Toom (Renew, Estonia)

Shadow rapporteurs: Jiří Pospíšil (EPP, Czechia)
Maria-Manuel Leitão-Marques (S&D, Portugal)

Next steps expected: Publication of draft report
Introduction

An increase in the international mobility of an ageing population affected by a growing number of age-related illnesses, such as Alzheimer’s and other forms of dementia, has given rise to a number of legal issues in cross-border situations, particularly for persons who are not able to take decisions for themselves. Who should be vested with powers to support or represent them? Which court should have discretion to decide in cases involving such matters, and which national law should apply? To bring legal clarity and ensure the simplification of procedures, such issues need to be settled at the international level.

The concept used in international law to refer to persons in such situations is that of ‘vulnerable adults’, usually defined as persons aged 18 or above who are not in a position to protect their interests due to an impairment or insufficiency in their personal faculties. Such adults may decide, before the impairment occurs, who will legally support or represent them. When they are not capable of doing so, these powers are assigned to others by means of a judicial or administrative decision. Legal support or representation are vital for the conduct of daily activities such as signing rental contracts, opening bank accounts or consenting to medical treatments. Differences among EU Member States with regard to the legal arrangements and practices applicable to vulnerable adults are significant however, including in how they organise their protection and deal with cross-border situations. Challenges in cross-border cases include language barriers and uncertainty regarding the validity of legal documents; legal uncertainty; varying rights from one Member State to another; lengthy legal proceedings and the non-recognition of foreign protective measures; costs of court cases/legal representation abroad; and lack of clarity over the notion of habitual residence.

From the above it is evident that the rules applying to cross-border situations involving vulnerable adults are in great need of harmonisation. The EU has intervened in resolving such cross-border issues in other areas before. Over time, it has adopted numerous pieces of legislation on private international law matters, determining, for cross-border situations, the competent jurisdiction and the applicable law, and providing for the recognition and enforcement of decisions taken in another Member State.

Context

Adopted in 2000 under the auspices of the Hague Conference on International Private Law (HCCH), the Hague Adult Protection Convention (HAPC) is an international private law instrument that deals with cross-border situations related to the protection of vulnerable adults. However, so far only 15 states worldwide, 12 of them EU Member States, have ratified it. The HCCH has 91 members: 90 states plus the European Union. All EU Member States are parties to the HCCH, but only Austria, Belgium, Cyprus, Czechia, Estonia, Finland, France, Germany, Greece, Latvia, Malta and Portugal have ratified the HAPC itself. Ireland, Italy, Luxembourg, the Netherlands and Poland have signed but not ratified it. The HAPC provides rules on jurisdiction, applicable law and international recognition and enforcement of protective measures, as well as on international cooperation. More precisely, HAPC provisions seek:

- to determine the state whose authorities have jurisdiction to take measures to protect vulnerable adults or their property;
- to determine which law is to be applied by these authorities;
- to determine the law applicable to the representation of the adult;
- to provide for the recognition and enforcement of such measures of protection in all states parties;
- to establish cooperation between the authorities of the states parties.

On the other hand, the HAPC has some limitations. It does not regulate matters such as the possibility of digital communication and close cooperation among competent national authorities, the recognition of powers of representation abroad and/or how the competent authorities in one
state could obtain information that someone from another state has limited capacity. Therefore, even if all EU Member States were to become parties, issues of this kind would not be resolved.

Moreover, the fact that only a few EU Member States are parties to the HAPC seriously limits its applicability, including in countries that have ratified it, because it can only solve problems experienced by contracting parties in relation to other contracting parties. The EU cannot become a party to this convention, because it is not open to international organisations. The EU can only accede to the HACP by authorising its Member States to ratify it ‘in the interest of the Union’, as it did for the 1996 Child Protection Convention.

The protection of vulnerable adults is also a human rights issue and therefore falls under the scope of international human rights law. According to the United Nations Convention on the Rights of Persons with Disabilities (the CRPD), adopted in 2006, states have an obligation to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. At the same time, states need to prevent abuse and make sure protection measures respect the rights, will and preferences of the person concerned, and are proportional and tailored to the person’s circumstances. By emphasising the decisional autonomy of disabled persons, the CRDP marked a shift in the paradigm. Today, a disabled person is considered primarily a holder of rights and not a passive recipient of care, and therefore their full and effective participation in society must be ensured. Among other things, CRDP provisions imply the right of persons with disability to engage in advanced planning. This means that the limitation of their legal capacity should not be full, but rather, that it should refer to specific acts in light of the persons’ individual circumstances. Several EU Member States have introduced new forms of protection favouring supported decision-making instead of substitute decision making. All Member States are parties to the CRPD and the convention is the only international human rights treaty to which the EU is itself a party. Therefore, the EU has direct obligations under it.

The Hague Convention was adopted 6 years before the CRPD. With its emphasis on personal autonomy, it reflects the emerging paradigm shift to a certain extent, but is not necessarily tailored to cover all CRPD requirements. Unlike the CRPD, it focuses on cross-border procedural rather than substantive matters.

The Council of Europe has adopted several recommendations that are relevant to vulnerable adults: the Committee of Ministers’ Recommendation (1999) on principles concerning the legal protection of incapable adults, Recommendation (2009) on principles concerning continuing powers of attorney and advance directives for incapacity, and Recommendation (2014) on the promotion of human rights of older persons. Recommendation 4 of 1999 applies to ‘adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests’. Its objective is to ensure that involuntary measures to protect a vulnerable adult are never prioritised, and are applied only if the adult cannot be supported otherwise.

Comparative elements

The approach proposed by the Commission in the two draft acts resembles that followed by the EU with respect to the Hague Convention of 19 October 1996 on Jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. The EU adopted relevant legislation and also authorised its Member States to ratify it in the interest of the Union.

Existing situation

There are no specific EU rules for vulnerable adults (see the definition under international law given above) in cross-border situations. The EU has adopted more than 20 regulations in the area of private international law dealing with civil and commercial matters, in which it has laid out rules that
apply to cross-border situations, without altering the substantive provisions of national legislation. The main issues addressed by these regulations relate to international jurisdiction, applicable law, recognition and enforcement of decisions made in one Member State by other Member States, and cooperation among Member States’ authorities. Therefore, existing regulations can serve as a model for a specific regulation on vulnerable adults.

The HACP contains the only international rules applicable to cross-border situations, but these apply only among the states parties, and therefore only to a small number of possible bilateral situations.6

Parliament’s starting position

The Parliament has long supported the adoption of EU legislation in the area, and has adopted two legislative-initiative resolutions, in 2008 and 2017, calling on the Commission to put forward relevant legislation.

In its 2008 resolution on cross-border implications of the legal protection of adults, the Parliament urged all Member States to ratify the HAPC, and asked the Commission to report on its implementation in the Member States and to assess the possibility of EU accession to the HAPC as ‘an area of enhanced cooperation’. The Parliament furthermore recommended to the Commission to submit a legislative proposal aimed at strengthening cooperation and improving the recognition and enforcement of protection decisions, incapacity mandates and lasting powers of attorney.

Parliament’s 2017 legislative initiative resolution on the protection of vulnerable adults contained a number of recommendations to Member States and the Commission. It:

- asked the Member States to ensure that their current legislation and protection measures meet the needs of all vulnerable adults, including the most disadvantaged, and stressed the need to inform the public about these provisions and measures;
- highlighted that the current legal diversity and multiplicity of jurisdictions is affecting negatively the right of vulnerable adults to move freely and live in the Member State of their choice, and that the delay in ratifying the HAPC is compromising the protection of vulnerable adults in cross-border situations;
- asked the Commission to press for ratification of the HAPC and for the Member States that have not yet signed or ratified it to do so as quickly as possible; and
- asked the Commission to submit a proposal for a regulation aimed at improving cooperation between the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults, before 31 March 2018. The proposal should take account of Parliament’s specific recommendations, including the creation of national registers of protection decisions and incapacity mandates and the introduction of single EU forms, to ensure that information can be shared more easily across the EU.

In preparation of the 2017 report, EPRS prepared a European added value assessment, which found that ratification by all EU states of the HAPC would be a ‘crucial preliminary step’. Taking into account the weaknesses of the HAPC, such as the insufficient number of provisions on cooperation among states parties, the study recommended that the EU also adopt legislation based on Article 81(2) of the Treaty on the Functioning of the European Union (TFEU) to complement the convention. According to the study, this would significantly decrease or eliminate the costs linked to legal uncertainty, estimated at €11 million per year for vulnerable adults.

Council starting position

In 2008, the Council adopted conclusions in which it invited those Member States that consider this to be in their interest to proceed with the ratification and implementation of the HAPC. It also urged the Commission to follow the implementation of the convention and to propose additional legislative measures at EU level if this proves relevant. In 2021, the Council adopted another set of
conclusions, this time on the protection of vulnerable adults across the EU with regard to civil and criminal law. In the area of civil law, the Council found that in the context of ageing societies, an increasing number of vulnerable adults in the EU encounter limitations in protecting their own interests without adequate support. In cross-border situations in particular, 'there are disparities between Member States' laws on jurisdiction, applicable law, and the recognition and enforcement of protection measures. The diversity of the rules on these issues might impair the exercise of the right of vulnerable adults to move freely and reside in the Member State of their choice'. According to the Council, vulnerability should not be an obstacle to the exercise of the right to freedom of movement in the EU. With regard to criminal law matters, the Council stressed that vulnerable adults who are suspects or accused persons in criminal proceedings in another state than their state of nationality may see the full exercise of their procedural rights restricted and their right to a fair trial undermined. The Council recommended to all Member States to consider ratifying the HAPC and to make sure that their approach to vulnerable adults is in line with UN CRPD. The Council urged the Commission to conduct a study and in the light of its findings to consider the creation of an EU legal framework. Finally, it recommended a strengthening, if needed, of the procedural safeguards for vulnerable adults who are suspects or accused persons in criminal proceedings.

Preparation of the proposal

In preparation of the proposal, the Commission conducted a study on the cross-border legal protection of vulnerable adults in the EU in 2021. The proposal was accompanied by an impact assessment (IA) and a subsidiarity grid. The IA concluded that a legislative proposal – one that would take over HAPC rules but ‘would also improve and modernise them’ – was the best option. According to the IA, such a proposal should cover matters of judicial cooperation that fall within the scope of Article 81(2) TFEU and not within the scope of EU family law (Article 81(3) TFEU), which is limited to the rules governing family relationships, such as matrimonial matters, parental responsibilities and maintenance obligations. Therefore, the proposal would not be subject to the special legislative procedure laid out in Article 81(3) TFEU (unanimity in the Council, consent in the Parliament), but to the ordinary legislative procedure. The impact assessment report received a positive opinion from the Commission’s Regulatory Scrutiny Board on 20 January 2023.

On 31 May 2023, the Commission adopted two legislative proposals:

- a proposal for a regulation, under the co-decision procedure;
- a proposal for a decision of the Council, under the consent procedure, authorising the Member States to remain or become parties to the HAPC.

The changes the proposals would bring

The Commission’s proposal for a regulation:

- provides that the general jurisdiction should be determined in accordance with HAPC rules, but it goes beyond these by giving direct recognition to the adult’s choice of jurisdiction. Namely, a different jurisdiction is possible when an adult has made a choice of jurisdiction and two other cumulative conditions have been fulfilled, namely that this choice is in the interest of the adult, and that the country of habitual residence has not exercised its jurisdiction. Jurisdiction conferred through choice is however non-exhaustive;
- provides that the applicable law should be determined in line with HAPC relevant provisions;
- provides for the direct mutual recognition of measures taken by the authorities of a Member State in another Member State. At the same time it leaves room for cases in which the refusal of such recognition is possible, such as when the adult was not provided the opportunity to be heard;
abolishes the *exequatur* requirement: decisions would be directly enforceable in another Member State;

provides for the establishment of an optional European certificate of representation that would enable the easy and quick recognition of powers of representation in another Member State;

further requires the establishment by the Member States of protection registers storing information on protection measures, as well as on conferred powers of representation in those Member States where such powers need to be confirmed by a competent authority. The Commission would make the technical arrangements to ensure their digital interconnection;

lays down provision on electronic communication between the Member States.

The proposed decision authorising the Member States to ratify the HAPC requires Member States, that have not already done so, to ratify the convention within 24 months from the decision's adoption. While the decision 'authorises' Member States to ratify the convention, experts have noted that it in fact implies that Member States are obliged to ratify the convention.

As explained in the recitals, the decision is motivated by the EU's exclusive competence under the HAPC. Such exclusive competence is granted by Article 3(2) TFEU. More specifically, the HAPC's implementation may affect or alter the scope of the proposed regulation, since there is significant overlap or interconnection between the two. Hence the need for all Member States to ratify the HAPC. Therefore, the decision to authorise Member States to ratify the HAPC relies on the adoption of the proposed EU regulation.

**Advisory committees**

The European Economic and Social Committee (EESC), consultation of which in this case is optional, is drafting an opinion on the proposal (scheduled for a debate at the EESC plenary session in December).

**National parliaments**

The subsidiarity deadline was 16 October 2023. Eight parliamentary chambers finished their subsidiarity check but none raised subsidiarity concerns. Of these, the German Bundesrat, while welcoming the proposal, expressed several concerns. For instance, it questions the need for a regulation given the existence of the HAPC, which it considers an 'efficient and flexible instrument'. It furthermore argues that 'the collection of highly sensitive data foreseen in the proposal is disproportional', and that by excluding vulnerable persons from legal transactions the proposal may be in violation of the UN CRPD. Last but not least, the proposal entails high administrative costs.

**Stakeholder views**

As part of the preparation of its impact assessment report, between December 2021 and March 2022 the Commission held an online survey to collect information that would feed into the impact assessment. The survey, which received input from a limited number of participants, registered broad support for the proposed regulation. Two NGOs voiced concern over the risk that the proposal does not take sufficiently into account the requirement under international human rights law that vulnerable adults should be afforded a maximum degree of self-determination. In a subsequent survey organised shortly after the publication of the proposal, another group of NGOs expressed criticism along the same line, pointing out that the proposal fails to observe the requirement put forward by the CRPD on the need to preserve the decision autonomy of vulnerable adults.

Two UN experts have also found the EU proposal in need of improvement in this respect. The UN Special Rapporteur on the rights of persons with disabilities and the UN Independent Expert on the enjoyment of all human rights by older persons published a joint report on the EU proposal, in which...
they suggested that 'representation agreements' should be replaced by 'supported decision making agreements'. They also suggested explicitly prohibiting the practice, between Member States, of institutionalisation as a form of protection. They recommended that states make an interpretive declaration when ratifying the HAPC, in which they commit to implementing it in accordance with the CPRD and other relevant international human rights norms.

**Academic views**

Between 2017 and 2020, the European Law Institute (ELI) carried out research on the protection of vulnerable adults. The final report outlining the outcome of this research includes recommendations for the European Union to use both its external and internal competences. On the external side, the EU should take such steps as are necessary to ensure that all its Member States ratify the HAPC within a reasonable timeframe, at the same time promoting its uptake internationally. On the internal side, the EU should adopt a regulation aimed at complementing the Hague Convention. The report sets out detailed recommendations for such a regulation, including allowing the adult to choose their preferred jurisdiction and court (however, with a limitation that takes into account the interest of the adult), setting up a uniform _exequatur_ procedure, providing for the acceptance and enforceability of authentic instruments, and introducing a European certificate of powers of representation. When responding to the Commission’s consultation, the ELI reiterated the findings of its 2020 report, adding some new recommendations, such as the creation of a register of European certificates of powers of representation, the recognition of binding advance directives as an important means to enhance self-determination in the event of future incapacity, particularly on health issues, a uniform European choice-of-law rule with regard to the _ex lege_ power of representation by family members, and abolition of the _exequatur_ provision (the report proposed a uniform procedure).

**Legislative process**

In the European Parliament, the Committee for Legal Affairs (JURI) is responsible for both proposals - the regulation and the consent to the Council decision (rapporteur: Yana Toom, Renew, Estonia). All three committees asked to deliver opinions, the Committee on Employment and Social Affairs (EMPL), the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Women's Rights and Gender Equality (FEMM) have decided not to do so.

In the Council of the EU, the Working Party on Civil Law Matters has held several debates to prepare the Council’s position on the file.

**EUROPEAN PARLIAMENT SUPPORTING ANALYSIS**


**OTHER SOURCES**

Protection of adults: jurisdiction, applicable law, recognition and enforcement of measures and cooperation, 2023/0169(COD), Legislative Observatory (OEL), European Parliament.

Convention of 13 January 2000 on the International Protection of Adults: authorising Member States to become or remain parties, 2023/0170(NLE), Legislative Observatory (OEL), European Parliament.


ENDNOTES

1 As highlighted in the EPRS European added value assessment and in the Commission impact assessment.

2 See this study commissioned by the EPRS EVAL Unit, P. Franzina and J. Long The Protection of Vulnerable Adults in EU Member States. The added value of EU action in the light of The Hague Adults Convention, in C. Salm, Protection of Vulnerable Adults, 2016.

3 See the EPRS European added value assessment on the issue, p. 121.


5 According to the explanatory memorandum of the legislative proposal.

6 Even if almost half of EU Member States have acceded to the Convention, out of 351 possible bilateral situations arising among the 27 Member States, only 66 (thus less than 20%) are among the 12 states parties and are thus regulated by the HACP.

7 These provisions complement the HAPC insofar as, under the convention, a choice of court made by an adult contemplating a possible loss of autonomy is not directly valid but needs to be enforced by the court possessing jurisdiction, in line with the convention.

8 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

9 This is somewhat at odds with the Commission’s own understanding. As stated in the explanatory memorandum, the Commission considers that ‘This proposal is a significant step forward for the respect of the right to autonomy enshrined in the UNCRPD because it will considerably facilitate the circulation of powers of representation granted in advance by an adult for a time when the adult will not be in a position to protect their interests.’

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eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

www.europarl.europa.eu/thinktank (internet)

http://epthinktank.eu (blog)

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