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## Protecting Vulnerable Adults: The European Union's New Legislative Package for Cross-Border Cases

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### Introduction

One of the continuing unresolved problems of modern succession planning, which has both theoretical and very real challenges on the ground, has been the wide divergence in approaches taken (or sometimes the relative void in the law) for situations of loss of capacity in adults where they have assets in more than one legal system: hitherto, each country's processes and documents have been very locally-specific, to the point that the documents differ between England & Wales and Scotland. Cross-border recognition has been patchy, to say the least. It has been no more straightforward in the European Union ("EU"), albeit a patchily adopted international model of best practice published by The Hague Conference on Private International Law ("HCCH") and known as the Protection of Adults Convention has existed since 2000.

On 31 May 2023, the European Commission ("Commission") published its long-anticipated proposals to enhance the protection of adults<sup>1</sup> in cross-border cases. In particular, the proposals are designed to protect adults who, "by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their own interests". This could be due to a permanent or temporary impairment, of a physical or psychosocial nature, caused by an age-related illness, such as Alzheimer's disease, or resulting from a health condition, such as a coma; i.e. a broad range of situations are envisaged.

The Commission considered a variety of approaches. The proposals adopted have two limbs, which are designed to provide uniform rules for where relevant adults are involved in a cross-border situation, which in EU terms can mean intra-EU or between an EU Member State and a Third State (such as the United Kingdom ("UK")):

- (i) a Council Decision<sup>2</sup> ("Decision"), authorising Member States to sign and ratify the 13 January 2000 Convention on the International Protection of Adults ("Hague Convention"), encouraging those Member States who are not already party to the Hague Convention to adopt it; and
- (ii) a Regulation,<sup>3</sup> prescribing new measures on the recognition and enforcement of "protective measures" for adults, including:
  - the facilitation of digital communication between Member States of the EU;
  - the introduction of a European Certificate of Representation ("Certificate");
  - the establishment of interconnected protection registers; and
  - the promotion of closer cooperation amongst EU authorities.

According to the Commission, the objectives of the proposals are threefold:

- to protect (fundamental) rights, including the right to autonomy, to access to justice, to equality, to be heard, to property and to free movement;
- to strengthen legal certainty and predictability in cross-border cases; and
- to improve the effectiveness and speed of cross-border proceedings involving the protection of adults.

The Commission states that common EU rules governing such circumstances are "necessary...to establish which court has jurisdiction, which law is applicable, under what conditions a foreign measure or a foreign document granting powers of representation or containing advance directives should be given effect and how authorities can cooperate".

Together, the proposals mark a very significant step. The EU estimates that between 145,000 and 780,000 adults in the EU are placed under a protection measure by a judicial or administrative authority in cross-border cases. The Regulation will apply to cross-border situations as between EU Member States, whilst the planned full adoption of the Hague Convention provides for mutual recognition and enforceability amongst the parties to the convention, so this will also impact jurisdictions such as Scotland and Switzerland, which have signed and ratified the Hague Convention but are not EU Member States.

This chapter considers the key pillars of the proposed regime and their implications for practitioners dealing with the EU.

### The Hague Convention and Its Relationship With the EU

The Hague Convention is a tried and tested mechanism: it is now some 23 years old and put forward by a widely respected organisation (the HCCH) with a membership far beyond the EU (of currently 90 states). It sought to bring about mutual recognition and enforcement amongst signatory states of private law measures to protect adults (be those measures taken by an authority or privately by the individual or someone on the individual's behalf, e.g. a continuing power of attorney, guardianship, curatorship and the like). As with analogous international instruments, it lists domains into which it does not stray, e.g. succession, marriage, etc. The states whose interest in the matter come into play include those of nationality, habitual residence,<sup>4</sup> location of the person at a given moment, where a measure has been taken, of habitual residence of someone prepared to undertake the person's protection, of presence of the person or of the location of property. In the case of something equivalent to a power of attorney, an element of choice exists as to the relevant law.

The Hague Convention exists separately to the EU, which is important, because mental capacity laws (specifically) fall outside the EU's competence under the Lisbon Treaties. However, with few exceptions, all the parties to the Hague Convention are EU Member States. The exceptions are Switzerland and Monaco,

which have very close ties with the EU in any event, and the UK, which was a member of the EU at the time of its accession to – and partial ratification of – the Hague Convention. At present, there are only 20 signatories to the Hague Convention out of 90 (HCCH) member countries. Fourteen countries have ratified it, 12 of which are EU Member States; one further EU Member State (Estonia) has acceded. Five have only signed but neither acceded nor ratified.

As with so many international instruments, e.g. the EU Succession Regulation (EU No. 650/2012), the approach taken is to start by applying the law of habitual residence, failing which the law of nationality comes in. So, readers unfamiliar with the Hague Convention will find some evident parallels.

The Hague Convention	
Scope	Adults who due to an impairment or insufficiency are not in a position to protect their interests (Article 1).
Jurisdiction	Generally, contracting states apply the law of the adult's "habitual residence" <sup>5</sup> (Article 5) with concurrent but subsidiary jurisdiction of the state of the adult's nationality (Article 7).
Applicable law	Authorities generally apply their own laws concerning mental capacity (Article 13), but the adult may designate an alternative (for example, the law of their nationality (Article 15)).
Mutual Recognition	Protection measures taken in one state are recognised in all the other contracting states (Article 22).

The UK sits in an unusual position: we have incorporated the Hague Convention (in England & Wales) in Schedule 3 of the Mental Capacity Act 2005, however we have not formally ratified the Hague Convention in respect of England & Wales (only Scotland). A number of commentators have attributed this unusual position to a lack of legislative time in the UK Parliament.

EU institutions have for some time encouraged Member States to sign up to and apply the Hague Convention. For example, the European Parliament published a report on the protection of vulnerable adults in 2017 with recommendations including a statement that it: "*Applauds those Member States which have signed and ratified the Hague Convention, and encourages those Member States which have not yet signed or ratified it to do so as quickly as possible.*" The report also "*calls on the Commission to exert political pressure on the Council and the Member States that could lead to an increase in the number of ratifications*". The EU is not able to sign the Hague Convention in its own right, since only states may sign it (and in any event, leaving aside the competence question, the EU is not a member of the HCCH).

The EU is positive regarding the Hague Convention and clearly adopting it by this two-pronged approach avoids the reinvention of a tested wheel: in explanatory notes to the current proposals (which we will come on to discuss), it is noted that in cross-border situations concerning capacity, "*adults are confronted with the complex and sometimes conflicting private international law rules... This leads to situations where adults, their families and their representatives experience significant legal uncertainty as to what rules will apply to their case and as to the outcome of the procedures and formalities they need to carry out*". The 2017 report referred to above is not critical of the Hague Convention, noting that it does not seek to "*replace the Hague Convention*"; rather, it recommends proposals to "*support the Convention and encourage Member States to ratify and implement it*".

There is a long history of multi-state initiatives within the EU to promote adoption of the Hague Convention. For example, there was an EC-HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults held in Brussels on 5–7 December 2018, which came up with recommendations and alludes to other conventions, including the 2006 UNCRRPD (a convention directly alluded to in the recitals to the draft Regulation); on 3 May 2021, the Ministers of Justice of the Czech Republic, France and Slovenia wrote to the Commission to request that it speed up its preparatory work on a legislative initiative in this area, whilst between 2021–2022 the Portuguese, French and Czech European Presidencies organised a range of events to promote awareness of this issue.

#### Advocacy from other groups

In addition, other groups, such as the Society for Trust and Estate Practitioners ("**STEP**") and the European Law Institute ("**ELI**"),<sup>6</sup> have for some time called for the Hague Convention to be in force in all Member States. They have also advocated for many of the practical reforms, such as the introduction of the Certificate and the ability for a relevant adult to choose, ahead of time, the jurisdiction to govern their protection (for example, the power to appoint and/or supervise guardians, etc.), which now appear in the new package.

It is in this context that the Commission has formally introduced two proposals: a Decision; and a Regulation.

#### The Proposed Decision

The Decision would encourage the 14 EU Member States, who have not yet ratified or acceded to the Hague Convention, to do so. Denmark is an exception to this, since it has an opt-out from EU legislation regarding justice and home affairs; Ireland also has a unique arrangement and may decide to opt in.

The provisions of the proposed Decision are straightforward: after the recitals, it contains two Articles. In the first, the European Council authorises Member States to become or to remain parties to the Hague Convention. In the second, the Member States that have not yet ratified the Hague Convention are listed and required to "*take the necessary steps to deposit their instruments of ratification or accession... no later than [24 months after the date of adoption of this Decision]*".

#### Member States that will be required to ratify (or accede to) the Hague Convention

Bulgaria, Ireland,\* Spain, Croatia, Italy, Lithuania, Luxembourg, Hungary, the Netherlands, Poland, Romania, Slovenia, Slovakia and Sweden.

\*If Ireland decides to opt in.

The Decision, if passed, will be legally binding upon the Member States concerned. Since the proposal concerns an international agreement to be ratified and acceded to by Member States, this is the only available EU legal instrument. Twenty-four months has been included in Article 2 as the maximum time allowed for Member States to ratify (or accede to) the Hague Convention, which would run from the date the Decision is adopted; however, that has been left in square brackets so is subject to review.

The legal underpinning for the Decision is interesting and connected to the proposed Regulation (which we will come on to discuss). As stated, the EU does not have competence under the Lisbon Treaties to introduce legislative measures in respect



of mental capacity. However, the EU's competence includes the adoption of measures to promote (*inter alia*) the recognition of legal judgments between Member States under Article 81(2) of the Treaty on the Functioning of the EU. Indeed, by November 2012, the EU had adopted 13 regulations relevant for the European framework of private international law: mutual recognition and similar private international law issues have been an area of work for the EU for decades, and these proposals are another step in that process. Today, that figure has risen to 20 regulations, and the proposed Regulation would take that to 21. The proposal for the Decision notes that “Member States retain their competence as regards regulation of the adoption of rules under substantive law directed at the protection of adults”, but rather that “the [Hague Convention] may affect or alter the scope of the proposed Regulation”, and so ratification of/accesion to the Hague Convention falls within the competence of the EU. The Commission has also stressed that it is neutral as regards the content of domestic mental capacity laws (see further below).

## The Proposed Regulation

The Regulation is intended to gold-plate the Hague Convention for EU Member States, internally within the EU. The Hague Convention sets standards for private international law as regards the protection of vulnerable adults both between EU Member States and between EU Member States and third countries, whereas the Regulation will apply specifically only to cases between EU Member States.

In addition to supplementing the Hague Convention as regards the recognition and enforcement of measures to protect vulnerable adults, the proposed Regulation would introduce innovations in three key areas:

- **Chapter II:** choice of jurisdiction/non-exclusive jurisdiction provisions to enable vulnerable adults to choose the Member State with jurisdiction over matters concerning their mental capacity, provided that this does not conflict with the Hague Convention;
- **Chapter VII:** a Certificate (a similar approach and format to that used in the EU Succession Regulation) made available for adults or their representatives to demonstrate authority as between Member States in cross-border cases; and
- **Chapter VIII:** protection registers, available online, making it straightforward for Member State public bodies to check mental capacity authority in cross-border cases. These will complement provisions for greater cooperation between Member States elsewhere in the Regulation, including as regards digital communication.

Other areas of interest (which we do not cover in detail, save as follows) include:

- **Chapter V:** which contains provision for mutual recognition of authentic instruments; additionally, the Regulation removes formal requirements for apostille (itself emanating from an HCCH instrument) or other forms of legalisation that some jurisdictions require to rely upon documents; and
- **Chapter IX:** which provides for the mandatory use of digital communication on protection issues between relevant EU authorities (for example, in some cases, via a decentralised IT system) and the optional use of digital communication between natural persons and the EU authorities. Approval is also given for the use of electronic seals or electronic signatures in certain circumstances.

### Choice of jurisdiction/non-exclusive jurisdiction

These rules give additional weight to the choice of jurisdiction made by adults, over and above the protections in the Hague

Convention. They are designed to promote the right to autonomy of a relevant individual (for example, where a state other than that of the adult's habitual residence is chosen, this need not be subject to the approval of the latter Member State) and avoid issues surrounding conflicts of jurisdiction.

Whilst these provisions make use of the concept of habitual residence, the relevant adult may opt for a jurisdiction other than that of their habitual residence, provided: (i) they have done so at a time when they were still in a position to protect their own interests; (ii) the exercise of the jurisdiction is in the best interests of the adult; and (iii) this does not conflict with a ruling under the Hague Convention.

However, the explanatory notes to the Regulation make it clear that the courts will have ultimate authority to decide whether the choice made by the adult is still in their best interests, given any change in their personal or financial circumstances, between the time of the adult's original choice and their incapacity.

### Certificate

The Certificate would be uniform across the EU, enabling representatives of adults to easily identify their status and powers in another Member State. For example, the representative of a power of attorney (“power”) in Luxembourg might request a Certificate from local authorities which they can show to authorities in other EU jurisdictions where the donor of the power has assets, in order to assert their control over them. The Certificate does not replace local documents (for example, in England & Wales, most commonly, a Lasting Power of Attorney): rather, it is an additional tool made available to assist in cross-border cases. The proposed Regulation repeatedly emphasises that it is designed to elucidate the “principle of mutual trust” between Member States.

The validity of the Certificate should “in principle” be limited to one year, with longer/shorter periods dependent upon the case in hand. So, Certificates may need to be renewed from time to time. The Certificate is not designed to be an enforceable title in its own right (that would continue to be the document from the originating jurisdiction) but rather, the Certificate provides a presumption of accuracy regarding the authority of the personal representative.

The proposal includes a draft form of Certificate that is highly detailed and designed to accommodate variations in local law. For example, the Certificate must identify whether under the authorising document the representative has authority to make gifts on the behalf of the vulnerable adult, and whether any powers may be delegated. This results in a long list of powers and authorities, upon which third parties in other Member States can rely. Domestic regimes for protecting vulnerable adults vary widely across the EU: some states use guardianship models, whereas others use curatorship. In some states, representatives must go to court before they can exercise their powers; in others, powers can be exercised without a court application.

Such proposals are likely to be welcomed by bodies such as STEP, who continue to advocate for the wider recognition and streamlining of documents authorising powers of representation on an international basis.

### Protection registers, including online access

These would also be a significant change to cross-border cases. Information including the name of the relevant vulnerable adult, their authorised representative and any measures taken by the applicable authorities would be made available on an online

database accessible to authorities in all EU Member States, thus enabling them independently to undertake their own verification of protective measures.

The details regarding the registers and online access to them are by necessity very prescriptive, which will be beyond the scope of what many legal practitioners will be interested in, save to note that the data protection implications of online registers have been clearly thought through. Limitations are placed on the nature of the information that would be made available on the online platforms to protect personal data, and it is noted that records may include sensitive personal data such as health data.

This would be a large step forward for harmonisation. At present, the accessibility of electronic registries varies greatly. For example: in Finland, the “Registry of guardianship affairs” is accessible by the general public whereas in Lithuania, the “Registry of Legally Incapable Persons and Persons with Limited Legal Capacity” is only accessible by the judiciary and notaries. The Regulation would set a common standard, which does not include disclosure to the general public, but rather access by public authorities.

The Commission states that such a measure is necessary to ensure that a foreign protection measure or the view expressed by the adult in the relevant powers of representation is respected in a cross-border situation.

#### Will the proposals change the national laws of EU countries?

The Commission has stressed that the proposals will not affect the national (i.e. domestic) laws of EU countries concerning the protection of adults: for example, national laws on the rules governing the types of available protection measures, their consequences, the powers that an adult’s representative may have and their limitations will remain as they are. The proposals are designed only to harmonise cross-border cases and provide clarity on issues such as which country’s courts have jurisdiction to take a protection measure concerning a particular adult and how protection measures and powers of representation enacted in one country can take effect in another.

#### Timeframe for implementation

The Regulation will apply from 18 months after its adoption (it is currently unclear as to when this will be; the proposals still need to be discussed and adopted by the European Parliament and Council, which could take some time), with a phased implementation of certain of the measures. For example, following the Regulation’s adoption, Member States will have four years to make their communication channels electronic and five years to establish a protection register and interconnect it with other Member States’ registers.

## Conclusion

There is plenty here for practitioners to digest. The Commission estimates that the administrative efficiencies introduced by these proposals will, on average, represent a saving of EUR

40–EUR 9,000 in each individual cross-border case involving mental capacity for the adult or representative concerned, more than outweighing the cost of IT systems and other costs of implementing the proposals. This will be welcome news for clients in cross-border cases with the aspiration that navigating these situations becomes cheaper and less time consuming. As with any new regime, there will undoubtedly be nuances to work through, as the EU measures (and Hague Convention) interact with differing domestic legal frameworks.

It is an open question whether these initiatives will increase international interest in adopting the Hague Convention outside the EU. In some areas, EU regulation has incentivised third-party countries to adopt the same or equivalent measures. The HCCH is in the process of publishing a handbook on the application of the Hague Convention, which has been the subject of extensive commentary by interested Member States and may attract interest. The HCCH held a conference in 2022 which emphasised the importance of expanding the number of participating states. What is certain is that this area can be difficult for practitioners and clients alike, and a new regime is on the horizon that any cross-border practitioners who work with clients or assets in the EU will need to become familiar with.

## Acknowledgments

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## Endnotes

1. I.e. those who are 18 years of age or over.
2. Proposal for a Council decision authorising Member States to become or remain parties, in the interest of the EU, to the Convention of 13 January 2000 on the International Protection of Adults (31 May 2023), [https://commission.europa.eu/document/9f84a9a4-324a-48db-9b71-871c5c04d3c7\\_en](https://commission.europa.eu/document/9f84a9a4-324a-48db-9b71-871c5c04d3c7_en)
3. Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (31 May 2023), [https://commission.europa.eu/document/6ff766ad-aca6-4b27-a3cd-b7a9afe8857d\\_en](https://commission.europa.eu/document/6ff766ad-aca6-4b27-a3cd-b7a9afe8857d_en)
4. For a discussion of this term, see further below.
5. “Habitual residence” is not defined in the Hague Convention, in line with its usage in other EU legislation, where it is frequently referred to, but rarely ever defined (e.g. the EU Succession Regulation and matrimonial law). It is generally considered to mean something akin to the country in which a person has established the permanent or habitual centre of their interests: normally being the country where the person lives or spends most of their time.
6. See the ELI’s 2020 report: “The Protection of Adults in International Situations”.



**Edward Reed** advises internationally mobile families on their asset structuring, personal tax and succession planning, wills, trusts and personal tax planning. Having been educated both in the UK and in France, Edward has developed an affinity for civil law issues generally. He is a bilingual French speaker and fluent in Italian. He advises on cross-border estate, succession planning and complex tax investigation issues. Being a trustee and protector himself, he also advises trustees and settlors on fiduciary and tax issues arising out of the administration of existing structures.

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