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European Commission's Public Consultation on the Initiative on the Cross-Border Protection of Vulnerable Adults

Response of the European Law Institute





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The European Law Institute

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Introduction

ELI welcomes the opportunity to respond to the public consultation of the European Commission on the cross-border protection of vulnerable adults in the European Union (EU).¹ The Commission invited relevant stakeholders to express their views on how 'to harmonise and simplify the legal rules for the designation of the court having jurisdiction in a cross-border case, the law applicable to the case and the recognition of foreign measures of protection'² and on how 'to facilitate cooperation between EU Member States and speed up the processing of cross-border cases'.³

ELI considers the issues raised by the European Commission as both important and topical. As the European Commission points out in its survey, the European population is ageing. More and more adults require assistance in the protection of their health, personal, or financial matters owing to an impairment of their personal abilities. Many adults are even unable to protect their interests due to advanced incapacity. At the same time, mobility within the EU is steadily increasing. Many people move from one EU Member State to another, or own property or other assets in an EU country other than the one where they live. There are a multiplicity of situations in which vulnerable adults cross borders within the EU. From a legal perspective, cross-border situations involving vulnerable adults raise numerous questions. The law on the protection of vulnerable adults is not harmonised and varies from one EU Member State to another. The differences are often considerable. Some EU countries provide for instruments enhancing the self-determination of vulnerable people, while others do not. Some Member States grant family members,

in particular, *ex lege* powers of representation, others do not. Guardianship, curatorship, and other measures differ greatly from one country to another, both with regard to the conditions under which such measures are taken as well as their scope, their exercise and their control by the court. There are also important differences as to the authority deciding on questions and measures of protection. These relate to the nature and status of such authority, which can be judicial or administrative, in particular, but also the procedure applicable before the authority as well as the possibilities of appeal. Not only do the laws on the protection of vulnerable adults differ considerably within the EU, but European common rules on cooperation among authorities are also lacking as are European common rules on the determination of the competence of authorities, on the cross-border recognition and enforcement of protective measures and, last but not least, on the determination of applicable law.

Issues of cooperation, competence, recognition and applicable law in relation to vulnerable adults in international matters are addressed in the Hague Convention of 13 January 2000 on the International Protection of Adults (hereinafter: the Hague Convention),⁴ which, as the European Commission points out, has so far been ratified by only ten EU Member States.

ELI has addressed the issue in its report on 'The Protection of Adults in International Situations', published in 2020 (hereinafter: the 2020 ELI Report).⁵ The Report deals extensively with questions which are now raised by the European Commission in its

¹ European Commission, 'Civil Judicial Cooperation – EU-wide Protection for Vulnerable Adults' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults_en> accessed 24 March 2022.

² European Commission, 'Civil Judicial Cooperation – EU-wide Protection for Vulnerable Adults' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults/public-consultation_en> accessed 24 March 2022.

³ European Commission, 'Civil Judicial Cooperation – EU-wide Protection for Vulnerable Adults' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults/public-consultation_en> accessed 24 March 2022.

⁴ Hague Convention of 13 January 2000 on the International Protection of Adults (entered into force on 1 January 2009).

⁵ European Law Institute, 'The Protection of Adults in International Situations. Report of the European Law Institute' <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Protection_of_Adults_in_International_Situations.pdf> accessed 24 March 2022.

survey. In particular, it addresses the question of how to ensure that all EU Member States sign the Hague Convention as well as the issue of legislative measures to be adopted by the EU to complement the Hague Convention and enhance its operation between Member States. The 2020 ELI Report proposes a number of measures that could be taken on a European level in order to enhance self-determination and the protection of vulnerable adults in cross-border situations.

The present response to the survey of the European Commission relies on the 2020 ELI Report. ELI reiterates the recommendations made in that Report, in particular in light of the fact that it was approved and published as recently as 2020. Therefore, the current response will draw from the main findings of the 2020 ELI Report in the first place and will subsequently address certain issues which received less attention in the 2020 Report, both at the level of substantive law and conflict of laws, but which ELI believes should be addressed by EU legislative measures seeking to promote better cross-border protection of vulnerable adults.

Part 1: The 2020 ELI Report

A. General Remarks

In 2017, ELI launched a project on ‘The Protection of Adults in International Situations’. The project was completed and published in 2020. The aim was to identify measures which the EU could take to enhance the protection of vulnerable adults who have interests in, and ties with, two or more Member States, for example, adults who move their habitual residence from one State to another, or adults who own property situated in another Member State.

The 2020 ELI Report reads that the term ‘adults’ refers to persons aged 18 and over who are not in a position to protect their personal and/or financial interests due to an impairment or inadequacy of their personal capacities. The term ‘protection’ is to be understood in a broad sense. It includes all private arrangements which an adult can make with regard to the loss of autonomy, such as a lasting power of attorney, a *mandat de protection future*, or a *Vorsorgevollmacht*. It also includes measures which a competent authority may take, either by appointing a guardian to assist or represent the person concerned, or by confirming, monitoring and enforcing private arrangements with a view to assisting an adult in exercising their legal capacity (eg, by appointing a guardian or other person charged to assist the adult in making certain decisions). The present response adopts the above definitions.

The 2020 ELI Report stresses a number of points which the present ELI response to the survey of the European Commission endorses. They will be summarised below:

B. The Need to Take Action

Adults in need of protection have a fundamental

right to be supported in the exercise of their legal capacity. This right is enshrined in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),⁶ to which the EU and all its Member States are parties. The European Convention on Human Rights, in conjunction with a number of instruments adopted within the framework of the Council of Europe and in the light of the case law of the European Court of Human Rights,⁷ also calls on States to take appropriate action to ensure that adults concerned receive the support they need to exercise their legal capacity. The EU itself is called upon to play an active role in this regard, in line with the above-mentioned instruments and the Charter of Fundamental Rights of the EU.⁸ The persons concerned must be supported in exercising their legal capacity both in domestic situations and in situations with cross-border implications.

C. A Lack of Uniform Rules of Private International Law

Currently, the protection of adults in international situations in Europe faces two major challenges. First, the substantive and procedural rules in this area vary considerably from one Member State to another. Second, the rules of private international law which apply in this area are largely inconsistent. The Convention of 13 January 2000 on the International Protection of Adults (Hague Convention), adopted within the framework of the Hague Conference on Private International Law, has achieved a degree of harmonisation in this area. Despite the efforts made by the Hague Conference, alongside various stakeholders, the Convention is currently in force only in a limited number of States. At the time of the approval of the 2020 ELI Report, only nine Member States — Austria, Cyprus, the Czech Republic, Estonia,

⁶ Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008) A/RES/61/106 (UNCRPD).

⁷ European Court of Human Rights, *Shtukaturov v Russia* (App No 44009/05), judgment of 27 March 2008, available at: <<http://hudoc.echr.coe.int>>; European Court of Human Rights, *Glor v Switzerland* (App No 13444/04), judgment of 30 April 2009, available at: <<http://hudoc.echr.coe.int>>; European Court of Human Rights, *Stanev v Bulgaria* (App No 36760/06), judgment of 17 January 2012, available at: <<http://hudoc.echr.coe.int>>.

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

⁸ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

Finland, France, Germany, Latvia and Portugal — were parties to the Convention; only one State has since acceded, namely Belgium. This state of affairs is unsatisfactory overall. The lack of uniform rules of private international law is likely to undermine the effectiveness of adult protection in cross-border cases. It affects the ability of the adults concerned to move from one State to another and/or to transfer their assets, as well as their right to move freely within the internal market and thus leads to discrimination. Finally, the absence of uniform private international law rules jeopardises the security of transactions concluded by the adults concerned with third parties and/or their representatives.

D. Harmonising Rules of Private International Law is in Line with the Fundamental Values of the EU

The EU could, and should, take into account the above concerns. In particular, harmonising private international law rules on the protection of adults at Union level, taking into account the UNCRPD, would be in line with the fundamental values of the Union itself, namely respect for fundamental rights. Such harmonisation would contribute to the creation of an area of freedom, security and justice in Europe and improve the functioning of the internal market. This development would be consistent with the principle of subsidiarity.

E. Article 81 of the Treaty on the Functioning of the European Union (TFEU) as the Legal Basis for EU Action

The legal basis for EU action is Article 81 TFEU on judicial cooperation in civil matters. The provision empowers the EU to adopt harmonised rules on jurisdiction, applicable law, recognition of judgments and decisions, and cooperation between authorities. Such measures can cover all matters with cross-border implications in the field of civil law, including the protection of adults. According to the 2020 ELI Report, the protection of adults does not fall within the scope of ‘family law’ within the meaning of Article 81(3) of the TFEU and, accordingly, is not subject to the special procedure provided for under Article 81(3)

of the TFEU, which calls for the Council, in establishing such measures, to act unanimously after consulting the European Parliament.

F. EU Law Should Draw on the Same Principles Underlying the Hague Convention

The EU should take measures to improve the protection of adults in cross-border situations in line with the Hague Convention on the International Protection of Adults. The Hague Convention was drafted against the background of the human rights-based paradigm of disability, which was later enshrined in the UNCRPD, and has proved to work well in practice.⁹ When taking action in this area, the EU should draw on the same principles that underpin the Hague Convention. This includes, in particular, the principle that the interests of the adult and respect for their dignity and autonomy are to be given primary consideration, as set out in the preamble of the Hague Convention. Furthermore, the EU should recognise that harmonisation in this area should be sought at both regional and global level. Finally, broad ratification of a uniform text of a universal character, such as the Hague Convention, should be encouraged.

G. Making Use of Both Internal and External Competences

On the basis of the above, in order to improve the protection of adults in international situations, the EU should consider making use of both internal and external competences. On the external side, the Union should take necessary steps to ensure that the Hague Convention is ratified, or acceded to, by all Member States within a reasonably short period of time. At the same time, the EU should contribute in general to the promotion of the Hague Convention in third countries. At the internal level, the EU should enact legislative measures aimed at improving the operation of the Hague Convention in relations between Member States, in accordance with the objectives of the Hague Convention itself and its underlying principles. Care should be taken not to jeopardise international coherence in this area,

⁹ For an in-depth analysis of the Hague Convention’s interaction with the UNCRPD, see Sonia E Rolland and Alex Ruck Keene, ‘Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities’ (2021) <www.ohchr.org/Documents/Issues/Disability/Hague-CRPD_Study.docx>.

bearing in mind that the adults concerned may move to the Union from outside it and vice versa.

H. Accession to the Hague Convention

The Union cannot itself become a party to the Hague Convention but the Union can, and should, authorise Member States which have not yet done so to ratify, or accede to, the Hague Convention in their interest. To the extent that the conclusion of the Hague Convention falls within the external competence of the EU, a decision on such an authorisation would lead to the Member States being effectively obliged to ratify, or accede to, the Hague Convention. External competence could be invoked on the basis of Article 216 TFEU, on the grounds that the conclusion of the Convention 'is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties'.

I. An EU Regulation Supplementing the Hague Convention

Internally, the Union should improve the operation of the Hague Convention in relations among Member States by adopting legislation in the form of a Regulation supplementing the Convention (which we propose to refer to as the 'Adult Protection Regulation' hereinafter). The Hague Convention would apply in the Member States as supplemented by the Regulation. It would set out the general rules applicable in the Member States in this area. In intra-EU cases, ie, cases involving the protection of the person or property of an adult habitually resident in a Member State of the EU or cases otherwise involving only two or more Member States, the Hague Convention would apply as supplemented by the suggested Adult Protection Regulation.

J. Content of the Proposed EU Regulation

Within the framework of the proposed Adult Protection Regulation, various improvements could, in principle, be achieved, two of which will be briefly recalled here. First, the Regulation should include a provision enabling the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when they have capacity, the Member State whose courts will have jurisdiction over their protection. This 'forum selection' should also be possible with respect to the authority which will supervise the guardian (appointed by a court or administrative authority)

or the person acting under a durable (lasting) power of attorney. Second, the Regulation should render it easy for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed. This could be done by introducing a European Certificate of Powers of Representation (ECPR), taking into account the experience gained with the European Certificate of Succession.

Part 2: Additional Recommendations

A. Need for an Online ECPR Register

We have outlined the recommendations made by ELI for a ECPR in its 2020 Report. We now develop that proposal further. In accordance with the traditional approach to matters of private international law, the 2000 Hague Convention addresses jurisdiction, applicable law, recognition and enforcement, as well as cooperation. These topics are important and necessary for the work of lawyers, but they point to a cumbersome environment, in which the exercise of measures in cross-border situations is approached as something exceptional and potentially difficult. That does not accord with the modern phenomenon of ever-increasing mobility, particularly within the EU, but also more broadly. Citizens seeking to look after the interests of friends or relatives with impaired capabilities, and who have the authority to do so in their own States, expect to be able to do the same across borders, and become frustrated if they cannot do so. Similarly those on the frontline dealing with such situations, be it counter or call centre staff in financial institutions, frontline medical and social care staff, and others, or their immediate managers to whom they turn for assistance, are also frustrated. They are presented with a document that does not fit their standard instructions. What are they to do?

Above all, those difficulties impinge on the rights and interests of the adult at the centre of such arrangements. Particularly under the influence of the UNCRPD, their rights should be exercisable and their interests safeguarded 'on an equal basis with others' (in the often-repeated phrase of that Convention), without encountering undue barriers or difficulties.

Cross-border issues and requirements should not go beyond effective compliance with the same principles that apply within a State: support for autonomy of the adult, either through arrangements established by the adult or put in place for the benefit of the adult, and the need for protection must be given equal consideration. When a representative has to deal with recognition and enforcement issues and procedures

in the course of acting for an adult, the relevant regime has failed. It has become difficult and may require legal advice and action to reach an agreement recognised in another State; and, in the worst case, formal enforcement proceedings may be required to force someone to comply with these agreements, even if they are actually legally enforceable. What all parties want is a different concept, namely that of 'operability'. The role of the representative should – subject to the necessary safeguards – be exercisable in a straightforward manner and should not create undue difficulties or obstacles either for the representative or for the persons with whom he or she has to deal.

The first reaction of a bank clerk or healthcare worker presented with someone other than the adult, asserting a right to represent the adult, is whether they can properly release relevant data without breaching confidentiality and data protection requirements. The next is whether they can accept, and act upon, the instructions and decisions of the adult's representative. Even within States, there is increasing recognition that little protection is afforded by a document produced months, or even only days, after its date of issue. While most representatives act honestly and properly, not all of them do. It is a common experience of those charged with investigating fraud and malfeasance that sometimes, when the appointment of a representative has been ended, powers curtailed, or other sanctions imposed, the representative (or former representative) goes to the bank, produces the document of appointment, withdraws funds, and disappears with them.

There is a growing recognition in States that there needs to be a quick and secure method to check the current status of such a document. Possible solutions are still being planned or are at a relatively early stage of development. As a rule, an up-to-date secure platform where basic information can be accessed is needed. Such information should be available online at all times on a platform that guarantees confidentiality and data protection. The

bank employee should be able to access it while a vulnerable adult's representative is still at the counter. A clerk's colleague at a call centre should be able to access it while a vulnerable adult's representative is still on the line. A doctor, who has to make medical treatment decisions for a vulnerable adult that has just been admitted in the middle of the night, must be able to do the same.

The solution envisaged for operation within States, and that is being developed in some of them, is an online system which enables the authority that registers measures and updates the register with relevant subsequent developments, to offer such an online service to those that need it. Greater efficiency would be achieved if that online facility were established and maintained centrally for the EU, accessible in respect of its Member States, and any other States that opt to join it. The computer system at national level would feed updated information to the ECPR Register in real time. It could even direct all enquiries, national as well as cross-border, to the ECPR Register. In the alternative, the EU could create a decentralised system for the interconnection of national registers, modelled on the solution found for national insolvency registers envisaged under Article 25 of the Insolvency Regulation (Recast).¹⁰ Either way, the ECPR system should serve as a central public electronic access point to information in the system, preferably linked to the European e-Justice Portal and providing a search service in all the official languages of the Union.

In relation to any particular measure or certificate, the ECPR Register could be accessed for answers to basic questions such as the following: Is the document still in force? Has it been revoked, or modified? Where there are joint appointees, is an instruction or decision of both required, or can either act individually, or has the appointment of one of them been revoked? Do any particular checks need to be conducted by the person with whom the representative seeks to deal?

While maintaining such a system will not be without cost, the overall savings will be substantial. Skilled staff and busy professionals will not spend time

wrestling with procedural requirements, finding answers and perhaps having to seek advice, all of that entailing costs in terms of resources. Once initial capital costs have been met, running costs should not be significantly higher than the combined individual costs of maintaining national databases and of dealing with requests for information relating to those databases. Above all, the legitimate interests of citizens will be better served, as will the interests of those providing services to them.

To avoid misconceptions, it might be useful to underline that the proposed Certificate of Powers of Representation is not intended to represent an alternative to conflict-of-laws rules or rules on the recognition of measures of protection. Like the certificate under the Succession Regulation,¹¹ it is intended as a tool that makes it easier for the representative of a vulnerable adult to provide evidence of the existence and scope of their powers.

B. Promotion of the Use of Advance Directives

The protection of vulnerable adults is based on fundamental principles, such as the right to respect inherent dignity and the right to lead one's life independently and in a self-determined and autonomous manner.¹² The promotion of self-determination in the event of a capable adult's future incapacity is arguably the most important goal of legislation geared at the protection of adults; a goal the EU subscribes to.¹³

The most important instruments needed to ensure self-determination in this field are continuing powers of attorney and advance directives. The former consists of authority granted to one or several persons to act for the principal in line with instructions specified in the power of attorney. The latter are instructions given by a capable adult concerning issues that may arise in the event of their incapacity. They allow capable persons to anticipate decisions they will no longer be able to make if they become incapable. Similarly to lasting powers of attorney ('POAs'), advance

¹⁰ Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19.

¹¹ Regulation (EU) No 650/2012 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 [2012] OJ L201/107.

¹² Council of Europe, Recommendation CM/Rec (2014)2, Principle 9, <<https://rm.coe.int/1680695bce>> (accessed on 24 March 2022); European Committee on Legal Co-operation (CDCJ), 'Enabling Citizens to Plan for Incapacity' (2017)2 final, para 9, <<https://rm.coe.int/cdcj-2017-2e-final-rapport-vs-21-06-2018/16808b64ae>> (accessed on 24 March 2022).

¹³ Council of Europe, Recommendation CM/Rec (2014)2, Principle 9, <<https://rm.coe.int/1680695bce>> (accessed on 24 March 2022).

directives may refer to matters such as the person's health, welfare, or living situation, the management, or the alienation and liquidation, of assets, etc. The difference as compared to continuing POAs lies in the fact that advance directives are not directed at a specific other person; thus they do not create an agency relationship, but are rather instructions, or wishes, which should be respected by the person, or institution, charged with the duty to care for and/or represent the author of the advance directives.

There are diverse provisions across Europe for advance directives for limited purposes, generally relating to healthcare. However, provision for advance directives, compared with POAs, is under-developed. Nowhere are there clear legislative provisions 'maximising the scope of self-determination by advance directives, so as, in conjunction with POAs, to maximise the total range of provision for self-determination.'¹⁴ This applies in particular to 'instructions given' in an advance directive, which represent the granter's decision in a matter, not mediated through a representative, as opposed to 'wishes made' which, again subject to much diversity of provision, often have to be taken into account.

ELI considers advance directives to be an important means to enhance self-determination in the event of future incapacity. On a European level, a first step could consist of introducing the concept of binding advance directives into the substantive law of all EU Member States. Legislation should ensure a broad scope of application, taking into account the full potential of advance directives with respect to health, welfare and other personal matters, as well as economic and financial questions. There would be particular value in having a consistent European provision on when an 'instructions given' advance directive should be disapplied because of factors not taken into account when it was granted, or that have arisen between the time of granting and the time the document potentially becomes operable.

The introduction of advance directives into the substantive laws of the EU Member States as a component of the promotion of self-determination will have to be accompanied by legislative provisions on private international law. Rules on applicable law and on the competence of authorities to assess the validity of advance directives or their interpretation

will be crucial in order to ensure their cross-border effectiveness and the free movement of vulnerable adults in the EU.

Article 15 of the Hague Convention deals with the law applicable to determining 'the existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act'. The law applicable to those questions may be chosen to a certain extent (cf Article 15(2) of the Hague Convention). In the absence of a choice of law, the applicable law will be the one of the State in which the adult has their habitual residence at the time the power or representation is granted (Article 15(1) of the Hague Convention). The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised (Article 15(3) of the Hague Convention).

It is open to debate whether Article 15 of the Convention refers to continuing powers of attorney only. One could argue that Article 15 of the Hague Convention could be interpreted to include advance directives. Indeed, it could be argued that, despite the wording of Article 15, which refers to 'powers of representation granted by agreement or unilateral act', the provision was intended to apply to all private measures taken by the adult in advance in the event that he or she loses mental capacity. Such an interpretation would have to be derived from the Hague Convention itself, as its interpretation is to be made autonomously. If the interpretation of the Hague Convention was to lead to the conclusion that Article 15 applies to all private measures, the Hague Convention would be considered to (already) provide for a choice-of-law rule with regard to advance directives. This conflict-of-laws rule could become a unified European choice-of-law rule if the EU were to authorise its Member States to ratify the Hague Convention on the basis of Article 216 TFEU (above, Part 1H).

Since an interpretation of the Hague Convention cannot be imposed by any measure of EU law, and in any event operability in practice requires clarity and certainty (which cannot be achieved where interpretation is uncertain, and a matter of opinion), action could and should be taken on a European level regarding advance directives. Advance directives can be expected to become increasingly important in

¹⁴ CDCJ (n 12) paras 35, 195.

the coming years, as has been the case with lasting powers of attorneys in recent times.

ELI therefore proposes that EU legislative measures aimed at complementing the Hague Convention should include a conflict-of-laws rule similar to that provided for in Article 15 of the Hague Convention, which determines the law applicable to advance directives.

Furthermore, the fact that legislation on advance directives is currently under-developed offers an opportunity for the EU to take pioneer action in the field. It could propose an optional standard format for advance directives which would facilitate their use across Europe. Although the content of advance directives will vary with the wishes of every granter and any limits on permissibility in individual Member States, the overall format would be recognisable across Europe.

Additionally, the possibility should exist to register the existence of advance directives in a ECPR, the creation of which is suggested by ELI (above, Part 2.A).

In ELI's view, a European Certificate for advance directives and the possibility to register the existence of advance directives, combined with a clear choice-of-law rule (for which different solutions are imaginable; see above), are important measures of enhancement of protection and self-determination within the EU.

These suggestions, or some of them at least, might become unnecessary if the Hague Conference were to address these matters by way of a Protocol to the Hague Convention.

C. Inclusion of a Conflicts Rule on Ex Lege Powers of Representation

The management of vulnerable adults requires striking a delicate balance between the promotion of self-determination and protection.

Whereas guardianship is conceived as an *extrema ratio* means to address mental disabilities, granting a power of attorney to someone before incapacity allows them to choose a substitute freely and express their own wishes.

As an alternative or complement to the power of attorney, a possible means to take care of the patrimonial and non-patrimonial interests of a mentally disabled person is *ex lege* substitution by family members who, by law, are allowed to act as

representatives in a restricted field of matters as soon as the person concerned loses their decision-making capacity.

In some European jurisdictions, this power is expressly and generally granted to family members (parents, children over 18 years, and/or the other spouse or registered partner). In other jurisdictions, *ex lege* powers of representation are not provided for at all or are limited to specific issues, such as medical matters and organ transplants. Here, family members are allowed to take certain decisions on behalf of the person if they are no longer able to express their will. This possibility is sometimes conferred by legislation; sometimes it is based on custom and practice. On a comparative level, if representation by family members *ex lege* as an alternative to guardianship and lasting powers of attorney is one of the means of protection of the vulnerable person, the crucial question arises as to whether it involves a family matter for the purpose of Article 81(3) TFEU.

ELI considers that, where family members are automatically entitled to make decisions on behalf of a person who no longer has capacity, the actual issue at stake is the protection of a vulnerable adult, while family ties come into play as mere criteria of identification of the persons who will be in the best position to act on behalf of the person concerned and according to their presumed will.

Against this background, the *ex lege* power of representation of family members should fall under the 'protection of vulnerable adults' heading, which, in turn, is not a chapter of family law, but rather focuses on the protection of a person and their personal and financial interests. Indeed, many adults who are in need of protection have no family relationships and, therefore, *ex lege* substitution does not apply at all.

In summary, the rationale for the *ex lege* power of representation of family members pertains to the law of persons and not family law, notwithstanding the obvious interplay between the two matters.

Once the obstacle based on Article 81(3) TFEU is set aside, *ex lege* substitution by family members should be included among the means of protection of vulnerable adults, which the EU may deal with in the context of judicial cooperation in civil matters.

As mentioned earlier, huge differences exist between Member States concerning the field of application, the extent of substitution, the modalities, and the formalities of this power of representation. Where

registration of the substitute is not required, issues concerning evidence of their right arise.

ELI suggests that legislative measures taken by the EU aiming at complementing the Hague Convention should take into account the *ex lege* power of representation by family members as a measure of protection of the adult in personal or patrimonial matters.

In particular, it would seem appropriate to adopt a choice-of-law rule inspired by that provided for in Article 15 of the Hague Convention. The choice-of-law rule concerning *ex lege* powers of representation could state as follows: 'Ex lege powers of representation are governed by the law of the (Member) State in which the concerned adult has their habitual residence at the time when the powers are exercised'. A rule to this effect would rest on the same assumption as Article 15 of the Hague Convention, ie, that it is appropriate in cases of adult protection to refer to the habitual residence of the adult. However, while Article 15 of the Hague Convention refers to the time when the powers are granted, the choice-of-law rule regarding *ex lege* powers of representation rather should take as the relevant point in time the one at which the powers are relied upon. Referring to that moment in time would be consistent with the nature of *ex lege* powers, which are not granted by the adult concerned but which apply automatically when they lose their capacity. For reasons of legal certainty, a choice of law by the interested adult should not be possible. Following the solution in Article 20 of the Hague Convention on Adults, the uniform European choice-of-law rule would be without prejudice to overriding mandatory provisions as they may be in force in the State where the *ex lege* powers of representation are invoked.

D. Abolition of Exequatur Procedures

The 2020 ELI Report advocates the introduction of a uniform European *exequatur* procedure to be applied by all EU Member States (except Denmark) to measures of protection requiring enforcement and originating in another Member State of the Hague

Convention, modelled on the *exequatur* proceedings laid down in the Succession Regulation and the Matrimonial Property Regimes Regulation.¹⁵ As the 2020 ELI Report states, procedural harmonisation of that kind would facilitate the cross-border movement of such measures within the European judicial area, increase the effectiveness of the measures concerned, bring more legal certainty, and limit the costs associated with the enforcement procedure, especially when the measure is to be enforced in two or more Member States other than the Member State where the measure was taken.

On closer inspection, it seems to be possible to even go a step further: in numerous EU regulations dealing with the cross-border enforcement of decisions and measures in civil matters, *exequatur* proceedings have been abolished altogether in favour of 'automatic' enforceability (most prominently in the Brussels Ibis Regulation¹⁶ and the Brussels Ibis Recast Regulation¹⁷). Such enforceability by operation of law depends on two conditions. First, some procedural safeguards must be respected in the originating jurisdiction, such as the use of multilingual standard forms and the issuing of a certificate of enforceability. Second, legal remedies must be available to affected parties in the jurisdiction of execution. Numerous authors are of the opinion that automatic enforceability should be introduced into the Succession Regulation and the Matrimonial Property Regimes Regulation at the next opportunity. We do not see a reason why this welcome trend towards guaranteeing effective, rapid, and low-cost cross-border enforceability should stop short of protective measures issued by a Member State authority under the Hague Convention.

¹⁵ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

¹⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

¹⁷ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1.

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