



STUDY ON THE CROSS- BORDER LEGAL PROTECTION OF VULNERABLE ADULTS IN THE EU

Final Report

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November – 2021



EUROPEAN COMMISSION

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Print ISBN 978-92-76-46710-6 doi:10.2838/192145 DS-07-22-000-EN-C
PDF ISBN 978-92-76-46709-0 doi:10.2838/952193 DS-07-22-000-EN-N

Manuscript completed in November 2021.

Final edition

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Luxembourg: Publications Office of the European Union, 2022

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List of abbreviations

CC	Civil Code
CJUE	Court of Justice of the European Union
EU	European Union
MS	Member State(s)
MSCA	Member States Competent Authority
The Hague Convention The Convention	Convention on the International Protection of Adults of 13 January 2000
The 2000 Hague Convention	
UNCRPD	United Nations Convention on the Right of Persons with Disabilities

Executive summary

The study's objective is to evaluate the main legal difficulties and practical challenges in the cooperation within the EU in the field of the protection of vulnerable adults, and to assess the need for and the possible added value of a common legal framework for the protection of vulnerable adults in cross-border cases, either through mandatory ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults ('the Convention') or via the adoption of an EU instrument to reinforce and streamline the judicial cooperation in that area.

To this end, the study examines the national laws and practices of the Member States with regard to the roles and functioning of competent authorities, the different types of measures of protection provided for in the national legal systems, the main procedural rules applying to these measures, as well as the private international law rules in place for cross-border cases. The data presented in the report is based on desk research, as well as on the results of an online survey targeted at national competent authorities, legal practitioners and other stakeholders involved in the protection of vulnerable adults (e.g. NGOs, service providers).

On the basis of the data collected, and in particular the information gathered on the existing problems in judicial cooperation between Member States and disparities in the current level of protection of vulnerable adults across the EU stemming from the absence of a common legal framework, the need, added value and feasibility of further action at EU level, which may take the form of a mandatory ratification of the Convention and/or of EU legislation on the matter, was assessed.

Comparative analysis of the EU Member States regulatory systems

EU Member States rules in domestic matters

The report provides an overview of the rules applicable **in domestic matters**. The manner in which the protection of vulnerable adults is regulated in the domestic legal system allows indeed to obtain a basic understanding of the national context in light of the further assessment of cross-border situations.

In the Member States, the legislation on the protection of vulnerable adults is mostly embodied in general civil law instruments (Civil code, Code of Civil Procedure). Less frequently, this area is covered in instruments relating to family law and the law of persons or in dedicated pieces of legislation. The concept of 'vulnerable adults' is overall defined in the Member States' legal frameworks with common characteristics: a medical component (e.g., impairment, disability, illness) and a legal component (inability to defend one's interests, absence of capacity to act); however, there are significant discrepancies in the way each characteristic is detailed in the Member States, **with a direct impact on the scope of legal protection in each Member State, which differs depending on the persons covered**.

The analysis of the protection of vulnerable adults in the domestic legal systems carried out for this study encompasses three situations:

- (1) where measures of protection are taken by judicial or administrative authorities, i.e., a judicial or administrative authority appoints someone charged with assisting or representing the vulnerable adult (e.g. a guardian, a curator, a deputy);
- (2) where powers of representation (in the form of a private mandate) are granted by the adult concerned, at a time when he or she is in a position to protect his or her interests;

(3) where protection is regulated directly by the operation of the law, i.e. where a person, usually the spouse of the adult, is, pursuant to national rules, automatically vested with the power to represent the adult in the event that the latter is not in a position to protect his/her interest.

Member States provide for a wide range of **protective measures** taken by judicial and administrative authorities (the competent authorities, both for the adoption and the implementation of protective measures, are in the vast majority of cases, part of the judiciary). **Although there are some important trends between national measures of protection of vulnerable adults across Member States, there are also significant differences.** Indeed, even between Member States that provide for the same type of measures, e.g., guardianship, there are differences with regard to the introduction of the proceedings (e.g., the person that can initiate the proceedings, the competent authorities for taking the measure, the persons that can be appointed as a representative), the hearing of the adult (in some Member States, it is mandatory, in some it is not), the opposability of the decisions (not all Member States provide for registration/publication requirements, some provide for a specific timing, some do not), the conditions for review (although there are common grounds, conditions for review are quite different, e.g., the timing for reviewing the measure, the person that can request a review), the end of the protective measure (there are different grounds and proceedings); and finally the possibility of appeal (e.g., competent authorities, person that can appeal the decision).

The nature of **private mandates** also varies across Member States. They may be specifically regulated to address the situation of vulnerable adults, be regulated as general mandates, or regulated by general law on mandates. These scenarios apply in 18 Member States. The scope of private mandates is usually quite unrestricted, within legal boundaries (e.g. rules applying to the representative as defined by law, conflict of interest). In most Member States where it applies, it may cover personal and material interests, with exceptions for highly personal issues in five countries. The designation of the guardian is a key element covered in some Member States and the sole purpose of a mandate in others. The formal requirements set in the Member States' legal frameworks for the establishment of mandates are very heterogeneous. There is a slight tendency to prefer unilateral acts over contracts, but authentic acts and private deeds are overall equally represented among the mechanisms in place. Publication is never a condition for opposability of the mandate to third parties. Registration into registries is, however, a prerequisite in a number of Member States (even though the nature and content of the registries vary significantly across Member States). The modification or end of the mandate usually follow the procedures set for the establishment of the mandate. Consequently, the procedures vary significantly from one Member State to another, from very simplified procedures (especially if the protected person is still capable) to a judicial procedure. The conditions to end the mandate beyond the death of the protected person also diverge, but usually encompass changes in the situation or in the protection regime, and the protection of the vulnerable adult's interest.

Protection by **operation of law** is possible only in seven Member States. In three of them, such protection covers more or less the same scope as other types of representation. In the remaining Member States, it applies in the context of medical care, for the exercise of the patient's right of the vulnerable adult. Persons who can be designated as representatives under these circumstances are usually the closest relatives. Because of the nature of this type of protection, procedural rules are in most cases limited. Protection applies *ex lege* and thus does not need to be confirmed or recognised; modifications are not possible, and representation will end where the situation of the adult represented changes (death, recovery), or where another type of protection, i.e. a decision of a judicial or administrative authority, is adopted. Due to their nature, these measures are usually not recorded and apply *de facto*.

Overall, **significant differences remain in the approach taken in the regulation of the protection of vulnerable adults** between those Member States which have recently

reformed their system (and tend to promote and support assisted decision-making by the vulnerable adult) and those which have not (and tend to regulate substitute decision-making for the vulnerable adult). These differences are likely to result in difficulties in cross-border cases involving Member States with different approaches, sometimes at the expense of an efficient protection of the adult concerned.

EU Member States rules in cross-border cases

In order to ensure the protection of vulnerable adults in cases where more than one Member State is involved, private international rules apply.

The 2000 Hague Convention, which regulates cross-border situations concerning vulnerable adults, has been ratified by ten Member States¹, with Belgium being the last Member State to join in 2020. A few other Member States have signed, but not yet ratified the Convention. This situation applies to Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland. Greece, Ireland and Italy have undertaken concrete measures to advance in the ratification process. The rules applying to cross-border cases differ between the Member States which are parties to the Convention, and the ones that are not.

In the Member States which are parties to the Hague Convention, in addition to the rules set by the Convention, some elements are usually provided in domestic acts, on either international private law, civil (procedural) law, or the protection of vulnerable adults. The rules which determine the jurisdiction, and the applicable law, are those set out in the Convention (i.e., the State of habitual residence of the vulnerable adult has jurisdiction, and the authorities apply their own law). The grounds for refusal (and enforcement) are directly regulated in Article 22, paragraph 2, of the Convention. However, in relation to the recognition and enforcement of measures adopted in another country, even though this is regulated by Chapter IV of the Convention, various procedures to recognition, with variable levels of complexity, apply depending on the Member State. The simple and rapid procedure for enforcement referred to in Article 25 paragraph 2 of the Convention is in place in three Member States. It should nevertheless be noted that the Permanent Bureau of the Hague Conference has no enforcement powers in case a party fails to comply with their international commitments.

For those Member States which are not parties to the Convention, in 12 Member States, the rules on the cross-border aspects applying to vulnerable adults are governed by the general rules on private international law. Only in a few Member States is cross-border protection of vulnerable adults as such regulated in domestic law. In these countries, a number of different situations apply, depending on the situation. Jurisdiction is based on the nationality of the person concerned in two Member States, on the habitual residence in five Member States, and both, or either of the two depending on the circumstances, in the remaining Member States. Recognition of foreign measures can take place either by operation of law (in four Member States) or by judicial recognition (in the remaining Member States). In most States, to enforce the measures taken abroad, a declaration of enforceability by a judicial authority of the State where the decision is to be enforced is required. Only in four of the non-party States is an exequatur procedure not required. The grounds for refusal provided for in the national laws of the non-contracting Member States are usually comparable to those provided in the Convention. In some States, however, grounds for refusal are more limited; while, in others, additional or different grounds from those listed in the Convention are listed under national law.

In sum, **the analysis of the legal systems of the Member States point to numerous differences, both in the way the protection of vulnerable adults is ensured across Member States, but also in the manner in which cross-border cases are dealt with.** With regard to cross-border cases, differences are observed between the Member States

¹ Austria, Belgium, Cyprus, the Czech Republic, Finland, France, Estonia, Latvia, Germany and Portugal.

which are parties to the Convention and the ones which are not, but also among parties to the Convention. Consequently, there is a risk of conflicting provisions or parallel proceedings in a same case, as well as a risk of confusion of the persons involved in a cross-border case.

Practice in cross-border cases

In the context of this report, stakeholders (authorities, practitioners and other key stakeholders) have been surveyed in order to gain an understanding of the practical implementation of the regulatory systems described above, and of the challenges they experience in understanding and applying the existing rules.

Use of protective measures in the Member States

In order to understand the practical implications of the regulatory frameworks, it is necessary to grasp the magnitude of the issue, i.e. the number of protective measures adopted across the EU, and of cases involving vulnerable adults with cross-border implications.

Limited data is available on the number of protective measures adopted in the Member States between 2015 and 2020 and the majority of national authorities indicated that they do not record information on cases with a cross-border element. However, based on the limited data available and on the overall perception of stakeholders, there appears to have been **an increase in the number of protective measures adopted between 2015 and 2020** (with an overall increase of 18 % across eight Member States). At the same time, NGOs and medical/social care organisations have perceived an increase in the number of persons in need of protective measures and an increase in their cross-border mobility. Similarly, based on the limited data available, the number of **private mandates appears to have been steadily increasing over recent years**.

Only two Member States provided data on cases of recognition and enforcement of foreign protective measures. In both, the number of requests for recognition and the number of foreign protective measures recognised reported is relatively low. Several other MSCAs also indicated that the number of cross-border cases has been very rare in recent years. However, one of the Member States which provided data has seen a five-fold increase in the number of requests for recognition, going from five requests in 2015 to 26 in 2020. In another Member State, which provided data on the number of requests received from other Member States party to the 2000 Hague Convention, the number of requests, though remaining low, has increased on average by 84 % per year over the five past years. Many legal practitioners have also perceived an **increase in the number of cases with cross-border implications** in their line of work.

Legal and practical challenges in cross-border cases

Stakeholders surveyed have been asked to indicate the challenges they experienced in cross-border cases, in order to understand the concrete difficulties raised by the various legal systems and their implementation across all Member States. Responses provided by stakeholders in Member States parties to the Hague Convention, and in Member States non-parties have then been compared to assess the impact of the Convention on the issues raised.

Language barriers and uncertainty regarding the validity of legal documents were cited as key challenges faced by vulnerable adults and their representatives in cross-border situations. **Legal uncertainty and varying rights** from one Member State to another were mentioned as key barriers to the cross-border mobility of vulnerable persons by NGOs active in the field of protection of vulnerable adults. According to stakeholders, vulnerable adults and their families often face difficulties in identifying which country has jurisdiction over specific matters in cross-border situations.

Lengthy legal proceedings and the **non-recognition of foreign protective measures** also seem to have adverse repercussions on and cause distress to vulnerable adults and their families. The majority of national authorities and legal practitioners indicated that the **average length of cases with cross-border implications is longer than similar national cases**, citing difficulties in obtaining information from all parties involved and differences in jurisdictions as key reasons behind the complexity of such cases. Two MSCAs provided information on the average length of cross-border proceedings which range between 1 and 12 months. The majority of respondents to the survey considered that these issues result in vulnerable adults often facing financial losses and the inability to manage their financial affairs, along with delays in receiving adequate medical care and breaches to their fundamental rights through the non-respect of their wishes/preferences.

Half of the respondents to the non-technical survey (NGOs and service providers) and legal practitioners indicated that vulnerable adults often or always need legal aid to meet the **costs of court cases/legal representation abroad**, while more than half believe that legal aid is not sufficient to cover all costs, as it does not cover costs of translation, certification of documents or travel and accommodation costs.

Overall, on the issues above, respondents from Member States that have not ratified the 2000 Hague Convention indicated more difficulties than those from Member States that have ratified the Convention.

Over 70 % of **legal practitioner respondents** indicated that they face difficulties in understanding/accessing information in other countries and difficulties in entering into transactions with third parties in the context of cross-border cases. More than half also experienced lengthy proceedings, legal uncertainty and difficulties identifying the correct contact point in the other country. Respondents from Member States that have ratified the 2000 Hague Convention and from those that have not ratified the convention highlighted similar types of challenges – with no statistically significant differences among both groups.

National authorities appear to face fewer challenges. The main challenge reported is the difficulty in understanding/accessing information in other countries (80 % of respondents). A higher proportion of MSCAs from Member States that have not ratified the Hague Convention reported difficulties in identifying the correct contact point in the other country and uncertainty regarding the validity of legal documents compared to MSCAs from Member States that have ratified the Convention.

Challenges linked to the functioning of the Hague Convention

Finally, stakeholders from EU Member States parties to the Hague Convention were asked additional questions to understand the challenges related more specifically to the application of the 200 Hague Convention.

In terms of **awareness**, one authority respondent indicated that further promotion of the Convention towards legal practitioners was necessary, while two highlighted the limited number of cases where the Convention has been applied which leads to a general lack of experience among practitioners.

Looking at the **application of the specific provisions of the Hague Convention**, most authorities and legal practitioner respondents did not experience particular issues in applying the general and specific provisions on **jurisdiction**, though the main issues highlighted were the unclarity over the notion of “habitual residence” and difficulties for competent authorities to obtain knowledge about any measures already taken by competent authorities under Articles 5 to 8 of the Convention, and the uncertainties related to the transfer of residence (transmission of information and of competence between the authorities of the two countries involved). Most authorities and legal practitioner respondents also did not experience particular issues in applying the provisions on **applicable law**.

Several legal practitioners, however, did indicate that in practice it can be difficult to determine which national law should be applicable in certain cases.

The position of authorities is more mixed regarding the **recognition** of cross-border measures, with three respondents stating that they have experienced issues and four stating they have not. The issues highlighted are notably the need for additional procedures despite the rules set under Article 22 of the Convention. On the other hand, no significant issues were reported regarding the **enforcement** of cross-border measures, although three authorities mentioned difficulties in obtaining recognition and enforcement of foreign measures by financial institutions. Similarly, none of the authorities could provide data on the number of cases where the recognition of a measure was **refused** and none of the legal practitioners have experienced such cases.

It is noteworthy that none of the survey respondents, neither authorities nor legal practitioners, indicated having experienced conflicts between the jurisdiction rules and the applicable law regarding confirmation of **powers of representation** (Article 15), except for one legal practitioner.

Finally, none of the survey respondents, neither MSCAs nor legal practitioners, reported issues when requesting, issuing or presenting the certificates under Article 38, except one MSCA and a legal practitioner. The MSCA indicated that financial institutions are sometimes unwilling to accept the certificate, while the legal practitioner highlighted that it is complicated to issue a certificate due to different national provisions that must be taken into consideration.

Thus, overall, besides awareness, a limited number of issues were raised by stakeholders with regard to the application of the Hague Convention, though this is to be nuanced by the fact that stakeholders had limited experience dealing with cases falling under the Convention.

Potential for EU intervention

No legislative measures have been enacted so far by the European Union to address the specific needs faced by vulnerable adults. However, over the last fifteen years, EU institutions, stakeholders, legal practitioners and academics have expressed repeatedly their concerns about this gap. Since 2008, the Council of the EU and the European Parliament have regularly underlined **the need for action in that area**, inviting Member States to ratify the Hague Convention. Both the European Commission and the Secretariat of the Council have since been active monitoring the steps taken by Member States towards the ratification of the Convention. The EU institutions have continued being active in that area, most recently with the Council conclusions of the Justice and Home Affairs meeting of June 2021, which invited Member States parties to the Convention to raise awareness and Member States non-parties to ratify the Convention. Similar actions have been undertaken by other stakeholders, including the Hague Conference on Private International Law and academia.

As explained above, disparities do exist across Member States regarding substantive and procedural rules, as well as private international law rules. Although the EU has, in principle, no competence to harmonise substantive and procedural law in the area of justice, the harmonisation of private international law rules does fall within the scope of the powers vested in the Union by Article 81 of the TFEU. With regard to the protection of vulnerable adults in the EU, the **harmonisation of the private international law rules** would address a number of needs. This includes gaps and inconsistencies in the protection of the adults concerned (e.g. in case of unresolved conflict of jurisdiction), a limited reliability of future mandates (e.g. in case arrangements made in one Member States are not enforced in a second one), obstacles to the free movement of persons and to the proper functioning of the internal market (the absence of legal certainty affects mobility and exchanges), as well as in difficulties in the practical cooperation between Member States (the lack of common rules affect efficiency where more than one authority is involved). The need for more

harmonisation was also acknowledged by the majority of the respondents to our survey. More than half of the legal practitioner respondents to our survey believe there is a need for more harmonisation of the jurisdiction rules and of the rules on applicable law, to simplify and speed up procedures. The majority of legal practitioners also believe that there is a need for more harmonisation of recognition and declaration of enforceability. Authorities on the other hand have a more mixed position. The majority believe that there is a need for further discussions at EU level to evaluate the necessity of EU action.

The ratification of the Hague Convention

Mutual recognition and enforcement of decision are based on the principle of reciprocity, and require a uniform and systematic application of common rules. The **ratification of the Convention by all Member States would either fix or significantly mitigate many of the shortcomings** mentioned above, as well as ensure such reciprocity. Stakeholders, practitioners and academics largely agree that a broad ratification of the Hague Adults Convention 2000 would significantly enhance the protection of vulnerable adults across the Union, and address the needs identified.

The intervention of the EU to ensure ratification is **legally feasible**. The Union cannot itself become a party to the Hague Adults Convention 2000, as the Convention make it clear that the latter is only open to sovereign States, not to international organisations. Therefore, for the Convention to form part of the EU acquis, the EU would need to authorise (and in fact oblige) the Member States to ratify or accede to the agreement in question 'in the interest of the Union'. Whether the EU has the power to adopt a measure to that effect is debated. Various arguments may be put forward to support the view that the conclusion of the 2000 Hague Convention would fall within the non-exclusive external competence of the Union. Indeed, in accordance with the Treaty on the Functioning of the EU, the conclusion of the Convention may be regarded as "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties", and in this case, the objective of judicial cooperation in civil matters.

The exercise of the Union's external competence with a view to ensuring the ratification of the 2000 Hague Convention involves basically the **same process followed for the 1996 Hague Children Convention**, under Council Decision 2008/431/EC of 5 June 2008. Article 218 TFEU would apply. Unanimity would not be required, pursuant to a combined reading of Article 218(8) and Article 81 TFEU, since the protection of adults does not belong as such to family law.

The adoption of the EU instrument

Provided that all Member States have ratified the **Hague Convention**, even though the Convention works well, it could still be improved in some respects, and **does not necessarily address sufficiently the specific needs pertaining to the relations between the Member States of the EU**, given the size and intensity of the cross-border mobility of individuals and assets in Europe. The enactment of a legislative measure regarding the international protection of adults should therefore be considered to complement the Hague Convention.

The adoption of an EU instrument would in principle be **compatible with Member States obligations under the Hague Convention**, even though, for some specific issues, it may prove more difficult to assess whether the Union may regulate without hindering the functioning of the Hague Convention (e.g. if the obligations applying to the Central authorities are different under the two instruments).

With regard to the **form** of the instrument, with respect to the field of private international law, solutions can only realistically be achieved through legislative options as the flexibility afforded to States by soft-law mechanisms is not suited to the field, especially when dealing

with international procedural law aspects (i.e., jurisdiction and recognition and enforcement of judgments). Based on the instruments already existing at EU level to regulate private international law matters, a **Regulation would be most suited** to ensure that the relevant rules are directly and uniformly applicable in a mandatory manner and require no action by the Member States to transpose them into national law.

With regard to the **content** of the instrument, the experience drawn from the application of other private international law instruments adopted at EU level shows that the creation of a set of rules that are virtually identical to the Convention is not be advisable. Instead, **additional, complementary rules in an EU instrument should be considered**, as has been done in the field of international child abduction with the Brussels II bis Regulation². Such an instrument would then cover address the shortcomings, develop specific aspects or complement the Convention.

Provisions would include a key set of measures, such as the **choice of the court** by the adult in advance (before the incapacity occurs), the creation of an EU **certificate** of powers of representation (based on the example of the European Certificate of Succession and recent development in the field of maintenance), the adoption of common **enforcement rules** among Member States (with clear rules on exequatur), the acceptance and enforceability of **authentic instruments**, rules on **legal aid**, and measures to facilitate **communication** between Member States competent authorities.

Other measures could also be considered, such as the creation of an electronic European registry, or interconnection of electronic national registries of protection measures, the use of standard multilingual forms, the notification of information in relation to national law or judicial cooperation to be published on the e-Justice Portal; the facilitation of legal aid application in cross-border cases, and digitalisation of the communications between central and competent authorities.

² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003.

1 Introduction

1.1 Project objective and scope

The Hague Convention of 13 January 2000 on the International Protection of Adults ('the Convention')³ deals with the cross-border protection of vulnerable adults in international cases. The Convention creates a comprehensive set of rules that determine the State whose authorities are to have jurisdiction to take measures of protection and the law to be applied. It also ensures the recognition and enforcement of measures of protection between Contracting States and establishes cooperation between the authorities of those States. Whilst the Convention is generally regarded as a well-balanced and efficient instrument, it is currently in force in only 10 EU Member States (Austria, Belgium⁴, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Latvia, and Portugal). The EU cannot itself become a party to the Convention, since the latter is only open to sovereign States. There is currently no EU legislative measure dealing with the international protection of adults. Consequently, the rules applying to cross-border situations vary significantly across the Member States, and the need to harmonise has become more pressing with the continuous increase in the cross-border movements of individuals, including vulnerable adults, and their assets, within the EU.

The study's overall objective is to evaluate the main legal difficulties and practical challenges in the cooperation within the EU in the field of the protection of vulnerable adults, and to assess the need for and the possible added value of a common legal framework for the protection of vulnerable adults in cross-border cases, either through mandatory ratification of the Convention or via the adoption of an EU instrument to reinforce and streamline the judicial cooperation in that area.

To this end, the study examines the national laws and practices of the Member States on the following aspects:

- the roles and functioning of competent authorities as well as the main procedural rules in the Member States (e.g., the introduction of proceedings, the persons entitled to request that measures of protection are taken or reviewed, the applicable procedural rules, notably as regards the hearing of the adult concerned);
- the different types of measures of protection provided for in the legislation of Member States concerning the protection of adults in the Member States (granted by courts or authorities);
- whether, and in which terms, the legislation of the various Member States provides that powers of representation may be granted by the adult concerned, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests;
- whether measures of protection are recorded in official registries in the various Member States, and the functioning of, and access to, such registries;
- the private international law rules currently applied in the various Member States and the conflicts that may arise from their operation in cases connected to two or more States;
- the operation of the Hague Convention in the Member State that have ratified it; and
- in addition, the functioning of cross-border cooperation in the absence of an international instrument (thus excluding Member States that have ratified the Convention).

³ Available at <https://assets.hcch.net/docs/c2b94b6b-c54e-4886-ae9f-c5bbef93b8f3.pdf>.

⁴ The Convention was ratified on 30 September 2020 and entered into force on 1 January 2021.

The study highlights the progress made in the legal and administrative cooperation in the protection of vulnerable adults in the Member States that have ratified the Convention and identify the legislative gaps that affect the effectiveness and efficiency of this protection. Based on this, the study presents conclusions and formulate recommendations to address the issues identified, including with regard to the pertinence of a common framework in the protection of vulnerable adults in cross-border cases within the EU.

This **Final Report** for the *Study on the cross-border legal protection of vulnerable adults in the EU* (request for service JUST/2020/JCOO/FW/CIVI/0114) presents the findings of the study. It also introduces the methodological approach (Section 1.2.1) and provides practical information on the implementation of the project, including the results of the data collection undertaken (Section 1.2.2) and the challenges experienced (Section 1.2.3). It then provides the findings of the data collection with regard to the regulatory framework in the Member States (Section 2) and practice (Section 3). Finally, the pertinence of ratification of the Hague Convention and/or of an instrument at EU level is analysed (Section 4). The annexes provide a comprehensive overview of the work carried out for the study, with:

- a glossary (Annex I)
- the country fiches for the 27 MS (Annex II);
- the database providing the sources of information and case-law identified (Annex III);
- the survey questionnaire (Annex IV).
- the list of stakeholders consulted (Annex V)
- a complementary analysis of the survey (Annex VI)
- a summary of the interview at EU level (Annex VII).

1.2 Project methodology, outcome and challenges

1.2.1 Methodology

1.2.1.1 Overview of project tasks and inter-linkages

Our methodology is structured around three phases:

- **Phase 1 – Inception:** phase aiming at ensuring a common understanding of the study with DG JUST and the refinement of the methodology and the data collection tools;
- **Phase 2 – Data collection and analysis at national level:** phase aiming at the collection of all relevant data and the subsequent analysis thereof;
- **Phase 3 – Development of recommendations and conclusions:** phase aiming at the development of recommendations and conclusions for the study.

The figure below outlines the main features of each of these phases, including their objectives, tools and tasks to be used for the completion thereof, meetings to be held with the European Commission, and the main project deliverables.

Figure 1: Overview of approach to methodology

	Phase 1: Inception	Phase 2: Data collection & Data analysis	Phase 3: Development of Conclusions & Recommendations
OBJECTIVES	- Ensuring common understanding of scope/objectives - Refining methodological approach and finalising data collection tools	- Collecting data (quantitative & qualitative) to analyse the legal and practical situation in the MS - Analysing nature and extent of the problems in judicial cooperation	Identifying legal benefits of mandatory ratification and added value of EU legislation
TASKS/TOOLS	- Preliminary desk research - Internal Kick-off workshop - Refinement of methodology and data collection tools	<u>Task A + Task B (national level analysis)</u> - Desk research - Surveys - Semi-structured interviews - Country Chapters - Data analysis	<u>Task B (EU level analysis) + Task C</u> - Internal workshop - Desk research - Semi-structured interviews - Drafting conclusions and recommendations
MEETINGS	Kick-off meeting	Interim Report meeting	Meeting on the Draft Final Report
DELIVERABLES	- Draft Inception Report - Inception Report - Finalised data collection tools	- Draft Interim Report - Interim Report - Country fiches - Database of sources (incl. case law)	- Draft Final Report - Final Report - Database of sources (updated)

1.2.1.2 Implementation of the methodology

This section presents the work undertaken in the three phases presented above.

Phase 1 Inception phase

Preliminary desk research was completed during Phase 1 of the project. Preliminary desk research served the following purposes:

- identification and analysis of relevant literature (studies, reports, case-law, and articles) at EU level which may be used as a source of information by the national experts;
- identification of key sources of information at national level, particularly regarding law and jurisprudence;
- identification of relevant stakeholders in the context of protection of vulnerable adults at national level.

Under the guidance of the Project Management Team, the Research Team undertook preliminary desk research to review all previous relevant studies and extract key information from these sources. The information compiled during this phase was included in a database, which is presented in Annex IV to this report.

As per the Terms of Reference, a **kick-off meeting** between the Commission and the Project Management Team was held at the end of the first month of implementation of the project. It covered in particular the context and objectives of the contract, questions and comments on the Draft Inception Report which was submitted before the meeting and the organisation of the work.

Following the kick-off meeting, an **internal workshop** was held with the Senior Advisory Board. The meeting focused on three main points:

- the identification of gaps in the mapping of data sources;
- the definition of the scope and content of the consultation of stakeholders;

- the structure of the reporting templates.

On the basis of the discussions, the tools were further refined by the Project Management Team and revised by the Senior Experts on the Advisory Board, and presented in the **Final Inception Report**.

Phase 2 Data collection phase

Desk research

The desk research initiated under Phase 1 was further developed under Phase 2, in particular at national level. **Country Fiches** were completed by national experts through desk research. The fiches aimed to provide comparable overviews of the 27 Member States' national legislations concerning the protection of vulnerable adults, to identify discrepancies and assess the need for increased cooperation within the EU.

The results of the technical surveys (in particular the questions addressed to the Central Authorities designated under the Convention and competent authorities in the other Member States- see below) and interviews with Central Authorities (see below) were then used to both cross-check the results of the desk research and complete the Country Fiches.

The Country Fiches are provided in Annex III to the Report. In addition to the fiches, national experts completed the **database** presented in Annex IV with national case-law entailing cross-border judicial cooperation identified in their desk research as applicable.

Stakeholder consultation

The stakeholder consultation was carried out in parallel with the desk research. Two stakeholder consultation methods were used: questionnaire-based surveys and semi-structured interviews. Both the surveys and interview questionnaires were developed in close cooperation with the Advisory Board and with the Commission.

The **questionnaire-based surveys** aimed for the collection of detailed, quantitative and qualitative information to support the different tasks of the study. Two separate types of surveys were carried out:

- technical surveys targeting central authorities / Member State competent authorities (MSCAs) and legal practitioners;
- non-technical survey targeting representatives of professions specialised in the protection of adults, financial/care service providers and NGOs.

The **technical surveys** covered primarily elements linked to legal frameworks (for national authorities) and practice. Two distinct surveys were prepared for authorities / national competent authorities and legal practitioners. They contained some questions common to all stakeholder groups and some others tailored specifically to each of the stakeholder groups. In both cases, specific questions were asked depending on whether the stakeholder is from a Member State party to the Convention or not.

A shorter **non-technical survey** focusing on understanding the practical challenges encountered by vulnerable adults and their families in cross-border situations was disseminated to other potentially relevant stakeholders, such as guardianship associations, care providers, financial providers, and NGOs.

In view of assessing the current state of play and recent evolution in the number and type of protective measures issued in the 27 Member States, **a call for quantitative data** was also included in the survey to the Member State competent authorities and legal practitioners.

The final version of the questionnaires is presented in Annex V to this report.

Semi-structured interviews

Semi-structured interviews were carried out by national experts to complement the information collected through the targeted surveys and the Country Fiches. While the surveys focused on factual and quantitative information, the targeted interviews mainly related to more qualitative information on current practices.

The results of the stakeholder consultation are presented in Section 1.2.2.

Phase 3 Development of conclusions and recommendations

Upon completion of the Interim Report, **Phase 3 on the development of conclusions and recommendations** was launched. On the basis of the data collection carried out in the previous phase, and in particular the information gathered on the existing problems in judicial cooperation between Member States and disparities in the current level of protection of vulnerable adults across the EU stemming from the absence of a common legal framework, the need, added value and feasibility of further action at EU level, which may take the form of a mandatory ratification of the Convention and/or of EU legislation on the matter, was assessed.

Three different tools were used for this phase, namely an internal workshop, desk research, and semi-structured interviews. The phase was implemented primarily by the Senior Experts of the Advisory Board, with the support of the Project Management Team.

The **internal workshop** on conclusions and recommendations brought together the members of the Project Management Team and the Advisory Board. It took place after the Research Team and Project Management Team had finalised the analysis of the collected data initiated for the Interim Report. The workshop aimed to:

- define the main elements of conclusions to be drawn from the previous phase on both mandatory ratification and adoption of an EU instrument;
- structure the conclusions; and
- assess which areas need further desk research and which information can be withdrawn from interviews.

On that basis, the Advisory Board **analysed the added value of a general ratification of the Hague Convention within the EU**. The purpose of this task was to assess whether the information gathered in the previous phase would provide sufficient legal grounds to demonstrate an external competence of the EU, as such competence would enable the EU to oblige those Member States which have not ratified the Convention to do so. It resulted in recommendations on legal benefits of mandatory ratification on judicial cooperation presented in the present report.

In addition, or alternatively to the compulsory ratification of the Convention, another possible action at EU level is **the adoption of an EU instrument**. Conclusions of the assessment of the added value of additional EU legislation to facilitate judicial cooperation and recommendations on the type and scope of possible EU instrument to be adopted are also presented in this report.

1.2.2 Stakeholder consultation

1.2.2.1 Stakeholder contacted

Targeted surveys

The three targeted surveys were launched on 26 April 2021 and closed on 11 June 2021 following a

one-week deadline extension (the deadline for MSCAs was subsequently further extended to 28 June 2021). The Project Management Team sent the targeted surveys to the relevant stakeholders via email. European level associations were contacted to act as distribution channels across their national level members and to encourage them to participate; national level stakeholders were identified through our team of national experts.

Table 1 below shows the number of stakeholders targeted for each of the surveys along with the response rate obtained.

Table 1: Number of stakeholders contacted

Survey	Number of organisations contacted	Number of responses	Response rate
MSCAs	27	18	67 %
Legal practitioners	130 (<i>including umbrella organisations</i>)	50	38 %
Non-technical survey	515	16	3 %

All 27 MSCAs were contacted to provide answers to the targeted survey. Legal practitioners include lawyers, judges, notaries and professional guardians, who were targeted through both European and national level associations of practitioners such as bar associations and chambers of notaries. For the non-technical survey, European and national level NGOs and associations providing care/support for elderly persons and persons with disabilities were targeted. See Annex V for a comprehensive overview of the specific organisations that were contacted.

Interviews

The semi-structured interviews with the MSCAs of the Member States party to the Convention (Belgium, Austria, Cyprus, the Czech Republic, France, Estonia, Germany, Finland, Latvia and Portugal) were launched on 4 June 2021. The national experts contacted the MSCAs of their countries. In the cases where the MSCAs did not respond directly, the national experts sent reminders.

The national experts were able to conduct interviews with the MSCAs of Austria, Belgium, Cyprus, the Czech Republic, Germany, Finland, Latvia and Portugal. The authorities in Estonia indicated that they felt they were not in a position to contribute meaningfully to an interview. With regard to France, it was not possible for the national expert to carry out the interview within the timeframe of submission of this report⁵.

Following the request of the Commission at the Interim Meeting, Milieu prepared additional short interviews or questionnaires on the status of adhesion to the Convention in specific countries. The aim of these short interviews or questionnaires was to obtain information on the status of signature or ratification in the Member State and on the reasons for not yet adhering to the Convention.

These questions were sent to the competent authorities of Greece, Spain, Ireland, Italy, the Netherlands and Sweden. It was possible to collect the relevant information for Hungary, the Netherlands, Italy, Ireland, Spain and Sweden.

Table 2: Overview of responses to interviews

Interview	Number Member States contacted	Number of responses	Response rate
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⁵ The timeframe of the project did not allow the interview to be carried out.

Parties to the Convention	10	8	80%
On ratification	7	6	85.7%

1.2.2.2 Profile of respondents to the survey

MSCAs survey

The survey targeted to MSCAs received 18 responses from the following Member States: Austria, Belgium, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia and Sweden.

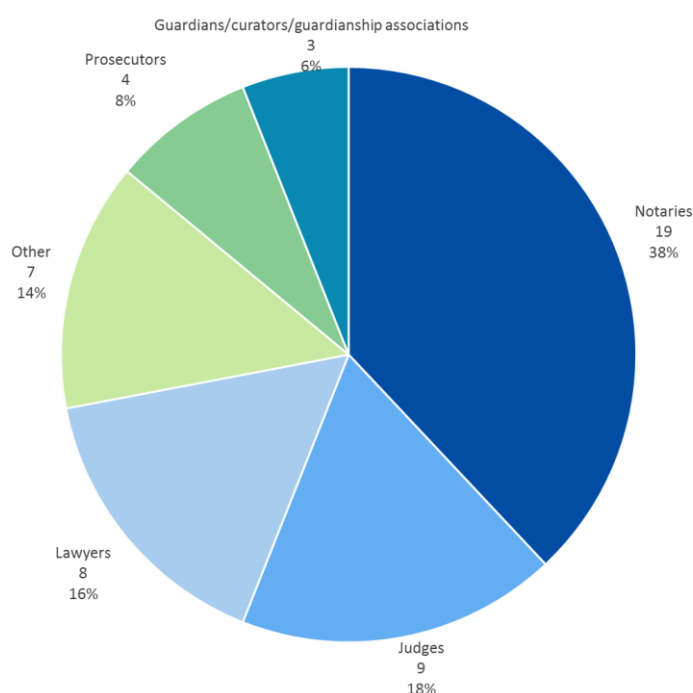
Legal practitioners survey

The survey targeted to legal practitioners received a total of 50 responses. Respondents came from 15 different Member States, shown in Table 3.

Table 3: Country of establishment of legal practitioners (N=50)

Member State	Number of responses	% of respondents
France	8	16%
Italy	7	14%
Croatia	7	14%
Belgium	5	10%
Slovenia	5	10%
Portugal	3	6%
Austria	3	6%
Netherlands	3	6%
Romania	2	4%
Malta	1	2%
Slovakia	1	2%
Sweden	1	2%
Estonia	1	2%
Finland	1	2%
Latvia	1	2%

The largest group of legal practitioner respondents (38%) are notaries or representatives of notary bodies, followed by judges (18%) and lawyers (16%), as shown in Figure 2. Prosecutors represent 8% of respondents, while professional guardians/curators represent 6% of respondents.

Figure 2: Type of legal practitioner (N=50)

Most respondents (66%) were individual practitioners, while 34% responded on behalf of an association of practitioners. Table 4 below indicates the different associations of practitioners that responded to the survey.

Table 4: Association of legal practitioners

Association of practitioners represented	
Austrian Chamber of Civil Law Notaries	Ministry of Justice and Administration (Croatia)
Chamber of Notaries of Slovenia	Public Prosecutor's Office (Croatia)
Châtellerault in France	Regional Court in Poznan - Poland
National Council Bar Association (CNB) - France	The Supreme Court of the Republic of Slovenia
Council of the Notariats of the European Union - CNUE	The National Union of Notaries Public in Romania
County State Prosecutor's Office - Croatia	Federation of Belgian Notaries
DGAJ - Portugal	Flemish Bar Association
Estonian Chamber of Notaries	Dutch royal organisation of notaries
Family Judges Association of Austria	

Non-technical survey

The **non-technical survey** received 16 responses in total from 12 different Member States, shown in Table 5.

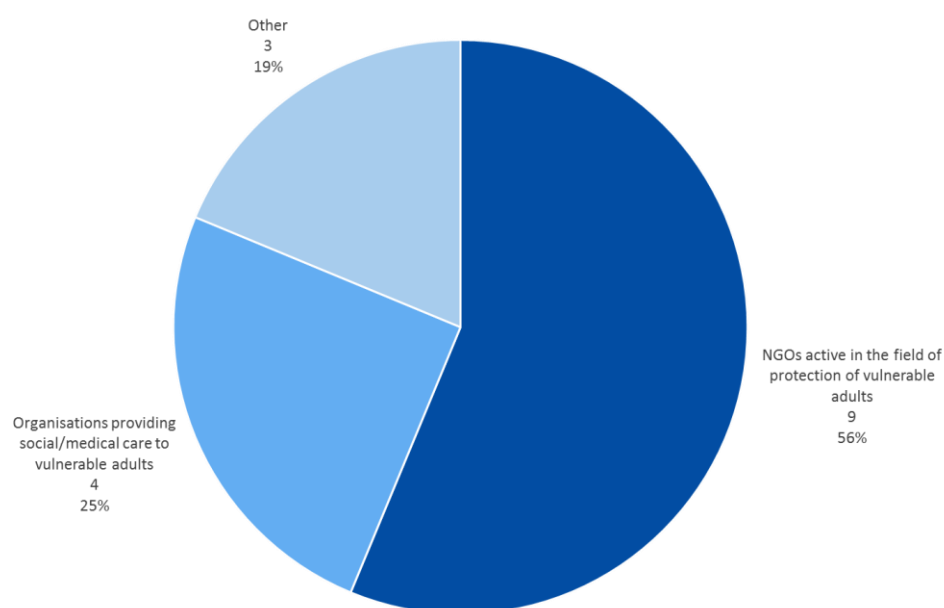
Table 5: Country of the non-technical survey respondents (N=16)

Member State	Number of respondents	% of respondents
Ireland	2	13%
Italy	2	13%
All EU Member States	2	13%

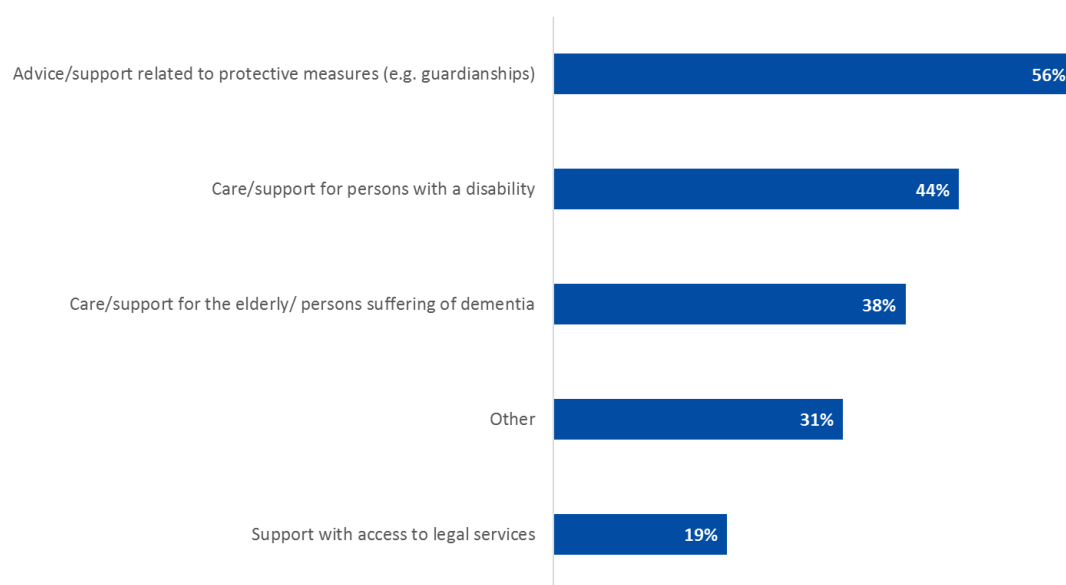
Member State	Number of respondents	% of respondents
Spain	1	6%
Romania	1	6%
Portugal	1	6%
Germany	1	6%
Slovenia	1	6%
Sweden	1	6%
Cyprus	1	6%
Belgium	1	6%
Malta	1	6%
Netherlands	1	6%

The majority of the non-technical survey respondents (56%) are NGOs active in the field of protection of vulnerable adults and 25% are organisations providing social/medical care to vulnerable adults (see Figure 3). Respondents who answered 'Other' include a statutory body providing evidence-based policy advice to the government on disability matters; an organisation providing social, employment and educational care; and one unspecified respondent.

Figure 3: Type of non-technical respondents (N=16)



More than half of the non-technical survey respondents (56%) provide advice/support related to protective measures to vulnerable adults, 44% provide care/support for persons with a disability and 38% care/support for the elderly/persons suffering with dementia (see Figure 4). Other fields of activity include advocacy and all areas related to disability.

Figure 4: In which field(s) is your organisation active? (N=16)

1.2.2.3 Level of responses

Responses to the legal practitioner and non-technical surveys are relatively complete. On average, 80 % of legal practitioners and 88 % of non-technical survey respondents provided answers to all closed questions. However, a more limited number (around half of the legal practitioners and 75 % of the non-technical respondents) provided further information in the open text boxes to substantiate their answers. Only two legal practitioners provided examples of relevant case-law and none were aware of any statistics on the number of cases with cross-border implications.

The level of responses received from MSCAs is more mixed. On average, 78 % of those not party to the 2000 Hague Convention provided all answers to questions in relation to the national PIL rules; 80 % of those party to the Convention provided answers to all questions in relation to the Convention; and 71 % provided answers to all questions on possible EU action. On the other hand, only 64 % of MSCAs provided answers to all questions in relation to the general practice in the protection of vulnerable adults and only half provided answers to all questions on legal and practical challenges. In addition, very limited quantitative data on protective measures was provided by the MSCA. Only 10 MSCAs were able to provide data on the total number of decisions on protective measures between 2019-2020, with six providing a breakdown by type of measure, and only four could provide data on the number of private mandates. Only the Czech Republic, Luxembourg, and Portugal provided data on the number of foreign protective measures requested and recognised between 2019-2020. Furthermore, only five MSCAs provided examples of relevant case-law.

1.2.3 Challenges

Limited response rate to the consultations and incomplete answers

The response rate to the different surveys is relatively low particularly for MSCAs and the non-technical survey. In addition, as mentioned in Section 1.2.2.3, a limited number of respondents substantiated their responses within the open text boxes. As a result, **only a limited view of the practical situation could be obtained based on anecdotal evidence and this limitation should be borne in mind when interpreting the results of Section 3.** It should be noted, however, that most of the MSCAs that provided answers to the survey indicated that they are only aware of a limited number of cases in the field of cross-border protection of vulnerable adults – for example, one MSCA party to

the Hague Convention stated that there have been no cases of application of the Convention in the country. It is therefore likely that **the limited response rate reflects the limited experience of legal practitioners in this domain.**

To mitigate the low response rate, the Project Management Team sent several reminders to all stakeholders and the survey deadline was extended by a week for legal practitioners and non-technical respondents and by three weeks for MSCAs. For the non-technical survey, several targeted organisations responded that they were not able to provide answers as they have no experience in the cross-border protection of vulnerable adults. Similarly, no financial service provider was able to respond to the survey. Following reminders sent by the Project Management Team, one pan-European organisation representing financial service providers indicated that they could not provide input to the study. Furthermore, the Project Management Team, along with our team of national experts, sent multiple reminders to the MSCAs to obtain their input to the survey. Several MSCAs subsequently provided answers. In addition, follow-up emails were sent to MSCAs that only provided partial answers to the survey. In most cases, these MSCAs indicated that no information was available in relation to the missing answers or that the Member State was not able to provide a position on the issue and therefore could not answer all questions.

Limited quantitative data available on protective measures

In the same vein, very limited quantitative data on protective measures was provided by MSCAs and only one could provide data on foreign protective measures. The MSCAs that responded to the survey and did not provide data indicated that **the information is not available and data on foreign protective measures is not recorded.** In addition, among those that provided quantitative data, data is not available across all years (2015-2020) for all Member States. **As a result, the analysis on the trends in the number of protective measures (Section 3.1.1) only covers the situation in nine Member States over a four-year period (2014-2019), which cannot be considered representative.** As a mitigation measure, all three surveys included several questions asking stakeholders for their perception on the overall trends in the number of protective measures taken over the past years and on the number of cases with cross-border implications. Answers to these questions were used to complement the limited quantitative data and obtain an overall picture of the situation.

Limited number of national case-law identified

The number of national case-law identified, touching upon cross-border protection of vulnerable adults and the 2000 Hague Convention, is very limited. Indeed, the protection of vulnerable adults is a non-contentious matter. Therefore, the number of cases regarding cross-border issues relating to the protection of vulnerable adults is by definition rather low.

Our methodology included both desk research on case-law by the national experts and asking the MSCAs to provide relevant case-law. During desk research, national experts searched through the national databases on case-law. Yet, **in most Member States, no relevant jurisprudence could be identified.** This is also exemplified in the responses of the MSCAs and practitioners. Of the MSCAs and practitioners who answered the surveys, only six were able to provide relevant case-law. Many of the responding stakeholders indicated that no case-law was available (for instance in Finland, Estonia, Hungary and Sweden). Consequently, the overview of case-law on cross-border cases in the Member States (Section 3.2) only covers the situation in eight Member States.

2 Comparative analysis of national regulatory systems

This section presents an overview of the Member States national legislation in relation to the protection of vulnerable adults, and in particular a general overview of the legal framework and competent authorities (Section 2.1), a summary of the types of protective measures in place and of the national registries to record such measures (Section 2.2) and a description of the private international law rules set by the Member States (Section 2.3).

2.1 General overview

2.1.1 National legal frameworks

2.1.1.1 Overview of domestic law on the protection of vulnerable adults

A few main trends can be observed when comparing the legislative framework of the 27 EU Member States regulating the protection of vulnerable adults⁶. In the vast majority (19⁷) of the Member States, the legislation on the protection of vulnerable adults is provided in the **Civil Code**, very often in combination with the Code of Civil Procedure. In several countries, the Civil Code was amended by laws regulating this specific aspect in the past few years.

- In **Austria**, the system of the protection of vulnerable adults – previously known as “guardianship law” - was modernised by passing Federal Law 59/2017, the Second Adult Protection Act (“*Erwachsenenschutzgesetz*”). It entered into force on 1 July 2018 and introduced amendments to a number of key acts, including the Civil Code, the Civil Procedure Act and other civil law acts in different areas (e.g. Marriage Act, Adult Protection Association Act, Accommodations Act), and procedural law acts (e.g. Notarial Code, Non-contentious matter Act).
- An important Act amending the Civil Code and other state Acts was adopted on 21 May 2021 in order to bring **Spanish** Law in line with Article 12 of the UNCRPD (recognition of legal capacity for persons with disabilities). This new Act (*Ley 8/2021, de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica*) was published in the Official State Gazette on 3 June 2021. It came into effect on 3 September 2021.
- In **France**, the legal framework was reformed several times, and most recently with Law no 2019-222 of 23 March 2019 and its application Decree No 2019-756 of 22 July 2019, which reduced procedures before courts and set up rules for cross-border situations. In particular, this law introduced a single application that will enable the judge to choose the least restrictive protective measure best suited to the vulnerable adult’s personal situation. Also, it enhanced the importance given to the French private mandate (*mandat de protection future*).
- In **Portugal**, the relevant provisions of the Civil Code were amended by Law 49/2018 of 14 August 2018 in order to establish a completely new system which is built around the figure of the “accompanied adult”. The previous system, which had been in place since 1966, was considered inadequate in view of the social developments of the last decades, namely the “very considerable rise in the standard of living of the population”, the “significant increase in life expectancy” or the “decrease in the aggregating capacity of families”⁸.

⁶ A full overview of the relevant acts is produced in the individual Country Fiches provided in Annex III.

⁷ AT, BE, CZ, DE, EE, EL, ES, FR, HU, IT, LU, LT, LV, MT, NL, PL, PT, RO and SK.

⁸ Beleza, M.P., Brevíssimas Notas Sobre a Criação do Regime do Maior Acompanhado, em Substituição dos Regimes da Interdição e da Inabilitação – Lei N.º 49/2018, de 14 de Agosto 1, O Novo Regime Jurídico do Maio Acompanhado, CEJ, February 2019.

Alternatively to the Civil Code, the protection of vulnerable adults is regulated under statutory instruments in the field of **family law and the law of persons**. This is the case in Bulgaria, Croatia, Sweden and Slovenia. A Family Act applies as a complement to the Civil Code in Germany, Estonia, Poland and Slovakia.

Only very few Member States have an **act specifically regulating protection measures for vulnerable persons**. In Cyprus, the relevant rules are provided in a number of acts on disabilities, including Law 127/2000 on persons with disabilities. The same applies in Croatia. In Denmark, distinct acts and orders regulate guardianship and other relevant aspects, such as future mandates. Acts on guardianship are also enacted in Finland, Ireland, Poland and Sweden. In Ireland, the Assisted Decision-Making (Capacity) Act 2015, which brings significant changes to the schemes for the protection of vulnerable adults, though adopted several years ago, is not yet fully in force. Until this is the case, the old 'Lunacy Regulation (Ireland) Act' of 1871 continues to apply for key aspects relating to wardships and enduring powers of attorney. According to the competent authorities, the Assisted Decision-Making (Capacity) Act 2015 will likely fully enter in force in 2022⁹.

Thus, despite common features, this issue is regulated differently from one Member State to another. In addition, in most Member States, the legislation has undergone reforms in the past ten years, in some cases leading to significant changes in the scope and the procedures applying to protective measures, illustrating the constant evolution of this area of law necessary to adapt to societal changes.

On one hand, the legislative changes did not necessarily cater for a harmonisation of the rules across the EU, as they usually corresponded to the need to adapt to very different judicial systems. On the other hand, they have in a few cases (e.g. Spain, France) been triggered by the ratification of international instruments, thus streamlining the level of protection.

Overall, however, significant differences remain in the approach taken in the regulation of the protection of vulnerable adults between those Member States which have recently reformed their system (and tend to promote and support assisted decision-making *by* the vulnerable adult) and those which have not (and tend to regulate substitute decision-making *for* the vulnerable adult). These differences are likely to result in difficulties in cross-border cases involving Member States with different approaches, sometimes at the expense of an efficient protection of the adult concerned.

2.1.1.2 Status of ratification of international conventions

Protection of vulnerable adults is regulated in two main international instruments:

- the **United Nations Convention on the Rights of Persons with Disabilities** (UNCRPD) was adopted on 13 December 2006 and entered into force at international level on 3 May 2008¹⁰. It aims 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'¹¹. The Convention is relevant in the context of this study, to the extent that it recognises and protects the fundamental rights to disabled persons, including vulnerable adults (see Section 2.1.3 on this point). Rights recognised by the Convention which are within the scope of the study include **equal recognition before the law**¹² (support in exercising

⁹ Indication is given on the official website of the Decision Support Service⁹ that its service, and thus the new legal regime, will be operational by mid-2022. See <https://www.decisionsupportservice.ie/getting-ready> (visited in June 2021).

¹⁰ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> consulted on 2 July 2021.

¹¹ Article 1 UNCRPD.

¹² Article 12 UNCRPD.

legal capacity and safeguards in the exercise of protective measures), and **access to justice**¹³ (effective role on proceedings and right to be heard) including in the context of administrative and judicial procedures. In addition, pursuant to a recent study, the interlinkages between the UNCRPD and the Hague Convention are such that the implementation of the latter would concretise some requirements of the former (see below);

- the **Hague Convention of 13 January 2000 on the international protection of adults**, which regulates cross-border situations and is at the core of this study.

The interlinkages between the UNCRPD and the Hague Convention have been a source of uncertainties for some time, the concern being that two instruments would not be compatible, in particular because the reference to “guardianship” in Article 3(c) of the Hague Convention would be contrary to the principle of autonomy of the adult. The UN Special Rapporteur on the Rights of Persons with Disabilities wanted to clarify this aspect and launched a study on the Hague Convention’s interaction with the UNCRPD. The results of this study make clear that there is no conflict between the Hague Convention and the UNCRPD. On the contrary, the Hague Convention plays a positive role in the protection of vulnerable adults’ rights.¹⁴

Both instruments do not have the same nature. The Hague Convention is a private international law instrument. Hence, as it is common with private international law instruments, it does not provide for substantive laws (e.g. definition of key concepts, such as “guardianship”, the protective measures to be adopted) and the Contracting States must apply their own substantive rules on the treatment of vulnerable adults. National substantive laws of the Contracting States include domestic law as well as standards and obligations deriving from international instruments, such as, for instance, the UNCRPD. The Hague Convention is thus a “tool” articulating the application of national substantive laws.

Moreover, as underlined in the study, Article 49 of the Hague Convention addresses relations between the Hague Convention and other treaty obligations such as the UNCRPD. This article provides that “*The Convention does not affect any other international instrument to which Contracting States are parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by State Parties to such instrument.*” This article suggests that the Hague Convention is subordinate to the application of the UNCRPD. Since all Contracting States of the Hague Convention are also parties to the UNCRPD, they can ensure that the application of the Hague Convention is consistent with the human rights obligations provided by the UNCRPD.

The table below provides a summary of the status of ratification of these Conventions in the Member States.

Table 6: Status of ratification of the UNCRPD and 2000 Hague Convention

MS	UNCRPD	Hague Convention
AT	Ratification: 26 September 2008 Entry into force: 26 October 2008.	Ratification: 9 October 2013 Entry into force: 1 February 2014.
BE	Ratification: 2 July 2009. Entry into force: 1 August 2009	Ratification: 30 September 2020 Entry into force: 1 January 2021
BG	Ratification: 22 March 2012 Entry into force: 21 April 2012	Not signed, nor ratified
CY	Ratification: 27 June 2011	Ratification: 4 July 2018

¹³ Article 13 UNCRPD.

¹⁴ Roland, S., Keene A., Study interpreting the 200 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities, 3 June 2021.

MS	UNCRPD	Hague Convention
	Entry into force: 27 July 2011	Entry into force: 1 November 2018
CZ	Ratification: 28 September 2009 Entry into force: 28 October 2019	Ratification: 18 April 2012 Entry into force: 1 August 2012
DE	Ratification: 24 February 2009 Entry into force: 26 March 2009	Ratification: 3 April 2007 Entry into force: 1 January 2009
DK	Ratification: 24 July 2009 Entry into force: 2009	Not signed, nor ratified
EE	Ratification: 30 May 2012 Entry into force: 14 April 2012	Ratification: 13 December 2010 Entry into force: 1 November 2011
EL	Ratification: 11 April 2012 Entry into force: 11 April 2012	Greece signed the Convention on 18 September 2008 but has not ratified it yet. The Hellenic Ministry of Justice, Transparency and Human Rights has already launched the process of setting up a special legislative committee for the ratification of the Convention. A timeline for the completion of the procedure cannot, however, be determined at this stage ¹⁵ .
ES	Ratification: 3 December 2007 Entry into force: 21 April 2008	Not signed, nor ratified, but consultations on legislative developments are ongoing at the time of writing this report ¹⁶ .
FI	Ratification: 11 May 2016 Entry into force: 10 June 2016.	Ratification: 19 November 2010 Entry into force: 1 March 2011
FR	Ratification: 18 February 2010 Entry into force: 20 March 2010	Ratification: 18 September 2008 Entry into force: 1 January 2009
HR	Ratification: 15 August 2007 Entry into force: 27 June 2007.	Not signed, nor ratified
HU	Ratification: 20 July 2007	Not signed, nor ratified ¹⁷

¹⁵ Information based on desk research. National authorities contacted in the context of this study have not replied to our request for relevant information. The respective bill from 2018 is available at: http://www.open-gov.gr/ministryofjustice/wp-content/uploads/downloads/2018/01/sxedio_hage.pdf; (2015) Council of the European Union, Updated compilation of comments from delegations concerning the ratification/accession to the 2000 Hague Convention on the International Protection of Adults and the application thereof. Available at: <https://data.consilium.europa.eu/doc/document/ST-5381-2015-INIT/en/pdf>; (2010) Council of the European Union, The Hague Convention of 13 January 2000 on the International Protection of Adults Compilation of comments from delegations concerning respectively ratification of or accession to the Convention and application thereof as of November 2010. Available at: <https://data.consilium.europa.eu/doc/document/ST-18083-2010-INIT/en/pdf>.

¹⁶ According to the competent authorities contacted in the context of this study 'Spain did not sign the Convention because it was not deemed necessary as Spain had legally solved the international protection of adults in a balanced manner. Further to very recent and relevant legislative developments at national level, inter-departmental consultations on this matter are currently being carried out.' This reply was provided in August 2021.

¹⁷ The competent authorities were contacted in the context of this study upon request from the Commission to enquire about the status of adoption of the Convention. They were not in a position to give information on that aspect however. Based on desk research, it can be said that there have been indications of the intention to join the Convention since 2016. Governmental Decision no. 1673/2016 on the concept of the new act on private international law already contained a reference to the Convention indicating the importance of adoption of the rules in line with the Convention due to Hungary's intention to join the Convention. Ever since then, there is no official communication available on any preparation for joining the Convention. The text of the Government Decision in Hungarian is available under this link: <https://net.jogtar.hu/jogszabaly?docid=A16H1673.KOR&txtreferer=00000001.txt>

MS	UNCRPD	Hague Convention
	Entry into force: 7 July 2007	
IE	Ratification: 20 March 2018 Entry into force: 19 April 2018	Ireland signed the Convention on 18 September 2008, but has not ratified it yet. Part 11 of the Assisted Decision-Making Act 2015 is to give effect to the 2000 Hague Convention. This part of the statute, while enacted, is not yet in force. According to the authorities, the Convention will be ratified 'on commencement of the Assisted Decision-Making (Capacity) Act 2015' which is 'due to take place in June 2022'¹⁸.
IT	Ratification: 15 March 2009 Entry into force: 15 March 2009	Italy signed the Convention on 31 October 2008, but has not ratified it yet. According to the authorities, the procedure of adoption of the law authorising the ratification of the Convention is in progress. The draft bill was prepared by the Ministry for Foreign Affairs. It was subsequently sent to the Presidency of the Council of Ministers and awaits discussion in the Council of Ministers before being submitted to parliamentary examination. Being aware of the political importance that the European Union has given to this dossier, the Ministry sought an update on the calendar for discussion from the Presidency of the Council of Ministers¹⁹.
LT	Ratification: 18 August 2010 Entry into force: 17 September 2010	Not signed, nor ratified
LU	Ratification: 26 September 2011 Entry into force: 26 October 2011	Luxembourg signed the Convention on 18 September 2008, but has not ratified it yet.
LV	Ratification: 1 March 2010 Entry into force: 31 March 2010	Ratification: 24 November 2017 Entry into force: 1 March 2018
MT	Ratification: 10 October 2012 Entry into force: 9 November 2012	Not signed, nor ratified
NL	Ratification: 14 June 2016 Entry into force: 14 July 2016	The Netherlands has signed the Convention on 13 January 2000, but has not ratified it yet. The reason was originally budgetary. Meanwhile, the courts apply the rules of the Convention in practice, based on a ruling of the Dutch Supreme Court of 2018. As a consequence, the Netherlands does so far not see an urgent need to ratify the Convention. In this context, the Dutch government has undertaken to consider what would be an

¹⁸ Answer from the competent authorities of August 2021 following the request issued in the context of this study.

¹⁹ Letter from the Ministry of Justice of 25 June 2021 following the request issued in the context of this study.

MS	UNCRPD	Hague Convention
		appropriate moment to start the procedure for ratification of the Convention ²⁰ .
PL	Ratification: 25 September 2012 Entry into force: 25 October 2012	Poland signed the Convention on 18 September 2008, but has not ratified it yet.
PT	Ratification: 23 September 2009 Entry into force: 23 October 2009	Ratification: 14 March 2018 Entry into force: 1 July 2018
RO	Ratification: 11 November 2010 Entry into force: 30 November 2010	Not signed, nor ratified
SE	Ratification: 15 December 2008 Entry into force: 1 January 2009	Not signed, nor ratified ²¹
SI	Ratification: 24 April 2008 Entry into force: 15 December 2008	Not signed, nor ratified
SK	Ratification: 26 May 2010 Entry into force: 25 June 2010	Not signed, nor ratified

All Member States have ratified the UNCRPD between 2007 and 2018. Adhesion being also open to regional organisations, the European Union itself became a party to the Convention on 23 December 2010 within the limits of its competences²². The entry into force of the Convention on 22 January 2011 led to regulatory changes in a few Member States. This was the case in Spain, as explained above, but also in Lithuania, where the UNCRPD entered in to force in 2010, but substantial changes to the Civil Code and the Code of Civil Procedure were made in 2016 to bring the Lithuanian legal capacity regime in line with Article 12 of the Convention²³.

Ten Member States are parties to the Hague Convention, with Belgium being the last Member State to join in 2020.

A few other Member States have signed, but not yet ratified the Convention. This situation applies to Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland. As indicated in the table, Greece, Ireland and Italy have undertaken concrete measures to advance in the ratification process, even though no precise timelines for ratification have been set for Greece and Italy. Luxembourg seems to consider ratification as a priority²⁴. The Netherlands seems to have fully stopped its ratification process, as the authorities consider the application of the Convention by national courts as sufficient at this stage.

A few other Member States which had planned their adhesion to the Convention, such as Hungary and Sweden, also do not seem to have set a concrete schedule for adoption. In Hungary, a Governmental Decision referring to the intention to join the Convention was

²⁰ Answer from the competent authorities of June 2021 following the request issued in the context of this study.

²¹ The competent authorities were contacted in the context of this study upon request from the Commission to enquire about the status of adoption of the Convention. They indicated that a special investigator had been commissioned to consider a Swedish accession to the Convention. The report (SOU 2015: 74) proposes that Sweden accede to the Convention. The report has been submitted and is currently being prepared by the Ministry of Justice. Necessary analyses and considerations related to a possible accession to the Convention still remain.

²² See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-15&chapter=4&clang=en#EndDec, consulted on 1 July 2021.

²³ See <https://www.liberties.eu/en/stories/reform-incapacity-lithuania/3714>.

²⁴ Information provided in the interview held with the Permanent Bureau of the Hague Conference on International Private Law for this study- See Annex VII.

adopted in 2016, without further initiative however. In Sweden, a special investigator was appointed to assess a Swedish accession to the Convention; and a report advising to accede was submitted in 2015; it is currently with the Ministry of Justice. Spain on the other hand has picked up the ratification process recently.

Different reasons were given by the Permanent Bureau of the Hague Conference on International Private Law on the delays in the adoption of the Convention in some Member States²⁵. Firstly, the implementation of the Convention was not a **priority** for a long time in many States; taking into account that the Convention needs to be approved in most States by the national parliaments, for which the topic of vulnerable adults in the private international context may have had a lower priority than other private international law topics, such as the regulation of cross-border matters concerning children. In addition, on that specific issue, in many States, priority was given primarily to the implementation of the UNCPRD. Secondly, several States expressed the need to review their domestic legislation on the protection of vulnerable adults to align it with the UNCPRD or to adopt legislation on powers of representation before becoming a Party to the 2000 Convention. For example, Poland and Slovakia have indicated that they want to review their legislation before ratifying the Convention, in particular to make sure their legislation is in line with the UNCPRD.

The Netherlands is at this stage the only Member State which has clearly indicated its willingness to stop the ratification process. The sole application of the Convention by national court leads however de facto to a limitation of the application of the Convention, since the mechanisms set within the act, such as the designation of a Central Authority, and the benefits of multilateralism, and in particular reciprocity, are non-existent. The fact that the application only relies on jurisprudence also affects legal certainty.

2.1.2 Description of the competent authorities

This section provides a short overview of all authorities involved in the protection of vulnerable adults, with a particular focus on the following actors:

- the competent authorities making the decisions to impose protective measures (judicial and/or administrative authorities)
- the competent authorities involved in the implementation of the protective measures (judicial and/or administrative authorities deciding to apply specific measures, other (e.g., social) authorities involved in the protection of vulnerable adults)
- the authorities dealing with cross-border situations.

²⁵ Idem.

Authorities making and implementing the decision to impose protective measures

Table 7 below provides an overview of the role of the competent authorities in charge of adopting and implementing protective measures.

Table 7: Overview of competent authorities and corresponding role

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
AT	District court (court of first instance) acting as <i>Pflegschaftsgericht</i> (guardianship court): • appoints a judicial representative.	District court: for elected representation and legal representation (protection granted by operation of law): • exercises control over a representative; • takes care of accounting; • supervises the financial administration of the protected person; • provides a judicial approval for certain specific matters.
BE	The judge of the peace (<i>vrederechter - juge de paix</i>): • imposes protective measures. The notary together with the registrars to the judge of the peace: • drafts private mandates.	The judge of the peace (<i>vrederechter - juge de paix</i>): • monitors the implementation of judicial and extra-judicial protective measures.
BG	The Regional court (<i>окръжен съд</i>) of the permanent address of the person: • declares partial or full incapacity The 'guardianship and trusteeship body' embodied by the mayor of the permanent address of the person (or any other municipal council officer designated by them): • makes an inventory of the property of the person concerned; • takes measures to protect the vulnerable person and his/her property until the appointment of the guardian or trustee; • may entrust a person with temporary guardianship or trusteeship functions; • appoints a guardian or a trustee based on the decision of the court.	District court (<i>районен съд</i>): • issues a permission for some acts to be exercised by the guardian/trustee, such as acts of disposal of immovable property, of movable property through a formal transaction and via bank deposits, as well as transactions involving securities.
CY	District court of residence of the person concerned: • determines incapacity; • appoints a guardian or a property manager; • decides on compulsory hospitalisation.	District court: ■ monitors and reviews the decisions it has initially taken.

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
CZ	Regional court (court of the first instance): - limits the legal capacity of an adult person; - imposes protective measures to such a person.	Regional court (court of the first instance): competent for the implementation of protective measures.
DE	The Custodianship court (<i>Betreuungsgericht</i>), which is a department of the Magistrate Court (<i>Amtsgericht</i>): takes decisions concerning custodianship matters.	Custodian authorities (designated by Länder laws at the local level of districts and independent cities): - in most Länder: "<i>Betreuungsstelle</i>" (custodian office) (Bavaria, Hesse, Lower Saxony, North Rhine-Westphalia) or "<i>Betreuungsbehörde</i>" (custodian authority) (Brandenburg, Saxony-Anhalt), are often part of the youth welfare offices, sometimes also part of the social welfare or health offices; only in a few large cities, separate custodian offices; - in the city States: offices determined by special regulations due to their special administrative structure (Berlin: district offices; Bremen: Office for Social Services; Bremerhaven: Magistrate; Hamburg: no regulation in Land law, but tasks are performed by the Authority for Labour, Health and Social Affairs). Are in charge of: - exceptional execution of custodianship for a vulnerable person; - general tasks in relation to counselling of custodians; - assistance to the custodianship court (ascertaining facts for the court, appointing custodians vis-à-vis the court, rights of appeal against court decisions, presentation tasks); - public certification of signatures and hand signs under health care powers of attorney and care dispositions; - management of custodianships and procedural custodianships by employees of the custodianship authority; - additional tasks according to Land law (e.g. organisation of local custodianship working groups).
DK	Agency of Family Law (<i>Familieretshuset</i>) under the Danish Ministry of Social Affairs and Senior Citizens: decides and imposes protective measures, including guardianship and co-guardianship. Civil district court	Agency of Family Law: implements protective measures. Danish Civil Agency (<i>Civilstyrelsen</i>):

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
	decides and imposes measure of deprivation of legal capacity.	part of the Ministry of Justice, handles among other areas complaints regarding guardianship and future mandates.
EE	County court (first instance court): - imposes protective measures; - appoints a representative (a lawyer) to an adult with restricted active legal capacity; - orders an expert assessment in order to determine the need for appointment of a guardian for such person; - may order the rural municipality government or city government, where the person in need of guardianship lives to collect and present to the court information needed for the establishment of guardianship. The rural municipality government or city government: - provides, in proceedings, its opinion on who to appoint as guardian, on changing the scope of duties of the guardian or on changing the guardian.	
EL	Court of first instance of habitual residence of the person concerned: - decides on the placement of a person under judicial support; - appoints a judicial assistant, or assign association or institution for judicial support; - decides on involuntary hospitalisation. The competent social service issues a report on the necessity of the measure and the suitability of the judicial assistant or of the organisation to which the judicial support is going to be assigned to be taken into account by the Court. The prosecutor is responsible in the case of involuntary hospitalisation, to order the transfer of the patient to an appropriate mental health unit for the necessary examinations. Through this procedure of necessary examinations, the prosecutor can provide evidence of the person's state of mental health to the Court.	District court: monitors and reviews the decisions it has initially taken.
ES	The Court of first instance (<i>Juzgado de Primera Instancia</i>) where the vulnerable person resides: imposes protective measures, unless the measure is voluntary.	The Court of first instance (<i>Juzgado de Primera Instancia</i>) where the vulnerable person resides: is involved in the implementation of protective measures.

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
FI	The Digital and population data services agency (DVV) or, in Åland, the Åland state agency based on the act on the autonomy of Åland: • is competent on the power of attorney-cases, including the ratification of the document and supervising the persons entrusted with the power of attorney; • decides on guardianship, as the sole jurisdiction (when the person already has a guardian and due to the death of the guardian or for other reason finds himself without a guardian, and secondly, when the preconditions for appointing a guardian are met and the person in question -and he or she is capable of understanding the meaning of the matter- asks for a certain person to be appointed as his or her guardian), or together with the district court; • may issue a temporary guardian when the guardian is temporarily prevented from performing their duties. The district court: • shall make the final decision on the DVV application on appointing a guardian in all cases where the DVV does not have sole jurisdiction; • has sole jurisdiction to restrict a person's competence (where appointing a guardian is not sufficient).	Public guardianship offices are part of legal aid and public guardianship districts. They are structurally under Ministry of Justice and offer guardianship services, typically for people who do not have a close relative or other person suitable to act as their guardian.
FR	The Protection litigation judge (<i>juge des contentieux de la protection</i>) of the "judicial court" (<i>tribunal judiciaire</i>) (formerly the "guardianship judge" (<i>juge des tutelles</i>)) is a magistrate of the court of the first instance specialising in legal measures relating to the protection of adults, which: • imposes protective measures (family empowerment; safeguard of justice; curatorship; guardianship).	The Protection litigation judge is also involved in the implementation of protective measures. Along with the judge, the public prosecutor exercises general supervision of protective measures in his or her jurisdiction. Both the judge and the public prosecutor may, for instance, visit the protected person or his or her representatives and ask the latter to provide them with any information they require. The Family Council (<i>Conseil de famille</i>) is also involved in the implementation of protective measures. This is an assembly of relatives and qualified persons, responsible for authorising certain important acts carried out on behalf of the person under guardianship. The Family Council is chaired by the competent judge.
HR	The municipal court • takes decisions on the restriction of the legal capacity.	

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
	The welfare centre: • appoints a special guardian on an interim basis in the capacity of defence counsel when the court proceedings are instituted—provided that the individual for whom the proceedings have been initiated has not authorised a proxy; • issues a decision on placing the person under guardianship and appointing a guardian following the court decision depriving the person of legal capacity.	
HU	The civil court (district court – <i>járásbíróság</i>): • takes the decision to limit a person's capacity to act; • places an adult under guardianship. The guardianship authority (at county level and for Budapest – <i>Kormányhivatal</i>): • appoints a guardian to the person based on the decision of the court.	The guardianship authority (at county level and for Budapest – <i>Kormányhivatal</i>): • oversees the activities of the appointed guardians.
IE	<i>Under the current system:</i> The High Court: • has a supervisory role for the power of attorney system. The Office of the Wards of Court (office of the High Court) • receives applications and administers the ward of court system. <i>Under the system established by the Assisted Decision-Making (Capacity) Act 2015</i> The Court: • will appoint decision-making representatives (strongest form of support). The Director of the Decision Support Service²⁶: • will assist in making decision support arrangements (i.e. all types of protective measures);	<i>Under the system established by the Assisted Decision-Making (Capacity) Act 2015</i> The Court: • will check that decision-making arrangements (strongest form of support) are satisfactorily implemented on an ongoing basis; • modify/end decision-making representation; • end registered powers of attorney. The Director of the Decision Support Service: • will monitor the implementation of decision support arrangements.

²⁶ The relevant statutory provisions for this new competent authority are in force, and the new authority is due to begin functioning in 2022.

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
	will review and certify decision-making assistance agreement (softest measure), register co-decision-making agreements, and enduring powers of attorney.	
IT	The Civil Court's tutelary judge (<i>Giudice Tutelare</i>) sitting in each Tribunal of the State: - declares the legal incapacity of an adult; - adopts protective measures, including the appointment of guardians. The Public Prosecutor: - is notified and participates in adult protection proceedings. Operators of the national health and social services directly involved in the care and assistance of a person have an obligation to inform the tutelary judge and the Public Prosecutor where they are aware of facts that make it appropriate to open the support administration procedure.	The Civil Court's tutelary judge: monitor the implementation of protective measures, including the supervision of guardians.
LU	The guardianship judge (functions exercised by a judge of the youth court in whose jurisdiction the adult is domiciled): - may open a guardianship or curatorship procedure ex officio; - appoints an official guardian or curator; - may appoint a special agent to carry out an act or a series of acts, within the limits of what a guardian may do, without the authorisation of the family council; - pronounces a safeguard of justice measure; - may designate a proxy for certain types of acts for a safeguard of justice.	The guardianship judge exercises general supervision over the legal administrations and guardianships and curatorship within its jurisdiction, and together with the State prosecutor of the place of treatment, may visit or have visited the protected adults. For the guardianship, four types of actors can be involved in the implementation of the protective measure: the guardian or the legal administrator, the subrogated guardian and the family council. For the curatorship, only the curator is in charge of implementing the protective regime.
LT	The Civil court (District court - <i>apylinkės teismai</i>): - issues the decision to limit a person's capacity to act (using medical and legal criteria); - puts in place or ends guardianship or curatorship; - appoints or dismisses guardians or curators. - may propose ex officio to the vulnerable adult to enter into an assistantship agreement where there are no grounds to declare a person as incapacitated or partially incapacitated.	Municipal authorities as the controlling institutions for the implementation of judicial and extra-judicial protective measures: - oversee whether the appointed guardians, curators and assistants carry out their duties appropriately (except for the vulnerable adults' proprietary interests). The independent Commission for Reviewing the Status of a Person Without Capacity: - carries out an annual review of a person's incapacity; - petitions the court to review decisions of incapacity.

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
	The Lithuanian Forensic Psychiatry Service provides expertise when making and revising decisions on incapacity, to certify medical conditions of vulnerable adults. Social workers from municipal authorities' departments for social services issue an assessment to the Court on whether the vulnerable adult whose capacity is to be limited is able to take care of themselves.	Depending on the number of incapacitated persons, there can be several Commissions in one municipality or one Commission across several municipalities.
LV	The Latvian Orphans' Courts (LV: <i>Latvijas Bāriņtiesas</i>) which are administrative organisations established by a municipality or local government.: • make decisions on the adoption of a trusteeship measure; • provide assistance to an incapacitated person who has applied for assistance to an orphan court;	The Latvian Orphans' Courts: • examine submissions and complaints, including regarding the actions of a parent, guardian, or foster family; • co-operate with other orphans' courts, long-term social care and social rehabilitation institutions, health care and education institutions, social services and police institutions in order to ensure the protection of the rights and interests of incapacitated persons;
MT	The Guardianship Board: • determines whether a guardian shall be appointed (issue a guardianship order). The Court of Voluntary Jurisdiction: • determines whether a person shall be interdicted and incapacitated.	The Guardianship Board: • is responsible for the implementation of the guardianship order, i.e. shall order that a hearing for the review of the guardianship order shall be held within a specified period of time, which shall not be longer than 2 years; • is also responsible to order the substitution of a guardian at any point in time when there is a good and sufficient cause; • may be asked for advice by the guardian on matters relating to the guardianship order or the exercise of the functions, obligations and duties of the guardian; • is responsible to revoke a guardianship order; • shall appoint a person to investigate the case when it receives information that the person's (under guardianship) physical, emotional or mental health is suffering. The Court of Voluntary Jurisdiction: • ensures the implementation of the measures for interdiction or incapacitation.
NL	The Subdistrict Court (<i>kantonrechter</i>): • is responsible to impose measures of guardianship, fiduciary administration or mentorship.	The Subdistrict Court:

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
		• is the competent supervisory authority throughout the implementation of guardianship, fiduciary administration or mentorship; • may conduct periodic status inquiries; • must approve certain predetermined actions in advance (for instance for selling or establishing rights on real estate, gifts, applying for loans); • may hear the guardian, administrator or mentor at all times and may request information, such as information regarding the financial administration of the person concerned, from the guardian, administrator or mentor.
PL	Provincial Courts (<i>sądy okręgowe</i>) - in a panel of three judges- (court of the domicile of the person who is the subject of incapacitation, and if none, of habitual residence): • examine cases of legal incapacitation. The proceedings are conducted in the presence of the prosecutor. Since 2007, when the regulations were amended, non-governmental organisations, whose statutory tasks include the protection of the rights of persons with disabilities, providing assistance to such persons or the protection of human rights, can join the proceedings at any stage upon their own initiative. The guardianship court (<i>sąd opiekuńczy</i>), i.e. district family court (pl. <i>sąd rejonowy rodzinny</i>): • appoints a guardian for a disabled person at the request of the provincial court, which dismissed the application for incapacitation, stating that it would be an excessive restriction of the person's independence, recognising, however, that the person needed help to handle their affairs.	Provincial Courts (<i>sądy okręgowe</i>) - in a panel of three judges- (court of the domicile of the person who is the subject of incapacitation, and if none, of habitual residence court in whose district the event giving rise to the proceedings took place in case of revocation): • review and revoke incapacitation.
PT	Judicial courts: • make the decisions to impose protective measures; • determine the specific measures.	• Judicial courts: ■ make a periodic review of the measures.
RO	Courts of law (Court of first instance within whose territorial jurisdiction the protected person has his domicile):	Administrative authorities do not have any duties related to the implementation of the protective measures. The National Authority for the Rights of the Disabled and of Children and for Adoptions is the

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
	- make decisions to impose protective measures, i.e. institute guardianship and curatorship. The National Institute of Legal Medicine: - provides a medical advice to the court shall rely on medical authorities, e.g., when analysing the degree of disability affecting the vulnerable person and making protective measures necessary. The Tutorial Authority, which a duty of the mayor: - is obliged to provide the court with a report on the psychological and social background of the person concerned (<i>'ancheta psihosociala'</i>).	national administrative authority responsible for public policies in the field of the protection of adults, implementing in Romania the relevant international treaties and convention, but is not entitled to carry out specific measures.
SE	First instance courts: make the decisions to impose protective measures in Sweden, i.e. either appoint a conservator (<i>god man</i>) or an administrator (<i>förvaltare</i>).	The chief guardian (<i>överförmyndare</i>) or chief guardian board (<i>överförmyndarnämnd</i>) appointed by each municipality (or a group thereof): is a supervisory local authority handling cases on administratorship and conservatorship. County administrative boards supervise the activities of chief guardians.
SI	Local courts (<i>okrajna sodišča</i>) (there are 44 local courts in Slovenia and the territorial jurisdiction is determined based on the domicile of a person who is put under guardianship): - decide on the placement of an adult under guardianship and on the nomination of a guardian.²⁷ The Social Work Centre or the authority with which the proceedings are conducted (e.g. courts): - appoint a guardianship for special cases or a guardian for specific kinds of tasks is appointed.	The Social Work Centres, which are specialised in matters of guardianship: - oversee the execution of a court's decision (i.e. supervise guardian's work); - cooperate with other relevant authorities; - propose to the court to start a procedure or to change a guardian; - participate in the court proceedings (if not already as an applicant); - propose a guardian or act as a guardian; - give obligatory consent to certain legal acts of the guardian;

²⁷ Under the old Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih*) decision on guardianship was a two-track decision with the courts deciding on the need for a guardian by a decision on the (full or partial) deprivation of legal capacity and Social Work Centres (*Centri za socialno delo*) deciding on the nomination of a guardian.

MS	Competent authorities making the decisions to impose protective measures	Competent authorities involved in the implementation of the protective measures
		• oversee and supervise guardians' work (e.g. review the guardian's report, decide on a potential award); • decide on guardianship for special cases; • appoint a collision guardian.
SK	District courts: • make the decisions to impose protective measures (restriction of legal capacity, appointing of a guardian and decision on the detention in an inpatient facility)	District courts: • monitor the implementation of measures.

Authorities **making the decision** to impose protective measures are, in the vast majority of cases, part of the **judiciary**. Only in Denmark, Finland, Latvia and Malta²⁸, the decision is made by an administrative authority, but not necessarily for all measures; measures with the greatest impact on the adult are taken by a court in Denmark, Finland and Malta. The same is foreseen in the future Irish system. In Slovenia, while local courts are competent in most cases, the Social Work Centre may appoint guardians in certain specific cases.

Where Courts take the decision, usually the **court of first instance** competent in civil matters (e.g. district court, county court, regional court) will adopt the measure. In a number of Member States, a **judge or chamber of the Court is dedicated** to the adoption of protective measures: a guardianship/custodian court is competent in Austria, Germany and Poland, the 'Orphan's Court' in Latvia, a 'protection litigation judge', 'tutelary judge', 'guardianship judge' is competent in France, Italy and Luxembourg.

In Bulgaria, Croatia and Hungary, a **two-tiered system**, whereby the **Court** declares incapacity, and an **administrative authority** designates the guardian, curator or other representative, is in place. The administrative body is a local authority, a guardianship authority, or social services.

Local authorities, including local social and health services, also provide experts' opinions in a few Member States, such as Estonia, Lithuania or Romania. The mayor acts as the '**guardianship authority**' in Romania and Bulgaria. **NGOs** may also be associated to the procedure in Poland. National health services provide medical advice or opinion to the court in Lithuania and Romania. The **prosecutor** also plays an active role in the procedure in Greece (for involuntary hospitalisation), in Italy and in Poland. **Social services** may trigger a procedure for protective measures in Italy; and parties to the procedure in Greece. In Belgium, the **notary** is competent to draft private mandates.

Authorities **involved in the actual implementation** of the measures (e.g. monitoring) are either administrative or judicial authorities.

There are **dedicated administrative authorities** (e.g. custodian/guardianship authorities) in Germany, Hungary, Latvia, Sweden and Finland. In Slovenia, Social Work Centres oversee the execution of the court's decision. In Lithuania, municipal authorities control appointed guardians, curators and assistants, while an independent commission carries out annual reviews of incapacity. In Denmark, Ireland and Malta, the administrative authorities monitoring implementation are the same as the ones adopting the initial measures.

The **judiciary** is also involved in the implementation of the protective measures in a number of countries. It may be the same **Court** as the one who took the protective measure (Austria, Belgium, Cyprus, Czech Republic, France, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, and Spain) or another (higher) jurisdiction (Bulgaria). In France and Luxembourg, the **prosecutor** is also involved in the monitoring and review of protective measures.

Authorities dealing with cross-border situations

In general, when the national authorities have jurisdiction, the courts or administrative authorities competent for domestic matters will also be competent in cross-border cases. More specifically for applications for recognition and declarations of enforceability, however, specific authorities are designated in a few Member States. In Lithuania, the Lithuanian Court of Appeal (*Lietuvos apeliacinis teismas*) is competent for such matters. In Poland, cases for the recognition and enforcement of decisions on incapacitation, pursuant to

²⁸ In Malta, courts are not involved in decisions on matters relating to guardianship, as the Guardianship Board is the competent (administrative) body.

Article 11481 of the Code of Civil Proceedings, shall be heard by the district court which would have jurisdiction upon a decision by a foreign court, or by the district court of the district where territorial jurisdiction is established, or in the absence of such grounds - the District Court in Warsaw.

In those Member States party to the Hague Convention, a Central Authority has been designated in accordance with Article 28 of the Convention 'to discharge the duties which are imposed by the Convention'.

2.1.3 The concept of vulnerable adult

The definition of the concept of 'vulnerable adult' in the Member States provides a basic understanding of the (personal) scope of the domestic, as well as the cross-border, protective measures. Table 8 below provides a summary of the way this concept is reflected in the legal orders of the Member States.

Table 8: Concept of vulnerable adult in the Member States

MS	Concept of vulnerable adult
AT	§ 21 ABGB (Civil Code) sets out that minors and persons who cannot take care of all or some of their own affairs for a reason other than being a minor are "under the special protection of the law". There is no concept of vulnerable adult as such, but the concept of decision-making capacity, set out in § 24 ABGB, i.e. the ability to understand the meaning and consequences of one's own actions in the respective context, to determine one's will accordingly and to act accordingly. The assessment of decision-making capacity must include whether a person's capacities can be "mobilised" by appropriate support measures.
BE	Pursuant to Article 488/1 of the Civil Code, the figure of protected adult under Belgian law corresponds to adults who, because of their state of health, are wholly or partly incapable of protecting their personal and asset interests without assistance or other support. A person can also receive the status of a protected person if he or she is in a state of prodigality²⁹. In the context of the judicial protective measures, the notion of incapacity, as defined in Articles 491 and 492 of the Civil Code, is also important. Incapacitated adults are protected persons, who are unable to perform autonomously all or certain actions. If a person receives the status of incapacitated by a decision by a judge, that person is not anymore able to perform the actions for which he or she is listed as incapable by the judge³⁰.
BG	Article 5 of the Persons and Family Act refers to persons (adults) who are unable to look after their own affairs and interests due to mental illness or deficiency. The conditions for placement of a person under full or limited incapacity are two and their cumulative presence is necessary, namely: 1) medical criterion - there must be a mental illness, which affects the intellect, psyche and will of the individual; 2) legal criterion - this illness has affected the person's ability to be aware of his actions and expressions of will.
CY	Cypriot civil law does not provide define the concept of 'vulnerable adult'. The website of the Social Welfare Services concerning public assistance, old persons and persons with disabilities³¹ only refers to 'Special categories of vulnerable persons i.e. persons with disabilities, single parent families, families with four or more children and families in high risk of dissolution are entitled to public assistance even if they are employed full-time'.
CZ	The term "vulnerable adult" does not exist in Czech legislation. The Civil Code, when dealing with the legal capacity of natural persons, refers in its Section 38 to one's own lack of capacity to make juridical acts. Section 45 of the Civil Code refers to an adult in need of assistance in decision-making due to complications resulting from their mental disorder. Section 49 applies to an adult who has a mental disorder which

²⁹ Art 488/2 of the Civil Code.

³⁰ Article 492 of the Civil Code.

³¹ http://www.mlsi.gov.cy/mlsi/sws/sws.nsf/dmlassistance_en/dmlassistance_en?OpenDocument.

MS	Concept of vulnerable adult
	prevents him from making juridical acts . These provisions deal with a private mandate ("preliminary declaration", assistance in decision making, and representation by a household member respectively).
DE	Pursuant to Section 1896(1) of the Civil Code (BGB), if a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs , the custodianship court appoints a custodian for him or her.
DK	According to 'Guidance on the use of force and other interventions in the right of self-determination towards adults, including pedagogical principles') ³² the concept of "vulnerable people" in national law is defined as 'people with significant and permanent mental disabilities , i.e.. people who, as a result of significant and permanent mental impairment, are unable to take care of their own lives and who are often unable to give valid consent'.
EE	The concept of vulnerable adult in Estonian law consists of persons who due to mental illness, mental disability or other mental disorder , are permanently unable to understand or direct their actions, have restricted active legal capacity (§ 8 of the General Part of the Civil Code Act).
EL	The concept of 'vulnerable adult' is not expressly defined in the law. However, pursuant to Article 1666 of the Civil Code dealing with judicial support, 'the adult is subject to judicial support: 1. When, due to mental or intellectual disorder or due to physical disability , they are unable to take care of their affairs in whole or in part, 2. When, due to promiscuity, drug addiction or alcoholism, they expose themselves to the risk of deprivation'.
ES	There is no legal definition of vulnerable adult in Spanish Civil Law. The rules laid out in Article 249 of the amended Civil Code are, however, designed for situations of vulnerability in decision making and in the capacity to understand the scope of these decisions.
FI	The concept of 'vulnerable adult' can be found in section 8 of the Guardianship Act, which reads: 'A court may issue a guardian to an adult who, owing to illness, disturbed mental faculties, diminished health or another comparable reason, is incapable of looking after his/her interests or taking care of personal or financial affairs in need of management, and which will not be appropriately managed otherwise'. Another definition may be found with regard to restriction of competency in section 18 of the Guardianship Act, stating that '(1) If an adult is unable to take care of his/her financial affairs and his/her property, livelihood or other important interests are thereby endangered, and the appointment of a guardian is not alone sufficient to safeguard his/her interests, a court may restrict his/her competency[...]
FR	Chapter II of Title XI in Book I of the Civil Code deals with the protective measures applicable to vulnerable adults. The first article of this Chapter, Article 425 provides that 'any person who is unable to look after his or her own interests by reason of medically certified impairment of either his or her mental or physical faculties such as to prevent the expression of his or her will may benefit from a legal protective measure provided for in this chapter'.
HR	A vulnerable adult is a person over the age of 18 who is unable to take care of themselves. Pursuant to Article 220 of the Family Act and in the relation to Article 219 Paragraph 2 of the same Act, a vulnerable adult is a person placed under guardianship which provides protection of their rights and interests of which they have been deprived by the court decision on restriction of his/her legal capacity.
HU	The Civil Code provides for the possibility for the court to limit the capacity of a person to act either partially or fully, and the concept of vulnerable adult corresponds accordingly to two different types of the limitation of a person's capacity to act: • In case of the partial limitation of the capacity to act, the court shall place an adult under guardianship if, due to his/her mental disorder, his/her ability required to take care of his/her own affairs is significantly reduced in a permanent or in a temporarily recurring manner and consequently, having regard to his/her personal circumstances, family ties and social relations, his/her placement under guardianship is justified with regard to specified categories of affairs (Article 2:19(2) of the Civil Code).

³² *Vejledning om magtanvendelse og andre indgreb i selvbestemmelsesretten over for voksne, herunder pædagogiske principper* Available in Danish at: <https://www.retsinformation.dk/eli/retsinfo/2019/10148>.

MS	Concept of vulnerable adult
	In case of the full limitation of the capacity to act, the court shall place an adult under guardianship if, due to his/her mental disorder, he/she permanently and completely lacks the ability required to take care of his/her own affairs and consequently, having regard to his personal circumstances, family ties and social relations, his/her placement under guardianship is justified (Article 2:21(2) of the Civil Code). In both instances, the concept of vulnerable adult focuses on the mental disorder of the person that results in a failure of his/her capacity to act. The Civil Code provides for another form of protection. In case of supported decision-making without prejudice to capacity to act, the guardianship authority shall appoint a supporter for the adult who, due to not being entirely of sound mind, needs help in administering some of his/her affairs or making his/her decisions (Article 2:38 of the Civil Code).
IE	In the Assisted Decision-Making (Capacity) Act 2015, section 2(1), “relevant person” means— (a) a person whose capacity is in question or may shortly be in question in respect of one or more than one matter, (b) a person who lacks capacity in respect of one or more than one matter, or (c) a person who falls within paragraphs (a) and (b) at the same time but in respect of different matters, as the case requires;’ Section 3(1) specifies the concept of capacity: ‘a person’s capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time. (2) A person lacks the capacity to make a decision if he or she is unable— (a) to understand the information relevant to the decision, (b) to retain that information long enough to make a voluntary choice, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party. [...] This definition will apply generally for the purposes of measures to assist decisions, and take decisions on behalf, of vulnerable adults. However, the legal regime is not yet in place because the 2015 Act is not in force at this time. Also in the same Assisted Decision-Making (Capacity) Act 2015, for the purpose of Part 11, implementing the Convention on the International Protection of Adults agreed at The Hague on 13 January 2000, section 109, provides: ‘In this Part—“adult” means a person who— (a) as a result of an impairment or insufficiency of his or her personal faculties, cannot protect his or her interests, and (b) has reached 18 years of age.’ For the Ward of Court procedure, Order 67 of the Superior Court Rules and Lunacy Regulation (Ireland) Act 1871 gives the following definitions: “ward” means a person who has been declared to be of unsound mind and incapable of managing his person or property, and includes where the context so admits, a person in respect of whom or whose property and order has been made under section 68 or section 70 of the Act, and a temporary ward; “temporary ward” means a person of weak mind and temporarily incapable of managing his affairs in respect of whom an order has been made under section 103 of the Act.
IT	The Italian Civil Code lists the situations in which a legal representative can may be appointed to an adult. These are: - A wholly or partial infirmity or a physical or mental impairment which makes the person temporarily or permanently unable to take care of their interests; - Mental infirmity; - Those who, through prodigality of abuse of alcohol or drugs expose themselves or their families to serious financial prejudice;

MS	Concept of vulnerable adult
	The fact of being deaf or blind since a very young age, insofar as the person concerned did not receive an appropriate education.
LU	The relevant provisions of the Civil Code addressing the different situations of persons eligible for legal protection in terms of 'capacity'. "Protected" adults are identified in Articles 488 and 490 of the Civil Code and refer to persons whose autonomy is so limited that they can only imperfectly express or exercise their will due to their condition or situation. This therefore includes minors, certain adults who are ill, infirm, insane or destitute (including through their own fault). The emphasis is thus placed on the alienation of the protected adult's faculties, whether mental or physical. A person of full age who, by his or her prodigality, intemperance or idleness, exposes himself or herself to need or compromises the fulfilment of his or her family obligations, may also be protected (Article 488 of the Civil Code). Article 490 of the Civil Code states that when a person's mental faculties are altered by illness, infirmity or age-related impairment, he or she may be subject to one of the three legally provided protection regimes, depending on his or her protection needs. The same protection regimes apply to impairment of bodily faculties, if it prevents the expression of will.
LT	Various vulnerability grounds are considered without defining what a 'vulnerable person' or a 'vulnerable adult' means³³. The grounds for vulnerability of adults could be captured by the national law notions of 'physical or mental impairments or characteristics' or 'those who cannot be held able to reasonably assess and evaluate their interests due to a health condition', used in the context of access to justice in administrative and civil procedures.
LV	The concept of "vulnerable adult" set forth in the Civil Code covers: (a) persons with health disorders of a mental nature, as well as other persons, whose capacity to act is restricted by a court, (b) persons with health disorders of a mental nature or other disorders, who do not have any restriction of their capacity to act.
MT	The concept of 'vulnerable adult' can be deduced from: - Article 188A of the Civil Code on persons subject to guardianship which states: '...a major who has a mental disorder or other condition, which renders him incapable of taking care of his own affairs may be subject to guardianship;...the parents of a person of age, with disability, with a mental disorder and with another condition, which makes such a person incapable of taking care of his or her affairs,...' - Article 189(1) of the Civil Code on person subject to interdiction which states: 'A major who is a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, or who is insane or prodigal, ...' - Article 520(1) of the Code of Civil Procedure provides that 'A demand for the interdiction or incapacitation of persons who have a mental disorder or other condition, which renders them incapable of managing their own affairs, or who are insane or prodigal ...'. Article 520(4) of the COCP further explains that '(a) "other condition", where used in the context of a condition that renders a person incapable of managing his own affairs, means a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder one's full and effective participation in society on an equal basis with others; and (b) "mental disorder" shall have the meaning assigned to it in the Mental Health Act'.
NL	The Dutch Civil Code provides for the possibility to place an adult who is not able to protect his own interests under guardianship. This concept of guardianship is defined as a person who 'loses legal capacity and can therefore no longer independently perform legal acts'³⁴.

³³ For example, see Juodkaitė, D., (2017). *Strengthening Procedural Rights in Criminal Law of Persons with Mental and / or Psychosocial Disabilities. Analysis of the Situation in Lithuania (Asmenų, turinčių proto ir/ar psichosocialinę negalią procedūrinių teisių stiprinimas baudžiamojoje teisėje. Lietuvos situacijos analizė)*, available at http://www.perspektyvos.org/images/failai/national_baseline_lt_www_edt.pdf.

³⁴ Informatieblad Ministerie van Justitie en Veiligheid. Curatele en bewind, p. 2.

MS	Concept of vulnerable adult
	Less far-reaching measures are fiduciary administration (Title 1.19 of the Dutch Civil Code) or protective mentorship (Title 1.20 of the Dutch Civil Code), but the corresponding incapacity is not defined by law.
PL	The concept of 'vulnerable adult' depends on the types of protective measures considered. - The provisions on full legal incapacitation concern a person who is unable to direct his or her behaviour. Article 13 of the Civil Code lists examples of abnormalities that can cause such a situation: mental illness, mental retardation and other mental disorders, in particular alcoholism or drug addiction. - The provisions on partial legal incapacitation concern a person who, as in the case of full incapacitation, has such disorders that cause him or her to need help to conduct his or her affairs. Partial incapacitation may take place only insofar as the person retains to some extent the ability to direct his or her proceedings. - Furthermore, a curator can be appointed if the person needs help to conduct any matters, especially to deal with a particular case.
PT	Article 138 of the Civil Code provides that adults who are unable for health, disability or behavioural reasons, to fully, personally and conscientiously exercise their rights or to fulfil their duties , shall benefit from the accompanying measures provided for therein.
RO	Article 164 paragraph 1 of the Civil Code stated that a person who does not have the necessary discernment to attend to their own interests, due to mental alienation or mental debility, shall be placed under judicial interdiction. According to Article 211 of Law No 71/2011, which is in force, 'mental debility' and 'mental alienation' have the following meaning: a mental illness or a mental handicap which cause the person's mental inability to act critically and predictively with regard to the social and legal consequences of the exercise of civil rights and obligations, i.e. putting that person in a position which does not allow him/her to look after his/her interests.
SE	The legislation defines under which circumstances a person can get assistance, i.e. a person, who, due to an illness, a mental disorder, poor health, or similar circumstances , needs help to guard their rights, manage their property, or provide for the person (FB chap.11 sec.4).
SI	The system of protective measures for adults in loss of capacity has been changed with the new Family Code applicable from 15 April 2019. A person, who due to a mental disorder or a mental health problem or other cause affecting the ability to judge is unable to take care of his or her rights and interests without harm to himself or herself, shall be placed under guardianship and shall be appointed a guardian ³⁵ .
SK	Section 10(2) of Act No 40/1964 (the Civil Code) stipulates that if an individual is able to do only certain legal acts due to a permanent mental illness or to an immoderate consumption of alcoholic beverages , the court shall restrict his or her legal capacity and shall specify the extent of such restriction in the decision.

Article 1 of the Hague Convention refers to 'adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests'. Member States have usually not expressly defined the concept of 'vulnerable adults' under national law, but rather refer to specific circumstances which lead to the recognition of incapacity and the adoption of protective measures. Accordingly, the concept varies depending on the level of protection granted.

When comparing with the Convention, only Ireland reflected the Convention's definition in the section of the relevant legislation implementing the Convention. In the other Member States, even though concepts differ, the criteria are in most cases comparable to those provided by the Convention.

The **impairment or insufficiency of personal faculties** is reflected in all Member States, but their scope varies significantly from one Member State to another. Some Member

³⁵ Article 262(1) of the Family Code.

States refer to mental disorder, impairment or illness, whereas others cover mental but also physical impairments (Germany, France, Ireland, Italy, Luxembourg, Lithuania, Latvia, Malta, Sweden) or more broadly 'state of health'. Several also refer to prodigality (Belgium, Luxembourg, Poland, Slovakia). In the Netherlands, the medical criterion is not considered.

In particular, the inability to protect one's **interests**, or to 'look after their own affairs', is a consideration to define incapacity in nearly all Member States. **Portugal** refers to the inability to 'exercise their rights or fulfil their duties' and **Sweden** to 'guard their rights', which are close to the protection of one's interest. However, several Member States only refer to an 'incapacity to act', which is a bit different from the protection of interest: **Czech** law refers to the lack of capacity to make juridical acts, **Danish** law to the inability to give valid consent, **Estonia** to 'restricted active legal capacity', **Spain** to the 'incapacity to understand', and **Slovakia** to being 'unable to do certain legal acts'. **Luxembourg** law refers to the 'prevention of the expression of will'. In **Cyprus** and **Latvia**, an element beyond the actual impairment seems to be missing altogether.

Even though, broadly, the concept of 'vulnerable adult' includes common or comparable criteria across Member States similar to those of the Convention, there are still discrepancies when looking into the details of the Member States' legal frameworks. This can lead to concrete issues, including in cross-border issues, as differences in the concept result in differences in the scope of the protection granted from one country to another.

Key findings:

- Domestic law on the protection of vulnerable adults is mostly embodied in general civil law instruments (Civil code, Code of Civil Procedure). In a few Member States, incapacity is regulated in instruments relating to family law and the law of persons. Only in a limited number of Member States, is the issue regulated in dedicated pieces of legislation.
- The competent authorities, both for the adoption and the implementation of protective measures, are in the vast majority of cases, part of the judiciary. Administrative authorities in charge of adopting protective measures are present only in six Member States. These are more present in the monitoring and control of the implementation of measures, either in the form of dedicated- guardianship- authorities or as part of the general, usually local, administration.
- The concept of 'vulnerable adults' is overall defined in the Member States' legal frameworks with common characteristics: a medical component (e.g., impairment, disability, illness) and a legal component (inability to defend one's interests, absence of capacity to act). These are consistent with the Convention's definition. However, there are significant discrepancies in the way each characteristic is detailed in the Member States, with a direct impact on the scope of legal protection in each Member State, which differs depending on the persons covered.

2.2 Protection of vulnerable adults in the domestic legal framework

This section provides an insight on the protection of vulnerable adults in the domestic legal system, allowing a basic understanding of the national context in light of the further assessment of cross-border situations. A distinction is made between three situations:

- (a) measures of protection taken by judicial or administrative authorities: where a judicial or administrative authority appoints someone charged with assisting or representing the vulnerable adult (e.g. a guardian, a curator, a deputy);
- (b) powers of representation (in the form of a private mandate) –granted by the adult concerned, at a time when he or she is in a position to protect his or her interests;

- (c) protection provided by a spouse or other relative by operation of law: where a person, usually the spouse of the adult, is, pursuant to national rules, automatically vested with the power to represent the adult in the event that the latter is not in a position to protect his/her interest.

Table 9 below provides an overview of the way these three situations apply across the Member States. Each of these situations is described in the sub-sections below.

Table 9: Overview of means of adoption of protective measures

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
Protective measures taken by judicial or administrative authorities	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Private mandate	X	X			X	X	X			X	X	X	X	X	X		X			X	(X) ³⁶	(X) ³⁷	X	X	X		
Protection granted by operation of law	X	X								X	X			X											X	X	

2.2.1 Protective measures taken by judicial or administrative authorities

2.2.1.1 Nature and scope of protective measures

Article 3 of the Hague Convention provides that 'the measures referred to in Article 1 [*measures directed to the protection to the protection of the person or property of the adult*] may deal in particular with -

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

As underlined in the Explanatory Report of the Hague Convention³⁸, protective measures vary across the different Member States. Therefore, some of the measures enumerated under sub-paragraphs (a) to (g) of Article 3 of the Hague Convention may be unknown in certain legal systems or there may be overlaps between the different categories of

³⁶ In the form of a mandate under general law- see Section 2.2.2.1.

³⁷ As above.

³⁸ Lagarde P., Protection of adults Convention, Explanatory Report, 2017, p.46-47. <https://as-sets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf>

measures.

Determination of incapacity is linked to the measures of protection that can be pronounced, such as guardianship, curatorship, and analogous institutions, as well as other protective regimes provided under Article 3 of the Hague Convention (sub-paragraph (a)). However, the determination of incapacity and the request for a protective measure may be subject to separate proceedings. For instance, in **Bulgaria**, there is a clear distinction between, on the one hand, the declaration of incapacity of the adult by the court (the procedure is judicial) and, on the other hand, the appointment of a representative as part of a protective measure (the procedure is administrative). Nevertheless, in most Member States, the declaration of incapacity goes together with a protective measure and both are part of the same proceedings. In **Latvia**, the determination of the incapacity of a person is made by the judgment of a court on the adoption of a trusteeship or a guardianship measure. In **the Netherlands**, incapacity is determined as part of the proceeding creating a guardianship and in **Malta**, as part of the application for a measure of protection such as guardianship or a measure of interdiction or incapacitation.

In **Sweden, Slovenia** and **Spain**, a person cannot be declared incapacitated. In **Sweden**, since 1 January 1989, it is not possible to declare a person as legally incompetent. If someone, due to an illness, a mental disorder, poor health, or similar circumstances, needs help to guard their rights, manage their property, or provide for their person, the court can decide to appoint an administrator or a conservator for that person but no incapacitation is provided. In **Slovenia**, national law originally provided for a system of determination of (full or partial) incapacity and subsequent decision on placement under guardianship. However, this system was changed with the introduction of the new Family Code in 2019. One of the main reasons was that deprivation of legal capacity is an unjustified intrusion of private life. The situation is the same in **Spain** where there is no incapacity status.

In such situations where the protection of the adult does not necessarily involve a declaration of his or her incapacity, he or she may remain in control of his or her affairs but be placed under the protection of a an authority (sub-paragraph (b) of Article 3 of the Hague Convention). In some Member States, the adults can be **placed under the protection of a judicial or administrative authority**. For instance, in **France** and **Luxembourg**, the measure of safeguard of justice (*sauvegarde de justice*) is a temporary measure applicable in the event that a vulnerable adult needs to be protected for certain acts but continues to manage them. The adult retains the exercise of his or her rights (with some exceptions) but his or her placement under an authority makes it possible, where necessary, to annul or bring about the annulment of certain past acts of the adult³⁹.

Apart from the above measures, the adult may be subject to protective measures or regimes established based on his or her situation. Guardianship, curatorship, and analogous institutions are the most common measures provided in the different Member States. The adult can also be placed in an establishment or other place where protection can be provided, when so required. The administration, conservation, or disposal of the adult's property can also be planned. Finally, the protection of the adult can be limited to a specific intervention for the protection of the person or property of the adult.

The table below provides an overview of the measures available to the court and administrative authorities in the Member States, with a focus on the measures provided in sub-paragraphs (c), and (e) to (g). Sub-paragraph (d) is not covered in the table as the question for the designation and functions of a person or body having charge of the adult's person or property, representing the adult is linked to other sub-paragraphs of Article 3 of the Hague Convention.

³⁹ On this point, see *ibid.*, p.47, para. 21.

Table 10: Overview of protective measures available to competent authorities

MS	c) Guardianship, curatorship and analogous institutions			e) Placement of the adult in an establishment or other place where protection can be provided	f) Administration, conservation or disposal of the adult's property	g) Authorisation of a specific intervention for the protection of the person or property of the adult
	<i>Guardianship</i>	<i>Curatorship</i>	<i>Analogous institutions</i>			
AT			Judicial adult representation		By the judicial adult representative	N/A
BE		✓		Collocation or forced admission to a psychiatric institution	By the curator	N/A
BG	✓		Trusteeship	Request/decision for accommodation	By the guardian/trustee	N/A
CY	✓			Compulsory Hospitalisation Optional Hospitalisation	N/A	N/A
CZ	✓			Agreement on the provision of social services	N/A	N/A
DE			Custodianship	- Accommodation without deprivation of liberty - Accommodation with deprivation of liberty	In the context of custodianship	N/A
DK	✓			Involuntary admission, stay and treatment in a psychiatric ward	Specific measure applicable to real estate (purchase and sale of real estate for the person under guardianship, as well as mortgaging requires approval from the Agency of Family Law)	N/A
EE	✓			Placement of person in closed institution	N/A	N/A
EL	✓			Involuntary hospitalisation	By the judicial assistant	N/A
ES		✓	- Judicial defender - Administrative support	Internment	<i>By the vulnerable adult.</i>	Support measures (voluntary, ex lege or judicial)

MS	c) Guardianship, curatorship and analogous institutions			e) Placement of the adult in an establishment or other place where protection can be provided	f) Administration, conservation or disposal of the adult's property	g) Authorisation of a specific intervention for the protection of the person or property of the adult
	<i>Guardianship</i>	<i>Curatorship</i>	<i>Analogous institutions</i>			
FI	✓			N/A	By the guardian	N/A
FR	✓	✓		Admission to a psychiatric establishment at the request of a third party or in case of imminent danger	By the guardian	Family empowerment
HR	Appointment of a guardian/special guardian			Involuntary detention and involuntary placement in a psychiatric institution	By the guardian (but the scope is defined by the court)	- Securing the property of the vulnerable adult before making a decision on custody - Decisions on the vulnerable adult's personal situation
HU	✓			N/A	By the guardian	N/A
IE	Appointment of receivers and guardians			Involuntary admission to an approved centre on the basis of a mental disorder	N/A	Power of attorney
IT			- Incapacitation - Interdiction - Support administration	Compulsory health treatment	In the context of the protective measures of incapacitation, interdiction and support administration	N/A
LT	Guardianship/curatorship (type I and II)/assistantship	✓ (type I and II)	Assistantship	N/A	By the guardian, the curator or by a separate property administrator	Temporary protection (interim) measures
LU	✓	✓		Hospitalisation without consent of a mentally ill person	By the guardian, the curator or the other spouse	Representation between spouses
LV			Trusteeship	Placement	By the trustee	N/A

MS	c) Guardianship, curatorship and analogous institutions			e) Placement of the adult in an establishment or other place where protection can be provided	f) Administration, conservation or disposal of the adult's property	g) Authorisation of a specific intervention for the protection of the person or property of the adult
	<i>Guardianship</i>	<i>Curatorship</i>	<i>Analogous institutions</i>			
MT	✓		- Interdiction - Incapacitation	Placement	By the guardian	N/A
NL	□	□	- Fiduciary administration - Protective mentorship	Incapacity	By the guardian and by the fiduciary administrator	N/A
PL	✓	✓		Placement in a social welfare home	By the guardian of the curator	N/A
PT			Decision on the accompaniment and accompanying measures	Internment	By the accompanying person designated by the Court.	N/A
RO		✓	Judicial interdiction	N/A	By the guardian when the person is under judicial interdiction, by the curator when the person is under curatorship	N/A
SE			Appointment of an administrator/conservator	Compulsory psychiatric care	By the administrator, by the conservator	
SI	✓ Guardianship of adults and guardianship for special cases			- involuntary treatment - involuntary placement	By the guardian	N/A
SK	✓			Proceedings on the permissibility of admission and detention in an inpatient	N/A	Court approval for acts concerning the administration of the represented person's assets

MS	c) Guardianship, curatorship and analogous institutions			e) Placement of the adult in an establishment or other place where protection can be provided	f) Administration, conservation or disposal of the adult's property	g) Authorisation of a specific intervention for the protection of the person or property of the adult
	<i>Guardianship</i>	<i>Curatorship</i>	<i>Analogous institutions</i>			
				facility without informed consent		which fall outside of the scope of everyday acts

- ***Guardianship, curatorship and analogous institutions (sub-paragraph (c) of Article 3)***

One of the means often used in the different Member States to protect a vulnerable adult is the appointment of a representative. This representative is responsible for making decisions on the vulnerable adult's behalf during the time in which he or she will not be in a position to effectively protect his or her interests.

The measures providing for the appointment of such representatives are usually referred to as **guardianship** in most of the Member States⁴⁰. With regard to measures of guardianship as provided in several Member States, there are, however, national differences. For instance, the scope of the measure (e.g., the degree of the measure, the determination of the powers entrusted to the representative) may be different, as well as the related procedural rules (e.g., the competent authority, the introduction of the proceedings).

The measure of guardianship usually entails that the adult concerned becomes legally incapacitated as is the case in the majority of the Member States providing for such protective measure⁴¹. This incapacity can be either general or only limited to certain types of acts expressly covered by guardianship. The extent of the incapacity of the vulnerable adult is generally defined by the decision on the adoption of the measure taken by the competent authority.

A measure of guardianship can be taken to cover all personal and financial matters but may also be limited to just one of the parts, or certain personal or financial matters. Depending on the Member States, the decision on guardianship can cover all or specific assets. Some acts may be accomplished by the vulnerable adult, and some may require the consent of the guardian. In general, the vulnerable adult may act in common matters of daily life.

Apart from guardianship, some Member States provide for measures of **curatorship**⁴² (instead of guardianship or together with guardianship as is the case in **France, Lithuania, Luxembourg, and Poland** providing both) and others provide for analogous institutions⁴³ (e.g., trusteeship, assistantship). Again, these measures are different in terms of scope and procedural rules.

- ***The placement of the adult in an establishment or other place where protection can be provided (sub-paragraph (e) of Article 3)***

The majority of Member States' legal systems also provide for the possibility of **placing the vulnerable adult in an establishment or other place where they can be provided with protection**. These measures are often referred to as compulsory hospitalisation or admission to a psychiatric establishment; but the vulnerable adult may also be placed in other institutions such as, a nursing home, a social welfare home or any other specialised institution adapted to the situation of the vulnerable adult. Such measures usually apply in cases where the patient suffers from a serious mental disorder. A distinction is then often to be made with measures applicable to diminished mental capacity due to ageing or failure to adapt to society that are often not sufficient grounds for admission and placement in an establishment.

Measures of hospitalisation of the adult concerned are provided, in **Cyprus, Greece, and Slovakia**. **Cyprus**, provides for both hospitalisation with and without consent of the

⁴⁰ BG, CY, CZ, DK, EE, EL, FI, FR, HR, HU, IE, LT, LU, MT, PL, SI, and SK.

⁴¹ BG, CY, CZ, EE, EL, FI, FR, HR, LT, LU, NL, PL, SI and SK.

⁴² FR, LU, LT, PL and RO.

⁴³ BG, DE, ES, IT, LT, LV, MT, PT, RO, and SE.

vulnerable adult. For instance, in **Cyprus**, a measure of optional hospitalisation can be taken by the psychiatrist at the patient's request. In cases where the patient suffers from a serious mental disorder, for which appropriate treatment can only be provided in a safe psychiatric centre, the court can decide on the adoption of a measure of compulsory hospitalisation, i.e., without the consent of the adult concerned. For instance, the **Belgian, Danish, French, and Swedish** systems provide for specific measures aiming at the admission of the adult concerned to a psychiatric establishment.

- ***The administration, conservation or disposal of the adult's property (sub-paragraph (f) of Article 3)***

With regard to the **administration, conservation, disposal of the vulnerable adult's property**, in the vast majority of Member States, this is carried out by the representative appointed as part of a measure of guardianship, curatorship or analogous institutions (e.g., trusteeship, custodianship, incapacitation, interdiction). In various Member States, certain transactions cannot be entered without the authorisation of the competent authority. In **Denmark**, for example, national law provides for a specific measure applicable to real estate. The purchase and sale of real estate for the adult under guardianship, as well as mortgaging, requires approval from the Agency of Family Law, the competent authority to impose and implement protective measures.

- ***The authorisation of a specific intervention for the protection of the person or property of the adult (sub-paragraph (g) of Article 3)***

Some Member States provide for measures consisting of **a specific intervention for the protection of the person of the vulnerable adult or their property**.

For instance, in **Greece**, a temporary judicial assistant can be appointed by the Court. Their powers include any precautionary measures to avoid a serious risk to the person or the property of the person concerned. In practice the temporary judicial assistant carries out the duties of the judicial assistant until the final decision on the judicial assistant's appointment has been made.

In **France**, family empowerment consists of assistance or representation of the protected person. It may be general or limited to certain acts determined by the judge and covers the person's assets and/or the person.

In **Croatia**, national law provides for specific measures to secure the property of the vulnerable adult before making a decision on custody and the possibility to take decisions on the vulnerable adult's personal situation.

2.2.1.2 Procedural rules

Introduction of proceedings

The proceedings for judicial protection can be initiated by different persons or institutions. Table 11 below provides a snapshot of the persons/institutions that can introduce a proceeding for the protection of a vulnerable adult in the 27 Member States. It covers proceedings regarding protective measures taken by judicial or administrative authorities as provided for in Member States.

Table 11: Overview of persons-institutions that can introduce proceedings

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
Protected person	X	X		X		X	X	X	X	X	X	X	X			X		X	X		X	X	X	X	X	X	X

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
Ex officio by the court	X				X	X		X	X				X			X		X								X	X
Any interested party		X	X	X	X						X		X		X												
Public prosecutor		X	X						X	X		X		X		X	X	X	X		X	X	X			X	
Spouse (or partner)			X	X			X	X	X	X	X	X		X		X	X	X	X	X	X	X	X		X	X	
Other close relatives			X	X			X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X
Representative				X			X				X	X				X	X	X			X	X			X		
Public institutions				X			X	X					X	X							X	X		X			
Doctor or social/health institutions				X									X			X		X						X		X	X

In almost all Member States⁴⁴, the vulnerable adults themselves **can initiate the proceedings** for the creation of a protective regime.

In all Member States, the family is one of the main actors in the protection of the vulnerable adult. As a result, the spouses or partners are often considered as persons that can initiate the proceedings. Apart from the spouses and partners, ascendants, and descendants, brothers and sisters may also initiate proceedings in nearly all (21) Member States.

With regard to the public sphere, the public prosecutor is also an important actor in the protection of a vulnerable adult. As a result, in several Member States⁴⁵ the procedure for the provision of a protective measures may be initiated by the public prosecutor. In **France**, the public prosecutor can do it on their own initiative or at the request of a third person.

Lastly, some Member States⁴⁶ have a very broad approach to the persons who may initiate the proceedings and rather provide for such a possibility to “any interested party”. This then may cover family, friends, social and healthcare institutions or authorities, as long as these persons or institutions have an interest.

With regard to the **persons that can be appointed as a representative** by a court or administrative decision, some Member States provide for a general rule, i.e., any capable person can be appointed as a representative. In contrast, some Member States rather provide for a restrictive list, i.e., only specific persons, such as family members or specific professionals can be appointed as a representative.

⁴⁴ AT, BE, CY, DE, DK, EE, EL, ES, FI, FR, HR, IT, LU, LV, PL, PT, RO, SE, SI and SK.

⁴⁵ BE, BG, EL, ES, FR HU, IT, LT, LU and LV.

⁴⁶ BE, BG, CY, CZ, FI, HR and IE.

Few Member States⁴⁷ provide for the appointment of any capable person as a representative. For instance, in **Slovakia**, any capable person can be appointed as a guardian, but priority is given to the family. Otherwise, the court shall appoint as representative an authority of local administration.

National provisions in **Croatia, Luxembourg, Latvia** and **Slovenia** provides for a list of persons who cannot be appointed as representatives. This can include, for instance, a person whose interests conflict with the interests of the vulnerable adult.

In most cases, national provisions provide for a hierarchy with regard to the persons that can be appointed as a representative. For instance, in **France**, priority is given to the family by the judge. Firstly, the appointment of the spouse or partner is considered, and failing that, another family member (ascendant, descendant, brother, or sister), or an ally. Lastly, any person living with the adult or with close or stable ties with him or her, also known as a "close relative", may be appointed as representative.

Also, in some Member States, the representative shall be the person mentioned in the power of representation or the private mandate if established by the vulnerable adult where national law requires a declaration of incapacity.

Hearing of the adult concerned

Article 13 of the UNCPRD on access to justice provides that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

When making a decision on protective measures for a vulnerable adult, in all Member States, the judicial/ administrative authority considers the hearing of the vulnerable person concerned.

This requirement is sometimes mandatory (for all measures or only for some) and is sometimes only a possibility. For instance, in **Belgium**, the hearing of the vulnerable adult is mandatory for the request of a measure of compulsory admission to a psychiatric ward; however, in the context of a measure of judicial protection, hearing occurs only if the adult requests it (or his or her person of trust if incapacitated). In the latter case, information of the adult about his/her right to be heard is not required by law, but is ensured in practice by the lawyer or person of trust.

In Member States providing for the hearing of the vulnerable adult when deciding on the application of a protective measure, it is also provided that the person concerned does not have to testify if he or she is not able to do so⁴⁸, if it would be detrimental to his or her health⁴⁹, if he or she is not able to express his or her will⁵⁰.

Some Member States also provide for the hearing of the relatives of the vulnerable adult (**Bulgaria, Estonia**), or in the presence of a medical specialist as in **Poland** or **Luxembourg**.

Lastly, in **Luxembourg, Portugal, Romania** and **Slovenia**, the law also explicitly provides for the possibility for the adult to be heard at his or her place of residence.

⁴⁷ CZ, DE, LU, LT, and SK.

⁴⁸ As it is the case in CY, HR, DK, ES and FI.

⁴⁹ As in is the case in SK, FR, CZ, ES, FI and LU.

⁵⁰ As it is the case in FR.

Representation by a lawyer and legal aid

Mandatory representation by a lawyer in procedures that relate to vulnerable adults is only provided in ten Member States⁵¹.

In **the Czech Republic**, **mandatory representation by a lawyer** is only provided for some cases. In **Slovenia**, national law provides for a mandatory representation by a lawyer but only in cases of special security measures, such as compulsory detention and treatment in certain (medical) institutions.

In **Luxembourg**, although representation by a lawyer is not mandatory in the procedures that regard vulnerable adults, it is mandatory in case of an appeal of the judgment opening the protective regime.

In **Sweden**, if needed, the vulnerable adult may be assisted by a person in the court proceedings, but this person does not need to be a lawyer.

All Member States provide for the **right to legal aid** for persons that are unable to afford legal representation in the procedures that relate to vulnerable adults. As indicated in the results of a comparison of Member States' national schemes on legal aid on the European e-justice Portal, there are fundamental differences in the legal aid systems. In some Member States, the main purpose is to make legal services and access to justice generally available. In others, legal aid is limited to the very poorest. The nature, scope and conditions vary from one Member State to another⁵².

Opposability of the decision

The conditions and requirements for the opposability of a decision of protective measure vary between the Member States.

The question of the opposability of a decision creating a protective measure regards the civil law concept of opposability towards third persons. Namely, the question is whether a legal action (contract, court-decision) agreed between parties or imposed on parties would also have legal effect for third persons, who were not a party to the contract or the court proceedings. Regarding vulnerable adults, they may have legal interactions with third persons when protected under a specific measure, i.e., as they are fully or partially incapacitated, and these persons need to be aware of the measure.

Opposability may, for instance, require publication and/or the registration of the decision creating a protective measure to become opposable towards third persons. The following Member States do not require the publication or registration of the decision to become opposable toward third parties: **Finland, Hungary, the Netherlands, Sweden, and Slovenia**. The other Member States provide for the publication and/or the registration of the decision on protective measures. This allows persons that were not part of the proceedings to become aware of the measure protecting a person.

A certain period of time is also sometimes required for the decision to be opposable. For instance, in **Luxembourg**, for the guardianship regime, national law provides that 'judgments opening, modifying or terminating guardianship may not be invoked against third parties until two months after they have been entered in a file in the name of the protected person'⁵³. However, even in the absence of this entry, they may be invoked against third parties who have personal knowledge of them. Also, in **France**, judgments on family empowerment, curatorship, and guardianship only become opposable towards third parties two months after the mention of the measure in the Civil Registry (more

⁵¹ HR, CZ, DK, EL, HR, HU, IT, LT, PL, PT and RO.

⁵² [European e-Justice Portal - Legal aid \(europa.eu\)](https://e-justice.europa.eu)

⁵³ Art. 493-2 of the Civil Code.

specifically, in the birth certificate of the protected person).

Conditions for review

In all Member States, it is possible to modify protective measures in the course of their application. The competent authority to decide on any modifications of the protective measure is usually the same as the one that was competent for creating such a measure (i.e., the competent court or administrative authority).

In the different Member States, the most common modifications that can be made are the following:

- appointment of a new representative;
- extension or limitation of the scope of the appointed representative;
- extension of the term of office of the representative;
- modification of the categories of affairs covered by the limitation in case of partial limitation to act;
- extension or limitation of the vulnerable adult's legal capacity; and
- restoration of the vulnerable adult's legal capacity.

Some Member States provide for an automatic periodic review of the measures of protection of vulnerable adults.

- In **Spain**, national law provides that support measures adopted judicially shall be reviewed periodically within a maximum period of three years.
- In **Croatia**, it is provided that every three years, the Welfare Centre (the competent authority for creating protective measures) is obliged to review the need for guardianship protection of the vulnerable adults and to compile a report on that.
- In **Hungary**, national provisions order for a statutory review of the placement of a vulnerable adult under guardianship. In the judgment ordering, maintaining or modifying the limitation of capacity to act, the court shall specify the date of launching the statutory review of the placement under guardianship.
- Finally, in **Malta**, for matters relating to guardianship, where the competent authority makes an order for appointing a guardian, it shall also order that a hearing for a review of the order shall be held within a specified period (but not longer than two years).

On the contrary, some Member States do not provide for an automatic review of the measures:

- The **Bulgarian** legislation does not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remain valid.
- The same applies in **Denmark** where there are no requirements for continuous reassessments of guardianship cases to ensure that it is still required to maintain one specific guardianship.
- Lastly, in **Ireland**, there is no systematic requirement for periodic review of the measure and circumstances.

Modifications may be requested by the person protected, his or her representative, the public prosecutor, or any interested party. Modifications may also be initiated by the competent authorities themselves, such as the competent court. For instance, in **Greece**, regarding judicial support, the court may modify the type and extent of the measure of its own motion. The same applies in **Finland** where the competent authority shall on its own initiative review the guardianship during the next three months of its issuance and in **Malta** where the review of the measure shall be made by the Guardianship Board (the competent authority) of its own motion.

In **Belgium**, a modification of the measure may require taking the opinion of relatives of the protected person and in **France**, with regard to curatorship and guardianship, the judge needs to obtain the opinion of the person in charge of the protective measure.

Rules regarding whether registration and/or publication is required for opposability are generally the same as for the opposability of the decision creating the measure.

End of a protection measure

Apart from the death of the protected person, Member States' national legislations provide for several grounds for the termination of protective measures. This includes, for instance: the death of the representative of the protected person; when specific duration of the measure was set and it has expired; when the conditions for the protective measure are no longer met (e.g., the protected adult recovered his or her capacities); when the evolution of the adult justified it (e.g., his or her mental health has improved), or by the placement under another measure.

The table below highlights the main grounds provided by national legislation regarding the termination of protective measures applicable to vulnerable adults. This table does not provide an exhaustive overview but rather focuses on the most common grounds for ending a protective measure in the 27 Member States.

Table 12: Main legal grounds for the termination of a protective measure

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
With the death of the representative	X																										
When the set duration of the protective measures has expired		X								X		X									X						
When the conditions are no longer met (including recovery of faculties)			X			X	X	X	X	X		X	X	X	X		X	X			X	X	X	X		X	X
When the evolution of the conditions of the adult justifies it																							X				
By the placement under another measure												X						X			X						
Grounds are not specified by law						X													X						X		

Apart from these grounds, specific grounds are sometimes provided, depending on the type of measure for which termination is requested.

In all Member States, the authority that decided on the creation of the protective measure is the one competent to decide on its termination (e.g., the competent court, a specific agency or authority).

Usually, as is the case in **Greece, France, Hungary, Italy, Malta, Poland, Portugal, Romania, and Slovenia**, the termination of the measure is requested by specific persons (e.g., the spouse, other relatives).

Possibility of appeal

In all Member States, appeals are open against the decisions of judicial or administrative authority creating a protective regime or deciding on the entry into force of a protective measure. In many Member States⁵⁴, national rules governing appeals are provided by **general provisions regarding appeals in civil proceedings**. In other Member States⁵⁵, the law provides for **specific rules** applicable to appeals brought against decisions regarding the protection of vulnerable adults. These specific provisions usually deal with the authority competent for the appeal, the time limit for lodging an appeal, and the person who can appeal.

In some Member States⁵⁶ - where the decision on protective measure was issued by a court - the request for an appeal must be filed with the **first instance court**. For instance, in **Austria**, appeals are filed with the court of the first instance (but the decision on the merit is rendered by the court of the second instance). The same applies to **Slovakia** where appeals shall be lodged in the court which issued the decision (i.e., the district court which issued the judgment in first instance).

In the other Member States, the authority competent for receiving appeals against decisions on the creation or the entry into force of a protective measure is a higher court than the court that issued the decision creating a protective measure or regarding its entry into force. This is usually the "court of appeal" or another, higher, court as it is the case in **Slovenia** where appeals against the decision of the local court (*okrajno sodišče*) having placed the person under guardianship are decided by the higher courts (*višje sodišče*) with territorial jurisdiction.

Furthermore, the rules regarding the appeal against decisions creating a protective measure or the entry into force of a measure also **depend on the type of measure**. For instance, in **Bulgaria**, there are specific rules regarding the decisions by the mayor, as the guardianship and trusteeship body and any refusal by the mayor to appoint a guardian/trustee or to take other steps provided for in the national Family Code may be challenged by interested parties or the public prosecutor before the district court, which gives a final decision on the merits. In France, decisions regarding guardianship or curatorship can be challenged before the Court of Appeal but no appeal is open against a decision ordering a safeguard of justice, except in respect of the appointment of the representative.

In some Member States, the appeal is **open only to specific persons**. For instance, in **Luxembourg**, only a limited number of persons can challenge the decision to open a guardianship or the decision to refuse to release it. The protected person's spouse, his/her ascendants, and descendants, his/her siblings, the curator, the prosecution, the other family members, allies, and friends, even if they were not party to the procedure, can

⁵⁴ AT, BE, BG, CY, DE, HU, IE, IT, LU, LT, LV, MT, PL, PT, RO, SE, SI, and SK.

⁵⁵ DK, EE, EL, ES, FI, FR, and HR.

⁵⁶ AT, BE, and SK.

appeal the opening judgment (Article 493) and judgments refusing to end the protective regime (Article 507 of the Civil Code). In **France**, it depends on the decision that is challenged. Appeals against the decision refusing to order a protective measure of the vulnerable adult are only open to the applicant while appeals against the decision to open a protective measure may also be brought by other people who have been informed of the decision (e.g., spouse, parents, relatives, friends) (Article 1239 CC). In **Greece** and **Denmark**, national rules provide that the appeal is limited to the persons who were involved in the proceedings.

With regard to the appeal against decisions deciding or approving the modification to or termination of a protective measure, it appears that in almost all Member States⁵⁷, the same rules regarding the appeal (as described above) apply to these decisions.

Key findings:

- Member States provide for a wide range of protective measures taken by judicial and administrative authorities.
- Although some important trends are common between national measures of protection of vulnerable adults, there are quite some differences. Indeed, even between Member States that provide for the same type of measures, e.g., guardianship, there are differences with regard to the introduction of the proceedings (e.g., the person that can initiate the proceedings, the competent authorities for taking the measure, the persons that can be appointed as a representative), the hearing of the adult (in some Member States, it is mandatory, in some it is not), the opposability of the decisions (not all Member States provide for registration/publication requirements, some provide for a specific timing, some do not), the conditions for review (although there are common grounds, conditions for review are quite different, e.g., the timing for reviewing the measure, the person that can request a review), the end of the protective measure (there are different grounds and proceedings); and finally the possibility of appeal (e.g., competent authorities, person that can appeal the decision).
- In most of the Member States, courts are the competent authorities for creating such protective measures. Only a limited number of Member States have a specific administrative authority in charge of adopting measures of protection for vulnerable adults.

2.2.2 Private mandate

2.2.2.1 Nature and scope of private mandate

The protection of vulnerable adults often involves the conferral of particular powers on a natural person, or an institution, charged with representing and/or assisting the adult concerned as regards certain decisions. Under the law of some States, the above powers may be granted by the adult concerned, at a time when they are in a position to protect their

⁵⁷ The exceptions are:

- Greece, which provides for specific rules regarding privative or subsidiary judicial support. All the persons that took part in the procedure, according to the legislation, have the right to appeal against the decision that modifies the type and extent of the judicial support. However, in the cases when the procedure can be initiated only after the request of the person concerned and this request has been rejected, only the person concerned has the right to appeal. The judicial support also has the right to appeal, in his or her name or in the name of the person concerned, against the decisions concerning the scope of his or her competence. Regarding voluntary hospitalisation, a judgment can be appealed according to the provisions of the Code of Civil Proceedings. Note that the appeal may also be brought by the scientific director of the Mental Health Unit where the patient is being treated.
- Luxembourg, where the national rules on protected regimes for adults do not address the issue of decisions modifying the protective measure. However, national rules dealing with guardianship of minors but applicable to persons of full age, set up the general principle that “in all matters, persons to whom the decision of the guardianship judge must be notified may, within a period of forty days, appeal to the Court of Appeal, Civil Division”.

interests. In this report, the **terms 'powers of representation' or 'private mandate'** are used to refer to such powers that may be granted by an adult, under a contract, or a unilateral act, to be exercised when the grantor is not in a position to act in their interests.

Private mandates need to be distinguished from **advanced directives**. An advanced directive or 'living will', is an instruction given by a person, when they still have full capacity, providing guidelines in case the person will become unable to devise or express his or her preferences. Such directives may relate to **healthcare and end-of-life decisions**⁵⁸. It may be that an adult grants a private mandate and also issues advanced directives. Only private mandates are covered in the following analysis⁵⁹.

Nature of private mandates

National law provides for the possibility for vulnerable adults to set up their future protection via private mandates in 16 Member States: **Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Lithuania, Malta, Portugal, Romania, Spain, and Sweden**, as presented in Table 13 below.

Table 13: Overview of private mandates provided in national law

MS	Comments
AT	In the ABGB (Civil Code), §§ 260-263 set out the possibility for a precautionary power ("Vorsorgevollmacht"). § 264 sets out that insofar as a person of full age cannot take care of his/her own affairs due to mental illness or a comparable impairment of his/her decision-making capacity, and does not have a representative for this purpose and can no longer establish a precautionary power of representation, but is still capable of understanding the basic meaning and consequences of a power of attorney, of determining his/her will accordingly and of acting accordingly, he/she may select one or more persons close to him/her as adult representatives to take care of these affairs.
BE	The Civil Code provides in Article 490 and following the possibility of a private mandate or "care mandate". This is a specific form of the power of attorney (<i>Lastgeving - mandate</i>) as governed by the rules of Articles 1984 to 2010 of the Civil Code ⁶⁰ . In addition to the private mandate <i>stricto sensu</i> , Article 496 of the Civil Code provides the possibility to make a unilateral declaration of preference for the future case in which one will become incapacitated. This allows designating a person to be appointed as curator, and to stipulate the principles that the curator must observe in the performance of their duties.
CZ	Section 38 of the Civil Code enables a person who anticipates a future lack of legal capacity to make a preliminary declaration by which they express their will regarding the management of their interests or designating a guardian.
DE	According to Section 1896(2), sentence 2 of the German Civil Code (BGB), the appointment of a custodian is unnecessary despite the existence of the medical requirements if the affairs of the person concerned can be handled just as well by a private mandate. The private mandate in the context of vulnerable persons is a mandate as every other mandate under the German Civil Code regulated in Sections 662 ssq. BGB.

⁵⁸ Please note that in the Netherlands, the private mandate is called "living will" (*levenstestament*). Despite the terminology, the "living will" is not a last will, nor is it an advanced directive. Rather, the "living will" is a contractual construction or future decision concerning assets and other financial, personal or healthcare interests. It therefore, corresponds more with the concept of private mandate than with the concept of advanced directives.

⁵⁹ This limitation in scope was chosen to enhance the level of comparability across Member States. There are different understandings of the concept of 'powers of representation' and what it should entail. Whilst this report does not cover advanced directives, these are considered covered under Article 15 of the Convention by the 2017 Explanatory Report, paragraph 96 which provides that 'The powers thus conferred may be very varied. They have to do with the management of the adult's property as well as his or her personal care. One often finds in them the instruction given to the person mandated to refuse any persistent course of treatment in the event of incurable illness'.

⁶⁰ Article 490/, § 2 of the Civil Code.

MS	Comments
DK	Private mandates are provided for in Law 618 of 8 June 2016 - <i>Lov om fremtidsfuldmagter</i> (Law on future mandate) and Order 1018 of 23 August 2017 - <i>Bekendtgørelse om fremtidsfuldmagter</i> (Executive Order on future mandate). A future mandate gives a person over the age of 18 the opportunity to appoint one or more representatives to take care of their financial and personal affairs if the person at some point is unable to do so on their own, due to illness, impaired mental function or the like.
ES	Preventive measures are provided for in Articles 250 and 254 -262 Civil Code. They are established for the present or a future situation in anticipation of future disability. Among these preventive measures the most important are the preventive powers (<i>poder o mandato preventive</i>) (Articles 256- 262 Civil Code). These preventive powers can be included in an ordinary power of attorney with a clause stating that the power of attorney shall continue, when in the future the grantor needs support for the exercise of their capacity. The adult may also grant a specific power of attorney, for the specific case they would need support in the exercise of their capacity in the future. The power of attorney can include provisions for determining if the need for support has arisen at which point it shall take effect.
FI	The Act on the Continuing Power of Attorney provides the possibility for a person (the grantor) to issue a private mandate to another person. This may only be done before the grantor has become incompetent due to illness or other reasons.
FR	Articles 477 to 495 of the Civil Code and Articles 1258 to 1260 of the Code of Civil Procedure as amended by Decree No. 2019-966 of 18 September 2019 provide for a private mandate, the <i>mandat de protection future</i> .
HR	Any person who has not been deprived of legal capacity may appear before a notary to propose the trusted person they wish to be appointed by the welfare centre as their guardian or special guardian in case of their future loss of capacity (Article 241 of the Family Act).
HU	Articles 2:39-41 of the Civil Code foresee the possibility to make arrangements concerning the future limitation of the capacity to act.
IE	An adult with the requisite capacity can plan for possible future loss of capacity by executing an enduring power of attorney under the Powers of Attorney Act 1996.
LT	Pursuant to Article 2.137 ¹ .1 of the Civil Code, any person with sufficient capacity to act may appear before a notary to propose for the future the person whom they wish to be appointed by the judge as their legal representative when they are in a situation of incapacity and guardianship, and to establish the measures or criteria to be taken into account with regard to their person or property.
MT	Title XVIII 'Of Mandate', Sub-title I on 'Of the nature and form of mandate', Article 1864A of the Civil Code provides the possibility for a person of full age to give a mandate to a representative in anticipation of one's incapacity.
PT	Article 156 of the Civil Code sets out the rules for private mandates for the management of the interests of an adult person. Such mandates are subject to the general rules for mandates and must specify the rights involved and the scope of any representation, as well as any other elements or conditions of exercise, being freely revocable by the grantor.
RO	According to Article 166 of the Civil Code, any person who has full capacity may designate, by unilateral act or mandate contract, concluded in authentic form, the person to be appointed guardian to take care of them and their property in the event they are placed under judicial interdiction. Article 180 paragraph 2 refers under the same conditions to the designation of a curator.
SE	In Sweden, a person can draw up a future power of attorney (<i>framtidensfullmakt</i>), which may cover financial and personal aspects.

This table lists the Member States in which private mandates are provided for by law in case of incapacity, even though, in a few cases (Germany, Malta, Portugal), the rules are assimilated to the rules on private mandates in general. Also in **the Netherlands**, the Civil Code provides as *lex generalis*, the possibility to establish powers of representation by private mandate; but Dutch law does not recognise a specific lasting power of attorney for

specific situations involving loss of legal capacity and vulnerable adults. However, for future decisions concerning assets and other financial, personal or healthcare interests in Dutch **legal practice**, the notaries have developed the so-called 'living will' (*het levenstestament*). Despite the terminology, the "living will" is not a last will, nor an advanced directive. Rather, the "living will" is a contractual construction based on the mandate of the Civil Code. The corresponding characteristics are presented in this section as well. Under **Polish** law as well, the only legal solution that can be used as a private mandate is a general "power of attorney", which is not designed specifically to protect the interests of vulnerable adults, but can be used to that end. However, there are no regulations stating that this type of lasting power of attorney would become effective only after the principal loses actual decision-making powers, and that, if granted, the procedure for appointing a legal assistant would be implemented, though there seems to be no obstacle to include the suspensive clause in the power of attorney, stipulating that it can be performed only after the loss of legal capacity by the principal. The Polish system is also reflected in this section.

Bulgaria, Cyprus, Estonia, Greece, Italy⁶¹, Latvia⁶², Luxembourg, Slovakia and Slovenia⁶³ do not have private mandates.

Scope of private mandates

The scope of the private mandate varies across Member States. In certain cases, the types of decision(s) regarding the assets and/or regarding the personal aspects that can be covered are defined limitedly, and certain acts or categories of acts are excluded, such as disposal of specified categories of assets, gifts, personal and family matters, medical-related decisions.

In **Austria⁶⁴, Hungary and Portugal**, the content of the mandate is not defined by law, but is to be freely determined in the mandate. The scope is also very broad in **Belgium, Denmark, Germany, Spain, Finland, France, Malta, and the Netherlands**, where nearly all acts regarding assets and personal aspects can be part of the mandate. In **Ireland**, the vulnerable adult may decide freely which specific competences will be granted to the representative, within the material scope provided by the law. In **Romania** as well, the content of the mandate for a curator or a tutor may only correspond to their role as defined by law, i.e., the adult concerned may not eliminate by their unilateral act or by a mandate contract any of the powers granted to the tutor by law, and a private mandate granted to a curator may only cover property and (material) interests.

In the **Czech Republic**, the content of the preliminary declaration is defined limitedly. It may encompass how assets are to be managed (such as selling or rental, placement of the vulnerable adult in a specific social services institution or a wish not to be placed in a specific institution), that certain matters are managed by a specific person other than a

⁶¹ However, it should be noted that in their answer to the survey conducted within the framework on this study, national authorities indicated having a private mandate. The mandate they presented however corresponds to advanced directives. As previously explained, advanced directives are not assimilated to private mandates in the context of this study.

⁶² However, it should be noted that in their answer to the survey conducted within the framework on this study, national authorities indicated that a private mandate was provided for by Latvian law. In the follow-up interview, it was clarified that reference was made to private mandate as *lex generalis*, and not to the future power of representation.

⁶³ However, it should be noted that in their answer to the survey within the framework on this study, the national authorities indicated that private mandates are provided for by national law and the national authorities quoted relevant provisions of the Patient's Rights Act in this regard. Slovenian law does not regulate the possibilities of anticipating a future loss of capacity. That means that it is not possible to suggest a trusted person to be appointed as a guardian in case of future incapacity. Based on the information available (e.g. <http://www.the-vulnerable.eu/Questions.aspx?c=si>), the national expert therefore concluded that private mandates do not exist, and that the Patient's Rights Act provides for advanced decisions in case of medical treatment.

⁶⁴ For the precautionary power.

guardian, appointment of an asset manager, etc. and a wish that a certain person becomes his guardian. In **Lithuania**, besides wishes regarding the future place of residence (care institution), the mandate may mainly cover the identification of a guardian or curator (or who may not be designated as such) and of the person who would resolve issues in the implementation of acts related to their property or person. Also in **France**, the future protection mandate can be the basis for the grantor's designation of his or her trusted person, who may be different from the proxy. The designation of the future guardian is the sole purpose of the power of attorney in **Croatia**, of § 264 in **Austria**, and of the declaration of preference in **Belgium**, where the individual may only designate a potential guardian/special guardian but cannot specify the measures or criteria to be taken into account with regard to their own person or their property.

In a few countries, a specific and explicit mandate in the contract is required for the proxy to perform specific legal actions (e.g., concluding or amending marriage contracts or cohabitation contracts and making donations in **Belgium**, medical treatment, custodial accommodation, legal representation in Germany, legal representation in **Austria**). In **Denmark** and **Finland**, the holder may not donate or give gifts unless this has been specified in the power of attorney.

In **Belgium, Denmark, Finland, the Netherlands and Germany**, highly personal decisions cannot be covered by the private mandate (e.g. marriage related acts, testaments, decisions regarding the status of the parent, decisions in the medical sphere, right to vote).

In **Denmark** and **Finland**, the holder of the power of attorney may not represent the adult concerned in legal transactions where he or she would be biased.

In **France**, the content of the mandate depends on its form. Where the mandate is established under private signature, the management of the assets of the protected person shall be limited to administrative acts, excluding acts of disposal; whereas the mandate in the form of a notarial deed may allow the representative to make specific acts of disposal of the assets of the protected person. In **Poland** also, different types of mandates (general, generic or specific) correspond to a more or less broad scope of measures that can be adopted by the proxy.

Persons designated by the mandate

The persons that may be designated as proxy are more or less loosely in national law. Table 14 below provides an indication of the manner in which the regulatory frameworks of the Member States determine who can act as a proxy.

Table 14: Persons designated as proxy

MS	Type of mandate	Persons designated
AT	Precautionary power	No specific requirements/restrictions in the law
	§ 264	• close relatives • other close persons
BE	Private mandate / Declaration of preference	Exclusion of: • persons who themselves are subject of a judicial or extrajudicial protection measure • legal persons with the exception of private foundations which exclusively serve the protected person or which have been established for the administration of protected person • the board members or staff members of the institution where the protected person resides

MS	Type of mandate	Persons designated
		persons who have been completely deprived of parental authority⁶⁵.
CZ	Preliminary declaration	Exclusion of: - persons who do not have legal capacity to act - persons whose interests are contrary to the interests of the agent - an operator of a facility where the ward stays or a person dependent on such facility
DE	Private mandate	No specific requirements/restrictions in the law ⁶⁶
DK	Private mandate	Any person who is capable, i.e.: - aged not less than 18 - not under guardianship or under a future mandate as a grantor himself/herself which is in force.
ES	Preventive measures	No specific requirements/restrictions in the law
FI	Private mandate	Any natural person who is capable (legal persons are excluded)
FR	Mandate of future protection	The representative may be: - a natural person (family member, relative, professional, etc.) or, - one of the legal persons included in the list of legal agents for the protection of adults (this list can be consulted at the "prefecture" or at the court). Exclusion of: - adults who benefit from a legal protective measure - persons who have been prohibited from exercising pursuant to the Criminal Code - members of the medical and pharmacy professions, as well as medical auxiliaries, as representatives of their patients under curatorship or guardianship.
HR	Anticipated order	Any individual who meets the requirements prescribed for a guardian in the Family Act, and have full legal capacity. Exclusion of persons who: - have been deprived of custody rights; - have been deprived of legal capacity, - have a conflict of interest with the adult; - given their behaviour and characteristics and their relationship with the adult, cannot be expected to properly perform the duties of a guardian; - have previously entered into a lifetime caregiver agreement with the adult.
HU	Prior statement	No specific requirements in the law, but the court, in its decision on placing the person under guardianship and limiting his/her capacity to act, shall neglect the statement if: a) complying with the statement is explicitly contrary to the interests of the adult, or b) there are grounds specified in law for the exclusion of the person proposed.

⁶⁵ Article 490/1 j° 496/6 of the Civil Code.

⁶⁶ The empowerment of certain persons, however, may require the appointment of an additional custodian. This is the case, for example, when the spouses have given each other power of attorney and have become too old in the meantime to represent each other

MS	Type of mandate	Persons designated
IE	Enduring power of attorney	Any person who is 18 or older and who is: - not bankrupt, - not disqualified under company law, - not convicted of a relevant offence, and - not the owner or employee in a nursing home where the donor resides (unless they happen to be a close relative of the donor).
LT	Private mandate	No specific requirements/restrictions in the law
MT	Mandate	No specific requirements/restrictions in the law
NL	Living will	No specific requirements/restrictions in the law
PL	General power of attorney	The representative must have at least limited legal capacity.
PT	Private mandate	No specific requirements/restrictions in the law
RO	Mandate (guardian or curator)	Any capable person
SE	Future power of attorney	No specific requirements/restrictions in the law

In Austria (for the precautionary power), Germany, Spain, Lithuania, Malta, the Netherlands, Portugal and Sweden, there are **no conditions** set by law as to who can be designated as proxy. The conditions are very limited, requiring only legal capacity in Denmark and Romania. A number of exclusions are listed in Belgium, the Czech Republic, France, Croatia and Ireland. Such exclusions include situations resulting in a lack of capacity and conflicts of interest.

2.2.2.2 Procedural rules

Establishment of the mandate

The mandate is established following various formal requirements depending on the Member States. Entry into force then occurs also upon fulfilment of conditions that differ from a Member State to another. Table 15 below provides a summary of the conditions to set up the mandate in the 27 Member States.

Table 15: Formal requirements and entry into force of private mandates

MS	Type of mandate	Formal requirements	Entry into force
AT	Precautionary power	- unilateral act - in writing, before a notary, lawyer or adult protection association	registration in the Austrian Central Register of Representatives (ÖZVV)
	§ 264 mandate	- contract - in person and in writing before a notary, lawyer or adult protection association - the representative shall be personally instructed on the nature and consequences of the private mandate.	registration in the Austrian Central Register of Representatives (ÖZVV)

MS	Type of mandate	Formal requirements	Entry into force
BE	Private mandate	- contract - in writing, an authentic deed is not required, except if it applies to immovable assets - registration in the registry kept by the Royal Federation of the Belgian Notaries	according to the conditions set up in the contract
	Declaration of preference	- unilateral act (but with agreement of the representative) - in writing before a notary or the registrar to the judge of the peace registration in the registry of the Royal Federation of Belgian notaries.	with the imposition of judicial protection measures by the judge, upon agreement of the designated proxy and of the judge
CZ	Preliminary declaration	- unilateral act - public document drafted by the notary, or private document, made in a written form, dated and confirmed by two witnesses.	declaratory, but taken into consideration upon decision on incapacity issued by Court.
DE	Private mandate	- contract - no formal requirements, except if it covers highly sensitive issues, in which case it must be made in writing, and for certain real estate transactions, requiring a notarial deed.	according to the conditions set up in the contract
DK	Private mandate	- unilateral act - in writing, before a notary (who must make a declaration), - included in the 'Future Mandate Register'	by submitting a request to the Agency of Family Law, together with a medical certificate and the payment of a fee.
ES	power of attorney (<i>poder preventivo</i>)	- either by contract or by unilateral act - must be made in a notarial deed	- according to the conditions set up in the power of attorney - if necessary, with a notarial deed including the notary's assessment of the situation and an expert report.
FI	Private mandate	- unilateral act (handed over to the representative) private document, made in a written form, dated and confirmed by two witnesses	upon confirmation by the competent authority after submission of a medical statement or other reliable document
FR	Mandate of future protection	- contract - protected person shall choose whether the mandate takes the form of a notarial deed as an authentic deed or a private deed	upon presentation by the proxy of the private mandate and medical certificate to the court clerk's office for endorsement by the clerk.

MS	Type of mandate	Formal requirements	Entry into force
HR	Anticipated order	• unilateral act • notarial deed	• binding upon the Welfare Centre when appointing the guardian.
HU	Act concerning the future limitation of the capacity to act	• unilateral act • public deed before a notary, private deed countersigned by an attorney-at-law, or presentation before the guardianship authority	• binding upon the Court when deciding on placement under guardianship • due account to be taken by the guardianship authority when appointing the guardian
IE	Enduring power of attorney	• contract • in writing, signed by the principal, their representative, and two witnesses • registration in registry of enduring power of attorneys	• registration to Court upon application of the proxy and test for incapacity
LT	Private mandate	• unilateral act (but with agreement of the representative) • notarial deed as an authentic form • registration in notarial registry and Registry of Legally Incapable Persons and Persons with Limited Legal Capacity	• upon Court decision on incapacity
MT	Mandate	• unilateral act • notarial deed (with 2 witnesses and medical declaration) • registration in the Public Registry of Malta	• approval from the Court of Voluntary Jurisdiction upon application of the proxy when incapacity occur
NL	Living will	• unilateral act • no legal requirement but in practice, notarial deed	• according to the conditions set up in the act
PL	General power of attorney	• unilateral act • in writing, notarial deed depending on the content	• declaration of will by the principal
PT	Private mandate	• contract • form depending on the rights involved and the scope of representation	• accompaniment declared by Court taking into account the conditions of the mandate
RO	Mandate (guardian or curator)	• either by contract or by unilateral act • authentic deed before the notary • registration in the mandate registry of the public notaries	• confirmed by the Court when deciding on the protective measure • the principal is not entitled to set conditions for entry into force in the mandate
SE	Future power of attorney	• unilateral act • in writing, signed by the principal and two witnesses	• determined by the proxy unless the mandate provides that entry into force shall be determined by a court • the proxy holder can also apply to a court to

MS	Type of mandate	Formal requirements	Entry into force
			determine whether the mandate shall enter into force. In such case, the Court must obtain a medical certificate or equivalent document, unless clearly unnecessary.

In the majority of cases (12), the mandate is a **unilateral act**; it is a **contract** for six of the mechanisms presented, and may be one or the other in two cases (power of attorney in Spain and mandate in Romania).

There is no clear trend in relation to the **form** of the mandate. It has to be **notarised** in ten of the mechanisms presented⁶⁷, and can only be a **private** instrument in three cases (mandate in Finland, enduring power of attorney in Ireland, future power of attorney in Sweden). It can be either a private or an authentic instrument, depending on the choice of the protected person in the Czech, French and Hungarian systems. In Hungary, the act can also be presented before the guardianship authority. Finally, in several Member States, the form of the mandate will depend on its content. In **Poland, Portugal, Germany and Belgium** if a specific form is required for the validity of a legal action (e.g. notarial deed required for actions regarding immovable assets), the power of attorney to perform this action should be granted in the same form.

In terms of **entry into force** of the mandate, different situations can be observed:

- In several Member States, the conditions of entry into force are set up **directly in the mandate** (Belgium, Germany, Spain, the Netherlands, and Sweden in some cases). This occurs mainly when the mandate is a contract. In Poland, entry into force occurs with a declaration of will of the principal. In Romania on the other hand, it is expressly excluded that the mandate includes the conditions of its entry into force.
- **Registration** to the authorities determines entry into force in Austria. In Spain, if necessary, a notarial deed may be needed.
- **Confirmation** by the judge or authority when adopting the protective measure. The mandate must be **formally endorsed** or confirmed by the Court in a few cases: for the declaration of preference in Belgium, and for the private mandate in Finland and Romania. In Sweden, where the mandate is a unilateral act, the proxy may also seek the approval of the Court. Similarly, the **proxy has to trigger** the entry into force in Denmark, France, Ireland, and Malta, by sending a request (and medical certificate) to the competent authority. In addition, in a number of Member States, the judge will follow the conditions of the mandate when taking a decision (Croatia, Hungary, Lithuania). The mandate is not binding upon the Court in the Czech Republic, in Portugal, or for the appointment of the guardian in Croatia.

Opposability of the mandate

Registration, which is done by the notary, the judicial authorities, or other competent authority, is required for opposability to third parties in Austria, Belgium (private mandate),

⁶⁷ Precautionary power and Art. 264 mandate in Austria, declaration of preference in Belgium, private mandate in Denmark, power of attorney in Spain, anticipated order in Croatia, private mandate in Lithuania, mandate in Malta, living will in the Netherlands mandate in Romania.

Croatia, Denmark, Spain, France⁶⁸, Hungary and Lithuania. In Finland, the mandate is registered in the registry of guardianship affairs, but since it does not in itself limit the competence of the adult concerned, it does not require being opposable to third parties. Similarly, as it is assimilated to a contract, the living will is not opposable to third parties in the Netherlands, and registration, which is possible, does not affect opposability.

Publication is not required for opposability in any of the Member States. In fact, access to the information is often restricted to specific persons.

In Ireland, the enduring power of attorney needs to be **notified** to the listed number of the donor's relatives, and up to three other persons may be specified in the enduring power of attorney. In Portugal, the mandate becomes opposable when the accompaniment measure is **declared** by the Court. The same logic applies for Romania, whereby, though registration of the mandate is required, opposability occurs once the protective measure is adopted by the Court.

Conditions of modifications of the mandate

In **Germany**, the vulnerable person, as long as he or she has legal capacity, can modify the mandate at any time without any formal requirements. It is the same in **Spain**, where the person who set up the power of attorney may subsequently amend the power of attorney, with or without formal or informal support, and in **the Netherlands**, where the living will, as a private act, can be modified at will by the parties. Also in **Poland**, modification of the power of attorney is the unilateral act, based on the principal's declaration of will, which does not require specific formalities.

In **Belgium**, the proxy or principal who wishes to modify the mandate shall notify the judge or the notary who drafted the mandate; an authentic form will be required under the same conditions as the establishment of the mandate. The modifications need to be registered the same way the mandate was adopted. Along the same lines, in **Denmark and Sweden**, the person who established the mandate may modify (or revoke) it following the same procedure as for establishment.

In **the Czech Republic**, it is for the Court to amend (or cancel) the declaration if the circumstances change in such a substantial way that, under the new circumstances, the declarant would not have made the declaration or would have made a declaration with different contents, and is under threat of serious harm. Similarly, in **Hungary**, the Court may decide not to apply the mandate if the circumstances have changed in such a way that the implementation of the provisions of the mandate would be contrary to the interests of the individual under custodianship. It is also for the Court to modify the mandate in **Malta**. In **Croatia**, the Welfare Centre may appoint a new guardian if the guardian appointed by mandate needs to be replaced (dismissal or death of the guardian).

In **France and Lithuania**, the situation varies depending on whether or not the mandate has entered into force. Before the private mandate enters into force, it can be modified by the principal in the same form as its establishment. When the private mandate has already entered into force, its modification requires the intervention of a judge in France, and the mandate cannot be modified anymore in Lithuania.

Conditions to end the mandate

The circumstances under which the mandate may end are summarised in Table 16 below.

⁶⁸ Note that this decree has not yet been published as the special registry has not been created. This information has been confirmed by the national authorities.

Table 16: Conditions to end the mandate

	AT	BE	CZ	DE	DK	ES	FI	FR	HR	HU	IE	LT	MT	NL	PL	PT	RO	SE
With the death of the protected person/its representative	X	X	X		X	X	X	X	X	X	X	X	X	X	X ⁶⁹	X	X	X
When the designated person is not in a position to act as proxy anymore	X	X		X	X		X	X			X			X			X	
When the conditions are no longer met (including recovery of faculties)		X		X	X	X		X	X	X	X	X	X	X	X	X	X	
In case of substantial change in the situation			X															
When the proxy does not act in the interest of the protected person	X	X	X					X	X		X							X
By the placement under another measure		X			X		X	X			X			X				X

In terms of **procedure** to end the mandate, in most Member States, the procedure to end the mandate is similar to the procedure to establish it when **upon initiative of the represented person** while still capable. Revocation or termination can take place with a notification to the authorities who confirmed the mandate, and needs to be **registered** in the national registry in Austria, Belgium, Denmark, Hungary and Malta. It needs to be **confirmed** by the competent authority in Finland and Sweden. In the Czech Republic, in addition to a notarial deed, the represented person may **destroy** the act. Revocation may also take place **upon initiative of the designated person** who does not wish to be proxy anymore in Austria, Belgium, Germany, Denmark, Finland and Spain.

The act may be terminated upon a **Court decision** in Austria, Belgium, Croatia, the Czech Republic, Ireland, Malta, the Netherlands (in contentious cases) and Romania. There are no requirements for a revocation while the person is still capable in Germany, Spain, Portugal, and Romania, but a Court decision is necessary in other cases.

⁶⁹ However, Article 101 (2) CC allows for stipulating that (due to the reasons justified by the content of the legal relationship, which is the basis for the power of attorney) the power of attorney will remain in force even after the death of the principal. An exclusion of the effect of the termination of the power of attorney in the event of the death of the principal has to be made expressly in the content of the power of attorney.

Key findings:

- The nature of private mandates varies across Member States. They may be specifically regulated to address the situation of vulnerable adults, be regulated as general mandates (Germany, Malta), or regulated by general law on mandates (the Netherlands, Poland). These scenarios apply in 18 Member States.
- The scope of private mandates is usually quite unrestricted, within legal boundaries (e.g. rules applying to the representative as defined by law, conflict of interest). In most Member States where it applies, it may cover personal and material interests, with exceptions for highly personal issues in some countries (Belgium, Denmark, Finland, the Netherlands and Germany). The designation of the guardian is a key element covered in the Member State (the Czech Republic, Lithuania) and the sole purpose of a mandate in others (Croatia, Belgium). Except in a few cases (Belgium, the Czech Republic, France, Croatia and Ireland), the conditions set to be eligible as a representative are quite open.
- The formal requirements set in the Member States' legal frameworks for the establishment of mandates are very heterogeneous. There is a slight tendency to prefer unilateral acts over contracts, but authentic acts and private deeds are overall equally represented among the mechanisms in place.
- Publication is never a condition for opposability of the mandate to third parties. Registration into registries is, however, a prerequisite in a number of Member States⁷⁰.
- The modification or end of the mandate usually follow the procedures set for the establishment of the mandate. Consequently, the procedures vary significantly from one Member State to another, from very simplified procedures (especially if the protected person is still capable) to a judicial procedure. The conditions to end the mandate beyond the death of the protected person also diverge, but usually encompass changes in the situation or in the protection regime, and the protection of the vulnerable adult's interest.

2.2.3 Protection granted by operation of law

2.2.3.1 Nature and scope

In addition to the situation where protection is granted by Court or set up in a mandate, protection can be granted automatically by national law without the adoption of protective measures by a Court/administrative authority or the establishment of a private mandate in specific situations in a few Member States. This is the case in Austria, Belgium, Finland, Hungary, Slovenia, Spain and Sweden.

Nature

The possibility to adopt protective measures by operation of law corresponds mainly to two situations. In the first one, a person is obviously not in a position to protect their interests due to a degradation of their mental health, and the next of kin represents them in certain legal actions. This applies in **Austria, Spain and Sweden**. Also from 1 January 2023, legislation on marital representation will apply in **Germany**. The second one applies in relation to patient's rights, whereby a person's health requires representation in relation to medical decisions. This is provided in **Belgium, Finland, Hungary and Slovenia**.

Scope

In **Spain** and **Sweden**, the scope is not defined by law, even though in the latter case, representation and big purchases are excluded⁷¹. In Austria, the material scope is defined by law as broadly as possible to ensure that the proxy can act on behalf of the vulnerable

⁷⁰ Austria, Belgium (private mandate), Croatia, Denmark, Spain, France, Hungary and Lithuania.

⁷¹ Answer provided by MSCA to the survey completed in the context of this study.

adults to best protect their interests. It covers judicial and administrative proceedings, the management of income and assets, as well as medical treatment and decisions on permanent residence.

The sphere of decisions is circumscribed to medical decisions (e.g. refusal of treatment, choice of medical professional or organ donations) in Belgium and to invasive medical care in Hungary. It covers medical treatment and any other rights covered by the Patient's Right Act in Slovenia.

Persons acting as representative

Table 17 below lists the persons that can be designated as representative in the Member States concerned.

Table 17: Persons acting as representative

MS	Persons acting as representatives
AT	In an equal order: • parents and grandparents • adult children and grandchildren • siblings, nieces and nephews • spouse or registered partner and cohabiting partner if the latter has lived in the same household for at least three years.
BE	In order: • spouse, legal or factual cohabitant • parents • children • other close family members.
ES	'De facto guardian' • no designation by law • in practice often the spouse, partner, or the parents.
FI	▪ close relative
HU	In order: • legal representative • spouse or cohabitant with full capacity to act and living in the same household as the patient • child of the patient with full capacity to act and living in the same household • parent of the patient with full capacity to act and living in the same household • sibling of the patient with full capacity to act and living in the same household • grandparent of the patient with full capacity to act and living in the same household • grandchild of the patient with full capacity to act and living in the same household. If none of the above persons can exercise the right to informed consent and the right to reject healthcare, the following persons living in the same household and with full capacity to act may exercise these rights (in order): • child • parent • sibling

MS	Persons acting as representatives
	• grandparent • grandchild.
SE	In order: • spouse • children • grandchildren • parents • siblings • nieces/nephews. If there are more than one under each category, they represent the adult concerned together.
SI	In order: • legal representative • spouse, unmarried cohabiting partner or same-sex partner • children or adopted children • parents or adoptive parents • siblings • grandparents • grandchildren.

As indicated above, from 1 January 2023 legislation on marital representation will be introduced in Germany.

2.2.3.2 Procedural rules

Opposability

No registration or publication is required in the Member States concerned, except for Austria, where registration to the Austrian Central Register of Representatives is to be established. In the case of patients' rights, representation enters into force from the moment that the patient becomes incapable to exercise his or her patients' right. Because of their nature, the patients' rights will only be exercised vis-à-vis a health professional or a healthcare institution. Consequently, the rights are directly opposable towards health professionals or a healthcare institution.

Modifications and end of the representation

Due to the nature of the representation, **modifications** are usually not possible.

As for other types of protection, protection granted *ex lege* may **end** because of the death of the vulnerable adult, and of other circumstances such as the inability for the representatives to ensure their functions or to protect the interests of the person concerned. However, where an order of representatives is provided by law, if persons from the same row are no longer in a position to consent on behalf of the vulnerable adult, the persons from the following row takes its place.

In terms of **procedure to end the representation**, in Austria, the court shall order the termination of the protection generated by operation of law and, if necessary, appoint a judicial adult representative if the representative fails to act or acts in breach of duty or if the welfare of the represented person otherwise requires it. In Spain, protection by law would end with the placing of the vulnerable adult under another form of protection. In

cases where representation applies in the context of medical care, representation will end where the patient is no longer incapacitated. In Belgium, the patient can also revoke its representative with a dated and signed document.

Key findings:

- Protection by operation of law is possible only in seven Member States: Austria, Belgium, Finland, Hungary, Slovenia, Spain and Sweden. In Austria, Spain and Sweden, such protection covers more or less the same scope as other types of representation. In the remaining Member States, it applies in the context of medical care, for the exercise of the patient's right of the vulnerable adult.
- Persons who can be designated as representatives under these circumstances are usually the closest relatives.
- Because of the nature of this type of protection, procedural rules are in most cases limited. Protection applies *ex lege* and thus does not need to be confirmed or recognised; modifications are not possible, and representation will end where the situation of the adult represented changes (death, recovery), or where another type of protection, i.e. a decision of a judicial or administrative authority, is adopted. Due to their nature, these measures are not recorded and apply *de facto*, except in Austria.

2.2.4 National registries of measures of protection

2.2.4.1 Content and functioning

Most Member States covered by the study have set up registries for protective measures. However in Bulgaria, Cyprus, Estonia, Greece, Poland and Romania no registries were set up. Bulgarian law however provides for the establishment of a registry.

The body managing the national registry is either the national chamber of notaries, the general civil registry or the competent body for managing the protective measures for vulnerable adults:

- In Austria, Belgium, Germany, the Czech Republic, Croatia, Malta and Slovakia the notaries manage the national registry.
- In Latvia, Ireland and Luxemburg, the registry is managed by the judicial authorities.
- In France, Spain, Italy, Lithuania, Portugal and Slovenia the information on protective measures is included in the civil registry.
- In Malta and Finland, the competent authorities for protecting vulnerable adults manage the registries on protective measures.

In most Member States the registries are centrally managed. Exceptions are Bulgaria, Italy and Slovenia, where the registries are or will be managed by local and municipal authorities.

The national registries in the Member States are different in content. Some registries only include information on private mandates and powers of attorneys, while others include information on the protective measures adopted by judicial authorities.

- In Austria, Belgium, Spain, France, Hungary, Italy, Ireland, Latvia, Malta, Portugal, Sweden, Slovenia and Slovakia, registries are established that include information of protective measures adopted by judicial authorities.
- Of these Member States, the registries in Belgium, Denmark Spain, Hungary , Italy, Luxemburg, Malta, Portugal and Slovakia include extracts or copies of the judicial decisions that imposed the protective measures.

- In Austria, Belgium, Germany, Denmark, Spain, Croatia, Ireland and Portugal, the registries also include private mandates and powers of attorneys.

In most Member States, the registry is centralised. This is the case for Austria, Belgium, the Czech Republic, Germany, Denmark, Finland, Spain, Croatia, Hungary, Ireland, Luxemburg, the Netherlands and Slovakia.

Table 18 below provides an overview of the content and functioning of the registries in the Member States where there is one.

Table 18: Content and functioning

MS	Content and functioning
AT	• The “Central Register of Representatives” includes information on all forms of adult representation (judicial protective measures and private mandates). • The registry is established by notaries. • The registry is centralised.
BE	Two registries on protective measures are established: • The “central registry of mandate contracts” on private mandates and declarations of preference on the curator to be appointed is managed by the Federation of Notaries. • The “registry of protection of persons”, on judicial protection measures is managed by the Ministry of Justice. • The registries are centralised.
BG	• No registry is currently in place. • Bulgarian law envisages the establishment of a registry of the guardians/trustees appointed. • The registry will be maintained by the mayors of the municipalities.
CZ	• A national registry on declarations on the appointment of a guardian is in place. • Notaries are responsible for managing this registry. • The registry is centralised.
DE	• A registry on lasting powers of attorney and advanced decisions on medical treatment is in place. • The Federal Chamber of Notaries holds the registry. • Registration is not obligatory but recommended. • The registry is centralised.
DK	• Decisions on guardianship must be registered in the Danish Persons Registry. • Future mandates (private mandates) must be created and signed digitally via a website. It must then be upheld by a notary at the district court. Mandates are publicly available in the Danish Persons Registry • The registry is centralised.
ES	• Voluntary and judicial support measures must be recorded in the civil registry. • The Civil Registry is a public registry of persons which is kept by an administrative authority (the legal officer of the administration of justice). • The registry is centralised.
FI	• All information on the guardianship is set on a registry of guardianship affairs. • The competent authority for the protection of vulnerable adults, the Digital and population data services agency is responsible for managing the registry. • The registry is centralised.
FR	• There is no registry of legal protective measures, but measures of protection of vulnerable adults are registered in the “civil registry”, which is also found in the margin of the birth certificate of the protected person.

MS	Content and functioning
	- The filing and conservation of the registry is done by the clerkship of the tribunal where the person concerned is born or central civil status authorities when the person is born aboard. - The registry is not centralised.
HR	- A registry of private mandates and of powers of attorneys is in place. - The Chamber of Notaries maintains the registry. - The registry is centralised.
HU	- Hungary has two electronic registries: - The registry of those under guardianship - The registry of prior juridical acts. - The National Judiciary Office operates the registries. - The registries are centralised.
IE	- A registry for judicial measures and for enduring powers of attorney is in place. - The Office of Wards of Court keeps the registry. - The registry is centralised.
IT	- Decisions that institute guardianship and support administration are recorded in the registry of civil status. The registry of civil status is a registry kept by the local state authorities' bodies. - The tutelary judges keep a registry on protective measures, including: the registry of the guardianship, the registry of the curatorship and the registry of support administration. - The registry is not centralised.
LU	- Judicial protective measures, including the declaration establishing the safeguard of justice, as well the curatorship and guardianship are kept in a register. - It is managed by the Public Prosecution Office. - The registry is centralised.
LT	- The Lithuanian Registry of Legally Incapable Persons and Persons with Limited Legal Capacity includes information on judicial protective measures. - The registry is managed by the State Enterprise Centre of Registers and is overseen by the Ministry of Justice. - The registry is centralised.
LV	- A registry for files regarding guardianship and trusteeship is in place. - It is kept by the Orphans court - The registry is not centralised.
MT	- The Guardianship Board keeps an updated registry of guardianship orders. - The Archivist of Notarial Acts keeps a registry on interdiction or incapacitation orders. - Private mandates are registered in the Public Registry of Malta.
NL	- The <i>Centraal curatele- en bewindregister</i> records court decisions establishing an adult guardianship or fiduciary administration. - The courts publish the data in the registry and are responsible for the management of the register. - The registry is centralised.
PT	- Court decisions concerning the accompaniment (judicial protective measures) must be registered by the Civil Registry Office. - Moreover the accompaniment, including concrete measures established which have relevance, must be registered in the Civil Registry, which falls under the responsibility of the President of the Institute of Registries and the Notaries. - The registry is not centralised.
SE	Registries of representations done by administrators and conservators are in place.

MS	Content and functioning
	- The chief guardians keep registries. - The registry is not centralised.
SI	- No specially dedicated national registry of protective measures exists, but the fact that a person is placed under guardianship shall, in principle, be registered in several official registries and other official records, such as the Civil Registry and the registers of the Social Work Centres. - The registry is not centralised.
SK	- There are no specific registries of protective measures but judgments on legal capacity are filed in the Notary Central Registry of Documents. - The registry is centralised.

2.2.4.2 Digitalisation and access

Most (15) Member State have **digitalised their registries**. This is the case for Austria, Belgium, the Czech Republic, Denmark, Spain, Finland, Hungary, Lithuania, the Netherlands, Portugal, Sweden and Slovakia. Italy, Malta and Slovenia have only digitalised a part of their registers.

Access rights to the registries differ between the Member States. Table 19 below provides an overview of the persons with access to the registry(ies). Most Member States limit access to the competent authorities for the purpose of registration and for the fulfilment of their tasks. The protected person concerned or his/her representative has access to the registries in Austria, Belgium, Denmark, Spain Croatia, Luxemburg and Slovenia. Some Member States, provide access to the general public (e.g. Denmark and the Netherlands). Bulgaria does not have rules set by law on this issue.

Cross-border access is only allowed in Denmark, Finland, Italy, the Netherlands and Slovenia (only partly). In **Denmark**, the Danish Persons Registry is an online platform, digitally accessible to anyone as it does not require a special log-in, nor social security number of the person/institution looking for information. It is therefore accessible to any person, even in cross-border cases. The situation is the same in **Slovenia** and the **Netherlands** where registries are digitalised which implies that anyone can access the data. In **Finland**, there is a general right to obtain information on whether a person is under guardianship and the name of the guardian or holder of the mandate. On the contrary, in **Italy**, there are strict conditions of access registries set out by national law. Access by private individual is limited to interested persons. The same conditions of access applicable to national requests also apply to foreign requests.

Table 19: Access Rights

MS	Registry	Persons concerned	Representative	Judiciary	Competent admin. authority	Notary	Lawyer	Social welfare	Medical bodies	Social insurance institutions	General public	Other
AT	Central Registry	x	x			x	x	x		x		
BE	Central registry of mandate contracts	x	x	x		x						
	Central registry of protection of persons	x	x	x								
CZ	Registry on declarations on the appointment of a guardian			x		x						
DE	Registry on lasting powers of attorney and advanced decisions			x								
DK	Danish Persons Registry	x	x	x	x	x	x	x		x	x	
	Future Mandate Register	x		x	x							
ES	Civil Register	x	x									
FI	Registry of guardianship affairs	x	x	x	x	x	x	x	x	x	x	
FR	Civil Register	x	x	x	x	x	x	x	x	x	x	
HR	Registry of private mandates and of powers of attorneys		x	x				x	x			
HU	Registry on people placed under guardianship			x	x	x						
	Registry on prior juridical acts: courts and prosecutor's office, investigating authority and national security services.			x								Enforcement authorities
IE	Wardship of court and powers of attorney			x			x		x			
IT	Registry of Civil Status (extracts)	x	x	x	x	x	x	x	x	x	x	

MS	Registry	Persons concerned	Representative	Judiciary	Competent admin. authority	Notary	Lawyer	Social welfare	Medical bodies	Social insurance institutions	General public	Other
	Registry of Civil Status (full copies)	x										Person with personal and concrete interest for the protection of a legally relevant situation
	Registries on protective measures	x	x	x	x	x	x	x	x	x	x	
LU	Special registry for safeguards of justice		x	x		x	x		x			
LT	Registry of Legally Incapable Persons and Persons with Limited Legal Capacity			x		x						Enforcement authorities
LV	Registry for guardianship and trusteeship	x	x	x		x						
MT	Registry for guardianship orders											Person which is recognised as a legitimate interest by the Guardian Board
	Registry for interdiction or incapacitation orders			x		x	x				x ⁷²	Commissioner for the Promotion of Rights of Persons with Mental Disorders
	Public Registry of Malta (private mandates)											Not accessible to the public
NL	Central registry for curatorship and administration	x	x	x	x	x	x	x	x	x	x	
PT	Civil Registry	x	x	x	x	x	x	x	x	x	x	
SE	Registries of representations				x							For internal use only Extracts upon request
SI	Civil Registry	x	x	x	x	x						Inspectorates
	Databases of the Social Work Centres											For internal use only
SK	Registry (Certified copies)	x	x									Persons proving a legal interest

⁷² under supervision of the Court.

Key findings:

- All but six Member States have set up registries for protective measures. These registries cover information on both judicial protective measures and private mandates.
- These registries are mostly managed centrally, either by the chamber of notaries or by other authorities, such as the civil registries or judicial authorities.
- Access to the registries is mainly limited to the competent authorities and the persons concerned. Cross-border access is only possible in five Member States.
- Fifteen Member States have digitalised their registries.

2.3 Regulatory framework applying to cross-border situations

The present section provides an overview of the functioning of the main private international law rules that apply to cross-border situations involving vulnerable adults.

2.3.1 Applicable domestic legal framework

As explained in Section 2.1.1 above, Austria, Belgium, Cyprus, the Czech Republic, Finland, France, Estonia, Latvia, Germany and Portugal have ratified the 2000 Hague Convention. In Germany and Latvia, cross-border procedural rules are handled in the **act transposing the Hague Convention** in the national legal order. In other (monistic) systems, the Convention is **directly applicable** and constitutes the main legal framework to regulate on cross-border situations involving vulnerable adults. Additional elements are provided either in an internal private international law act (in Belgium, Czech Republic, Estonia) or in domestic civil law (France and Portugal) and/or procedural law (Austria and France). In Finland, cross-border aspects are regulated in the legislation on the protection of vulnerable adults.

For those Member States which are not parties to the Convention, rules regulating the cross-border aspects of the protection of vulnerable adults are in place either in a **domestic code or law on private international law** (in Bulgaria, Croatia, Hungary, Italy, Poland, Romania, Sweden, Slovenia and Slovakia) or in the parts of the **Civil Code** that deal with aspects of private international law (Greece, Spain, the Netherlands, Lithuania). In some Member States, the **legislation on civil procedure** also regulates some aspects of cross-border procedures (Malta and the Netherlands). In Denmark and Ireland, the **legislation that deals with the protection of vulnerable adults** also regulates the cross-border aspects of their protection.

Most Member States are not parties to bilateral or multilateral treaties that specifically concern the cross-border protection of vulnerable adults. If Member States are party to bilateral or multilateral treaties, these treaties are generic treaties regulating aspects of private international law in the context of personal and family law (for instance Poland and Hungary). All EU Member States are party to the UNCPRD.

Key findings

- In the Member States which are parties to the Hague Convention, in addition to the rules set by the Convention, some elements are provided in domestic acts, on either international private law, civil (procedural) law, or the protection of vulnerable adults.
- For those Member States which are not parties to the Convention, in 12 Member States⁷³, the rules on the cross-border aspects applying to vulnerable adults are governed by the general rules on private international law. Only in a few Member

⁷³BG, HR, IT, PL, RO, SE, SI, SK, EL, ES, NL and LT.

States⁷⁴ is cross-border protection of vulnerable adults as such regulated in domestic law.

- Most Member States are not parties to bilateral or multilateral treaties specifically concerning the cross-border protection of vulnerable adults. Nevertheless, in several Member States, some treaties dealing generally with issues in the field of private international law (e.g. the recognition of judgments) also apply in matters of the protection of vulnerable adults.

2.3.2 Private international law rules applicable in the Member States

2.3.2.1 Jurisdiction and applicable law

The rules applicable to the determination of the competent jurisdiction and applicable law in a cross-border case can be distinguished between the Member States which are parties to the 2000 Hague Convention and the Member States which are not parties to the Convention, as follows.

Member States which are parties to the Convention

In the contracting States (Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia and Portugal), the **rules which determine the jurisdiction and the applicable law** in cross-border cases regarding vulnerable adults are those set out in the Convention.

With regard to **jurisdiction**, Article 5 of the Convention provides that:

"(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.

(2) In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

This provision determines the competent jurisdiction for Contracting States in matters of protection of vulnerable adults and their property. Authorities of the Contracting State where the vulnerable adult has their habitual residence are the ones competent to adopt protective measures.

Regarding the **applicable law**, Article 13(1) of the Convention provides as a principle that the competent court shall apply its own law (*lex fori*).

Member States which are not parties to the Convention

With regard to non-contracting States, different grounds may apply in cases where a vulnerable adult needs protection. As illustrated in Table 20 below, under the private international law rules of Member States which are not parties to the Convention, the most common grounds for **jurisdiction** are:

- the **nationality** of the person to be protected; and/or
- their **domicile** or **habitual residence**.

There are, however, other grounds for jurisdiction. For instance, in **Spain**, national courts are also competent when it comes to adopting provisional or protective measures with respect to persons (and/or their property) who are on Spanish territory but who do not have their habitual residence in Spain, provided that these measures must be fulfilled in Spain. In **Poland**, national courts may also, if necessary, deal with the protection of the property of a foreigner with a habitual residence abroad if this is necessary with regard to the interest of the foreigner. Furthermore, Polish courts may be

⁷⁴ DK, IE, LT.

competent if the case shows a sufficient connection with the Polish legal order or if there is an urgent need to ensure the protection of a foreigner with their habitual residence abroad.

There are also specific cases of exclusive jurisdiction. For instance, in **Poland**, pursuant to the Code of Civil Procedure, the jurisdiction of Polish courts is exclusive in cases of incapacitation if the person to whom the petition for incapacitation relates is a Polish citizen, residing and habitually residing in Poland. In **Romania**, there is exclusive jurisdiction of Romanian courts for placement under a judicial interdiction, irrespective of the citizenship of the person if the latter has their domicile in Romania.

The **applicable law** is determined in most non-contracting States by the **habitual residence and nationality** of the protected person:

- In **Spain**, the law of the habitual residence of the protected person is the only relevant connecting factor.
- In **Greece, Italy, Luxemburg** and **Slovenia**, the nationality of the person concerned is the only connecting factor.
- In **Hungary, Ireland, Poland, Romania** and **Slovakia**, the applicable law is determined based on nationality or habitual residence.

The legislation of certain Member States, such as **Bulgaria** and **Italy**, specifies that domestic courts may apply the law of the forum when adopting urgent and provisional measures.

Table 20 below provides an overview of the content of private international law rules of non-contracting States.

Table 20: Jurisdiction and applicable law in the Member States that are not party to the Convention

MS	Jurisdiction	Applicable law
BG	Jurisdiction for the limitation or deprivation of legal capacity is based on nationality. Jurisdiction for the establishment and termination of guardianship or trusteeship is based on habitual residence.	• Foreign procedural actions or official documents, are governed by the law of the State from which the actions/documents originate. • The conditions and the consequences of the limitation or deprivation of legal capacity of the person are settled by the law of nationality of the person; when that person has habitual residence in Bulgaria, Bulgarian law applies. • Establishment and the termination of the guardianship and trusteeship is governed by the law of the State of habitual residence of the protected person or guardian. • For temporary and urgent protective measures, Bulgarian law may be applied.
DK	Jurisdiction seems based on the habitual residence of the person concerned.	• Lex fori seems to apply.
EL	Jurisdiction for the deprivation and restriction of capacity is based on habitual residence and place of property .	Deprivation and restrictions of capacity are regulated by the law of nationality of the person to whom these measures relate.
ES	Jurisdiction in matters related to the capacity of persons and in matters related to the protection measures of vulnerable adults or their property is based on habitual residence .	The applicable law for the protection of adult persons is the law of habitual residence .

MS	Jurisdiction	Applicable law
	Jurisdiction for the adoption of provisional or protective measures (provided that the measures must be fulfilled in Spain) is based on the location of the person or property in Spain .	
HR	Jurisdiction in matters related to the personal status of a person, such as deprivation and restoration of legal capacity, may be based on nationality or habitual residence. Jurisdiction for the adoption of provisional or protective measures is based on the location of the person or property in Croatia.	• Restrictions of legal capacity are regulated by the law of nationality of the person concerned. • The preconditions for deprivation and regain of legal capacity, placement under guardianship and termination of guardianship, are regulated by the law of habitual residence. • For temporary and urgent protective measures, Croatian law applies.
HU	Jurisdiction for the adoption of protective measures may be based on nationality or habitual residence .	• Deprivation and restrictions of capacity are regulated by the law of nationality. • The conditions for placement under guardianship, or for other protection measures, that do not affect the capacity of an adult to act, are regulated by the law of habitual residence.
IE	Jurisdiction for the determination of incapacity and for the application of protective measure may be based on nationality or habitual residence .	• Protective measures are regulated by the law of habitual residence. • Enduring powers of attorney are regulated by law of nationality, lex rei sitae or law of habitual residence.
IT	Jurisdiction is based on nationality or habitual residence. Italy is the competent jurisdiction for provisional and urgent measures of protection of vulnerable adults with regard to property if the property is located in Italy and where it is necessary to supplement or modify a foreign decision which is recognised in Italy.	The conditions for adopting protective measures and the relationship between the caregiver and the protected person are governed by the law of nationality of the person to whom these measures relate. Under the rule on <i>renvoi</i> , cases exist where the law governing the protection of a foreigner is eventually Italian law.
LU	Jurisdiction is based on nationality .	For the status of a person (including vulnerability), the law of nationality applies.
LT	Jurisdiction for the declaration of incapacity is based on the location of property in Lithuania, nationality or permanent residence (for stateless persons) in Lithuania.	Guardianship and curatorship are governed by the law of the domicile of the person to whom the measures relate.
MT	Jurisdiction is based on nationality (for Maltese citizens, provided they have not fixed their domicile outside of Malta), residence (persons domiciled, resident or present in Malta), or place of property (property situated or existing in Malta). Maltese courts are also competent to implement an obligation contracted or to be implemented or enforced in Malta, or if designated as a competent court by the parties.	The law of the nationality or place of domicile, residence or presence of the vulnerable adult applies.

MS	Jurisdiction	Applicable law
NL	Jurisdiction is based on habitual residence .	Following the decision of the Supreme Court, the applicable law in cases on the protection of vulnerable adults in cross-border situations is determined by the rules of the 2000 Hague Convention, i.e. lex fori .
PL	Jurisdiction may be based on nationality or habitual residence. Polish courts may also have jurisdiction for the protection of the property of a foreigner with habitual residence abroad if this is necessary with regard to the interest of the foreigner. Polish courts may also be competent if the case shows a sufficient connection with the Polish legal order or if there is an urgent need to ensure the protection of a foreigner with their habitual residence abroad. There are also specific cases of exclusive jurisdiction, e.g. in case of incapacitation, if the person to whom the petition for incapacitation relates is a Polish citizen, residing and habitually residing in Poland.	• The establishment of guardianship, curatorship or other protective measures for an adult is governed by that person's law of nationality or Polish law if the domicile or habitual residence is in Poland. • Enforcement of protective measures is subject to the law of habitual residence. • The termination of a protection measure is governed by the national law of the adult.
RO	Jurisdiction for guardianship and curatorship may be based on nationality or domicile (or habitual residence if no domicile). For placement under judicial interdiction, only Romanian courts are competent irrespective of the citizenship, if the person has their domicile in Romania.	• The state and capacity of natural persons are governed by the law of nationality. • Protective measures to be taken in the case of a fully capacitated person are governed by the law of habitual residence. • When powers of representation are stipulated, there is the possibility to choose the applicable law.
SE	Jurisdiction in proceedings of guardianship and trusteeship may be based on nationality or domicile. Swedish courts have jurisdiction in proceedings of protective measures for Swedish citizens residing abroad.	In cases concerning conservatorship and administratorship of vulnerable adults, lex fori applies.
SI	Regarding guardianship measures, Slovenian authorities have exclusive competence for Slovene citizens .	• In guardianship cases, the law of nationality of the protected person applies. • In guardianship cases, Slovene law applies (lex fori).
SK	Jurisdiction in proceedings on protective measures is based on habitual residence .	• Legal capacity of a person shall be governed by the law of nationality. • The applicable law for the conditions for establishment or termination of guardianship is the law of habitual residence. • The obligation to accept and carry out the guardianship is regulated by the law of nationality of the guardian.

MS	Jurisdiction	Applicable law
		Legal relations between the guardian and the protected person are regulated by lex fori of the guardianship court.

Parallel proceedings

In both Member States which are parties to the Convention and those which are not parties, the situation may occur that a court in one State is seized of a matter while a Court in another State is already dealing with the same issue. This is of particular interest for the protection of vulnerable adults in cross-border cases.

In situations of parallel proceedings, if, seized of proceedings concerning the protection of an adult (e.g., proceedings aimed at the appointment of an administrator, or analogous figure), a Court becomes aware that proceedings concerning the protection of the same adult are pending in another country, it can either:

- disregard the foreign proceedings and decide the matter on its substance; or
- stay the proceedings, provided that certain conditions are met.

The 2000 Hague Convention builds on the principle of reciprocity and provides rules on the coordination of parallel proceedings. Those rules, however, only work where the proceedings in question are pending in two Contracting States. On the contrary, these rules will not apply if the foreign proceedings in question are pending in a non-contracting State.

The table below provides an overview of the rules applicable to cases of parallel proceedings in such instances, and where Member States are not parties to the Convention.

Table 21: Rules applicable to parallel proceedings in the Member States

National court disregards the foreign proceedings and decide the matter as to its substance	National court stays the proceedings
AT, CY, IE, LV, SK	BE, BG, CZ, DK, EE, ES, FI, FR, HR, HU, IT, LT, LU, MT, NL, PL, PT, RO, SE, SI ⁷⁵

In a few Member States, the national court will disregard the foreign proceedings and decide the matter on its substance. On the contrary, in most Member States, the national court will stay the proceedings, provided that certain conditions are met. The most common conditions for the national court to stay the proceedings are:

- the other proceeding has been previously initiated;
- there is an identity of parties, grounds and request between the two proceedings;
- it is expected that the decision will be suitable for recognition and enforcement in the State of the court that stays the proceeding;
- it is expected that the decision will be taken within a reasonable time.

Key findings

- In the contracting States, the rules which determine the jurisdiction and the applicable law in cross-border cases regarding vulnerable adults are those set out in the Convention, in Article 5, which attributes jurisdiction to the state of

⁷⁵ The information is not available for DE and EL.

habitual residence, and Article 13, which provides for the application by the authorities competent of their own law.

- In the non-contracting States, a number of different situations apply, depending on the situation. Jurisdiction is based on the nationality of the person concerned in two Member States⁷⁶, on the habitual residence in five Member States⁷⁷, and both, or either of the two depending on the circumstances, in the remaining Member States.
- In case of parallel proceedings, in a few Member States (five), the national court will disregard the foreign proceedings and decide the matter on its substance. In most Member States (20), the national court will stay the proceedings, provided that certain conditions are met.

2.3.2.2 Recognition of foreign decisions

Member States which are parties to the Convention

Article 22 (1) of the 2000 Hague Convention provides that 'the measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States'. **Recognition** of measures between Contracting States is therefore automatic.

In addition, Article 23 provides for a recognition procedure open to any interested person who may request from the competent authorities of a Contracting State the recognition or non-recognition of a measure taken in another Contracting State. Pursuant to this provision, the procedure is governed by the law of the requested State.

Various procedures apply depending on the Member State.

- In **Austria**, anyone who has a legal interest may turn to the Guardianship Court (*Pflegschaftsgericht*, a specific section within the court of first instance) and ask for the recognition of a foreign decision. The application shall be accompanied by a copy of the decision, proof of its legal force or provisional effectiveness and proof that the adult concerned has been heard.
- In **Belgium**, the judge of the peace is competent for recognising foreign decisions that concern the protection of vulnerable adults. The request is submitted to the judge of the peace, by means of an application to the Central register of protection of persons (*Centraal register van bescherming van de personen - Registre central de la protection des personnes*). Upon receiving the request, the court shall make a decision without delay after examining, where appropriate, the fulfilment of the conditions referred to in Article 22 of the 2000 Hague Convention.
- In the **Czech Republic**, national law provides that only foreign decisions in property matters which comply with conditions for recognition set by law (final and conclusive decision and lack of grounds for refusal of recognition) may be recognised. An enforcement of a foreign decision shall be ordered by a decision of a Czech court. The request for a declaration of enforceability may be filed together with the request for enforcement of a decision pursuant to another legal act. In this case the Court shall decide in both matters in a single decision in two separate statements, which must be duly grounded. The statement ordering the enforcement of a decision may not become final and conclusive before the statement on the declaration of enforceability. The competent court is the general court of the requesting party.
- In **Estonia**, if there is a dispute on recognition or if it is necessary to a person due to another reason for the purpose of exercising their rights, recognition may be requested. (§ 620 (3) of the Code of Civil Procedure). Incidental recognition is possible.

⁷⁶ LU, exclusive competence for Slovenian citizens in SI.

⁷⁷ DK, EL, ES, NL and SK.

- In **Finland**, a person may submit an application to Helsinki district court which shall then rule on the recognition
- In **France**, any interested party may have a legitimate interest in removing any doubt as to whether or not there is a ground for non-recognition of a foreign decision. This preventive action may take the form of an action for recognition (*action en opposabilité*), or of an action for non-recognition (*action en inopposabilité*). The judicial court is competent.
- In **Germany**, an incidental recognition procedure for interested persons is regulated in Section 8 ErwSÜAG which refers to Sections 275, 276, 297 Abs. 5, Sections 308, 309 and 311 FamFG which are to be applied *mutatis mutandis*. These Sections regulate the participants of the procedure, the appointment of a guardian ad litem, communication of decisions to other courts, public authorities, or other public agencies.
- In **Latvia**, court judgments and decisions shall be enforced after they enter into lawful effect, except for the cases where, according to the law or a court judgment, the judgment and decision shall be enforced without delay. In this case, the indication that the judgment and decision shall be enforced without delay must be contained in the writ of execution itself. The Ministry of Justice is the competent authority responsible for the enforcement of decisions.

If Article 22 of the Hague Convention sets out the principle of recognition by operation of law in each Contracting State, it is limited to the measures taken in another Contracting State. Regarding the recognition of measures taken in non-contracting States, although the provisions of the Hague Convention are not applicable, **the Czech Republic, Estonia, Finland, France, and Germany** nevertheless provide for recognition by operation of law (*de plano*) of these measures.

On the contrary, in some contracting States, the recognition is not possible by operation of law.

- In **Austria** and **Belgium**, a request for recognising a foreign decision needs to be submitted to the competent court so that the court decides on the recognition of the foreign decision.
- In **Cyprus**, an application for summons accompanied by an affidavit for recognising a foreign decision needs to be submitted to the competent court.
- In **Latvia**, a foreign decision needs a judicial declaration in order to be recognised.
- In **Portugal**, a request for recognition must be introduced for a foreign decision to be recognised. The request must include the foreign decision to be reviewed.

Table 22: Recognition in Contracting States of measures taken in Non-contracting States

MS	Is the recognition of <u>measures taken in a Non-Contracting State</u> automatic? (yes/no)
AT	No
BE	No
CY	No
CZ	Yes
DE	Yes
EE	Yes
FI	Yes
FR	Yes
LV	No
PT	No

Member States which are not parties to the Convention

In non-contracting States, **recognition** of foreign measures can take place either by operation of law or by judicial recognition:

- In **Denmark, Italy, Poland, and Slovenia**, foreign decisions in matters of protection of vulnerable adults are recognised by the **operation of the law**.
- In the other Member States, foreign decisions in matters of protection of vulnerable adults are only recognised after a **recognition decision** from a judicial authority, provided that some conditions are met.

2.3.2.3 Enforcement of foreign decisions

Member States which are parties to the Convention

Article 25 of the 2000 Hague Convention provides that the **enforcement** of measures taken in a Contracting State and enforceable there shall be done according to the procedure provided in the law of the State where the interested party requests its enforcement. Contracting States are not required to adopt a specific procedure but shall, pursuant to Article 25, paragraph 2, provide for a "*simple and rapid procedure*" though remain free as to the means.

Germany does provide for a simplified procedure. A decision from another Contracting State that is enforceable there and requires acts of enforcement in Germany must be declared enforceable pursuant to Article 25 of the Convention by way of being provided, upon application, with an endorsement for enforcement ('*Vollstreckungsklausel*'). In the same vein, in **Austria**, national law provides that a declaration of enforceability may be applied for at the same time as the declaration of recognition, to the extent that enforcement is sought in proceedings other than in litigation. The court shall decide on both applications at the same time. In **Latvia**, a rapid procedure is provided whereby the party requesting the enforcement of a foreign decision can indicate that it shall be enforced without delay in the writ of execution itself.

However, in **France**, applicants apply to the exequatur procedure before the judicial court (*Tribunal Judiciaire*) with compulsory legal representation, which corresponds to a longer and more costly ordinary law procedure.

Belgian, Cypriot, and Portuguese laws provide that the same rules and proceedings shall apply for both the recognition and enforcement of a foreign decision. In **Estonia**, the general rules on enforcement of foreign decisions shall apply to decisions related to the protection of vulnerable adults. On the contrary, in **Finland**, enforcement of foreign decisions related to the protection of vulnerable adults is regulated by a specific act (the Guardianship Services Act).

In the **Czech Republic**, national law provides that enforcement of a decision of a foreign authority may be ordered in the Czech Republic only in property matters. Thus, if a decision to be enforced in the Czech Republic dealing with protection of vulnerable adults concerns a property matter, its enforcement may be ordered by a Czech Court.

*Article 22, paragraph 2, of the 2000 Hague Convention provides for several **grounds** pursuant to which recognition of measures taken by the authorities of another State party to the Convention may be refused. In particular, pursuant to this Article, 'recognition may [...] be refused:*

- a. if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II;*
- b. if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of*

the requested State;

- c. if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;*
- d. if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State;*
- e. if the procedure provided in Article 33 has not been complied with.'*

As provided in Article 25, paragraph 3, of the Convention, in Contracting States **the declaration of enforceability** may be refused only for one of the reasons above. The grounds for refusing the recognition of a foreign decision also apply to the enforcement of such decisions.

Member States which are not parties to the Convention

In most non-contracting States⁷⁸, to **enforce** vulnerable adults' protection measures taken abroad, a declaration of enforceability by a judicial authority of the State where the decision is to be enforced is required. There are, however, specific situations where the declaration may not be required. For instance, in **Lithuania**, although the principle is that a declaration of enforceability is needed to recognise and enforce foreign decisions regarding vulnerable adults, according to the practice of Lithuanian courts, in cases where the subject matter is not a dispute, but recognition of a status or a certain right (e.g. guardianship or curatorship), there is no need for compulsory enforceability action – it is sufficient to recognise the legal status of the person concerned.

On the contrary, in some non-contracting States, such as **Denmark, Greece, Hungary, and Sweden**, an exequatur procedure is, in principle, not required to enforce a foreign decision in matters of protection of vulnerable adults. There are, however, some exceptions.

Where an enforcement procedure is required to enforce the foreign measure, the **grounds** for refusing recognition or enforcement of a foreign decision in matters of protection of vulnerable adults are provided by national law. In many Member States, the recognition and admission of enforcement of foreign decisions are interlinked and the grounds for refusal are the same. For instance, in **Bulgaria, Italy, and Poland**, grounds for refusal for both recognition and enforcement procedures are listed in the same legal provision. In **Denmark, Greece, Ireland, and Lithuania**, the requirements that must be met for recognition and enforcement of a foreign decision are common.

The grounds for refusal provided for in the national laws of the non-contracting Member States are usually comparable to those provided in Article 22, paragraph 2, of the Convention. In some States, grounds for refusal are, however, quite limited. For instance, in **Denmark**, a foreign decision regarding the protection of an adult may be recognised and enforced in Denmark, if in addition to establishing that the foreign proceeding was first, the case in Denmark and the foreign case are identical. In contrast, some Member States provide for a very comprehensive list of grounds for refusal. For instance, **Bulgaria, Croatia, Hungary, Poland, and Spain** provide for more than five different grounds.

Grounds for refusal of recognition or enforcement of a foreign decision most frequently provided in the legal system of non-contracting States are:

- *the decision is contrary to the national public policy (Bulgaria, Croatia, Greece, Hungary, Italy, Malta, the Netherlands, Spain,);*
- *the proceedings are not identical (same parties, same cause of action) (Hungary, the Netherlands, Poland);*

⁷⁸ BG, ES, HR, IE, IT, LU, LT, MT, NL, PL, RO, SI, and SK.

- *the foreign decision is not final (res judicata) (Croatia, Ireland, Italy, Malta, Romania);*
- *the rights of the parties have been violated (e.g., right to defence, right to be heard) (Croatia, Poland);*
- *the decision is contrary to a national decision taken before by a national court or authority (Italy, Poland).*

Key findings

- In the contracting Member States, recognition and enforcement are regulated by Chapter IV of the Hague Convention. Various procedures apply to recognition, with variable levels of complexity, depending on the Member State. The simple and rapid procedure for enforcement referred to in Article 25 paragraph 2 of the Convention is in place in Austria, Germany and Latvia. The grounds for refusal (and enforcement) are directly regulated in Article 22, paragraph 2, of the Convention. However, the Permanent Bureau of the Hague Conference has no enforcement powers in case a party fails to comply with their international commitments.
- In the non-contracting Member States, recognition of foreign measures can take place either by operation of law (in Denmark, Italy, Poland and Slovenia) or by judicial recognition (in the remaining Member States).
- In most of these States⁷⁹, to enforce the measures taken abroad, a declaration of enforceability by a judicial authority of the State where the decision is to be enforced is required. On the contrary, in some States (Denmark, Greece, Hungary, and Sweden), an exequatur procedure is, in principle, not required. The grounds for refusal provided for in the national laws of the non-contracting Member States are usually comparable to those provided in the Convention. In some States (e.g. Denmark), grounds for refusal are more limited; while in others, additional or different grounds from those listed in the Convention are listed under national law (Bulgaria, Croatia, Hungary, Poland, and Spain).

⁷⁹ BG, ES, HR, IE, IT, LU, LT, MT, NL, PL, RO, SI, and SK.

3 Practice on cross-border cases

3.1 Use of protective measures in the Member States

This section presents the data obtained from the different types of stakeholders (MSCAs, legal practitioners and non-technical respondents (e.g., NGOs and medical/social care organisations) on the overall trends in the number of protective measures and cases with cross-border implications between 2015 and 2020.

3.1.1 Trends in the number of protective measures

Total protective measures

Limited statistics are available on the overall number of protective measures adopted over the past five years. Only ten out of the 18 MSCAs that responded to the survey provided figures which are compiled in Table 23 below⁸⁰. Belgium, Germany, Italy, Malta, Poland and Sweden indicated that the data requested is not recorded.

Table 23: Total number of decisions adopted on protective measures (2015-2020)

MS	2015	2016	2017	2018	2019	2020	Average annual increase/decrease
AT	58 606	58 548	55 462	50 204	45 709	42 474	-6 %
CZ	14 187	16 690	13 433	15 668	17 026	No data	6 %
FR	190 415	198 739	204 668	No data	No data	No data	4 %
HU	61 254	62 076	63 123	63 766	63 890	65 437	1 %
LT	1 157	813	1 685	1 784	1 673	1 488	13%
LU	No data	532	420	468	515	572	3 %
LV	387	331	517	378	379	436	6 %
NL	295 000	328 073	343 220	354 921	367 973	375 030	5 %
PT	5 588	5 843	6 939	8 719	16 433	No data	34 %
SK	1 380	1 181	1 084	1 129	1 131	902	-8 %
Total without FR	437 559	474 087	485 883	497 037	514 729	486 339	4 %

Source: MSCAs survey responses + French Ministry of Justice website

The figures available show **an overall increase in the number of protective measures adopted** between 2015 and 2020⁸¹, except in Austria⁸² and Slovakia where measures have been decreasing. Over the past five years, there has been an average increase of 4 % per year in the number of protective measures adopted across the eight

⁸⁰ The data for France was obtained online on the French Ministry of Justice website and is only available until 2017. In addition, the French MSCA provided data on the number of new measures adopted between 2015-2017. In 2015, 76,809 new measures were adopted, in 2016, 78,397 new measures were adopted and in 2017, 74,593 new measures were adopted.

⁸¹ The increase observed in Portugal coincides with the legislative changes that occurred in 2019, and which resulted in a more flexible regime.

⁸² The current law (Erwachsenenschutzgesetz) entered into force in 2018 and marked an important change in approach towards the protection of adults. While the previous system of guardianship kept increasing the number of measures taken, the newly introduced system is a paradigm shift as it provides for more autonomy, self-determination and freedom of decision. Some of the underlying goals were to live up to the UN Convention on the rights of persons with disabilities as well as to stop the ever increasing number of measures taken under the old legal regime.

Member States for which data is available (Austria, the Czech Republic, Hungary, Lithuania, Latvia, the Netherlands, Portugal, Slovakia) or a total increase of 18 % - going from 437 559 in 2015 to 514 729 in 2019. For France, no recent data is available for 2018-2020; however, the MSCA indicated that between 2000 and 2016 the number of new measures adopted increased from 55 000 to over 78 000 (i.e., a 43 % increase). Since 2010 the number of new protective measures steadily increased to reach a peak of 78 397 in 2016. At the start of 2017, around 730 000 people were placed under protective supervision.

Breakdown by type of protective measure

Table 24 below compiles the data obtained from MSCAs on the number of protective measures adopted between 2015 and 2020 by type of measure adopted.

Table 24: Total number of protective measures adopted by type of measure (2015-2020)

MS	Type of measure	2015	2016	2017	2018	2019	2020
AT	Guardianships/curatorship	7 237	7 237	6 527	4 579	5 405	6 017
CZ	Limitation of legal capacity	11 914	13 243	10 407	13 177	14 633	No data
	Guardianship without limitation of legal capacity	1 641	2 975	2 844	2 279	2 211	No data
	Representation by a household member	568	406	139	164	144	No data
	Assistance in decision-making	64	66	43	48	38	No data
FR	Guardianship	41 975	41 464	37 544	No data	No data	No data
	Curatorship	33 316	34 385	36 154	No data	No data	No data
	Family-member guardianship order	No data	6 000	17 000	No data	No data	No data
	Custody	1 518	1 485	895	No data	No data	No data
HU	Custody that concerns the capacity to act	56 515	57 039	57 983	58 242	58 153	57 327
	Trustee (of the person under custody) / Ad-hoc custodian	3 195	3 154	3 144	3 147	3 325	2 807
	Assignment of an ad-hoc custodian	1 308	1 599	1 719	2 010	2 064	4 986
	Assignment of a sequestrator	145	135	110	161	153	111
	Supported decision-making without prejudice to capacity to act	91	149	167	206	195	207
LT	Court decisions	1 157	803	1 670	1 769	1 657	1 468
	Assisted decision making		3	5	6	7	6
LU	Guardianship		336	224	283	330	378
	Curatorship		169	167	169	161	166
PT	Guardianship and curatorship	3 538	3 743	4 495	5 949	13 531	No data
	Compulsory internment	1 490	1 440	1 698	1 766	1 840	1 534
	Total or partial asset administration	280	330	373	502	531	No data
	Authorisation for a specific	280	330	373	502	531	No

MS	Type of measure	2015	2016	2017	2018	2019	2020
	intervention						data
SK	Deprivation of legal capacity	1 227	617	0	0	0	0
	Restriction of legal capacity	153	564	1 084	1 129	1 131	902

Source: MSCAs survey responses

The different types of protective measures available from one Member State to another limit the possibility to draw cross-country comparisons. However, it is visible that across six Member States, guardianship/curatorship and measures that limit the legal capacity of the vulnerable adults make up the majority of all protective measures adopted across all years.

Only Austria, the Czech Republic and Luxembourg provided data with a breakdown by type of proxy for the protective measures. In Austria, the majority of protective measures have a notary or lawyer as proxy (35 %), closely followed by family members of vulnerable adults (33 %) and public guardians (22 %). In the Czech Republic, family members make up 71 % of proxies and public guardians 29 %. In Luxembourg, family members make up around 54 % of proxies, guardianship associations 18 %, and private parties and care providers make up 3 % of proxies. In Latvia, on average family members make up over 70 % of proxies. Although no data were available for 2020, the French MSCA indicated that in 2016, nearly 6 out of 10 guardianships were entrusted to family members and less than 4 out of 10 to judicial representatives, while the opposite was true for curatorship, where three quarters of the measures were entrusted to professional guardians. However, the MSCA indicated that overall there has been an increasing trend of appointing professional guardians.

Private mandates

Similarly, very limited data are available on the number of private mandates registered over the past five years, only the Austrian, Dutch, Lithuanian and Latvian MSCAs were able to provide figures compiled in Table 25 below.

Table 25: Total number of private mandates registered (2015-2020)

MS	2015	2016	2017	2018	2019	2020	Average annual increase
AT	No data	No data	No data	No data	150 607	171 077	14 %
FR	909	1 083	1 164	No data	No data	No data	13 %
LV	6	17	17	22	28	31	50 %
LT	No data	7	10	9	9	13	19 %
NL	No data	65 590	69 162	74 298	79 262	83 998	6 %

Source: MSCAs survey responses + French Ministry of Justice website

In Austria, Latvia, and the Netherlands, **the number of private mandates has seen a significant increase in recent years**. In Austria between 2019 and 2020 private mandates increased by 14 %, while they increased on average by 6 % per year in the Netherlands between 2016 and 2020, by 19 % per year in Lithuania between 2016 and 2020, and by 50 % per year between 2015 and 2020 in Latvia. The data for France were obtained on the French Ministry of Justice's website and figures are only available until 2017. In France, the number of private mandates also increased (on average by 13 % annually) over a period of three years.

Foreign protective measures

Only the Czech, Luxembourgish and Portuguese MSCAs were able to provide data on foreign protective measures between 2015 and 2020. All other MSCAs that responded to the survey indicated that **data on foreign measures are not recorded**. However,

the German competent authority and the competent authority from another Member State not party to the HCCH Convention indicated that such cases are rare. The Estonian and Latvian MSCAs reported that, as far as they are aware, there were no cases in which the HCCH Convention was applied, while the Austrian and Cypriot MSCAs reported only one case where the Convention was applied. In addition, during an interview, the Finnish MSCA indicated that they can only recall two cases in which the Convention was applied. The data provided by Portugal and the Czech Republic are compiled in Table 26 below. It should be noted that the data for Portugal refers to the number of cases reported by courts to the Portuguese MSCA. The latter indicated that these figures are an approximation and that it is possible that more cases occurred but were either not detected by the IT software or not reported to the Central Authority. The Czech MSCA could only provide data on the number of requests coming from other Member States party to the 2000 Hague Convention and in which the central authority was involved.

Table 26: Number of foreign protective measures in Portugal (2015-2020)

MS	Type of decision	2015	2016	2017	2018	2019	2020	Average annual increase
PT	Number of cases for which recognition and/or enforcement of foreign protective measures was requested in your country	5	8	11	17	22	26	40 %
	Number of foreign protective measures for which recognition and/or enforcement has been refused in your country	1	1	1	0	1	0	
	Number of foreign protective measures which have been recognised in your country	4	7	10	15	16	27	49 %
CZ	Number of cases for which recognition and/or enforcement of foreign protective measures was requested in your country	1	3	2	5	4	9	84 %
LU	Number of cases for which recognition and/or enforcement of foreign protective measures was requested in your country			1		1		-
	Number of foreign protective measures which have been recognised in your country			1			1	-
	Number of confirmation cases of private mandate with an international element in your country				1			-
	Number of certificates issued on the basis of Art. 38 of the 2000 Hague Convention on the international protection of adults	0	0	0	0	0	0	-

Source: Portuguese Central Authority, Czech Central Authority, Luxembourgish Central Authority

The **number of cases with cross-border implications in Portugal was relatively low** between 2015 and 2020 – with a total of 89 requests for recognition and/or enforcement of foreign protective measures over the 5-year period. However, this **number has been steadily increasing**, on average by 40 % per year, representing a five-fold increase overall. Similarly, the number of foreign protective measures that were recognised in Portugal between 2015 and 2020 is low – with a total of 79 cases over the 5-year period. The recognition of foreign protective measures has also been steadily increasing, on average by 49 % per year.

The Portuguese MSCA indicated that **most of the cases refer to decisions taken in other countries regarding Portuguese citizens**, where the vulnerable adult had assets in Portugal or moved their habitual residence to Portugal. Only about five decisions were reported to be taken in Portugal regarding citizens of contracting States to the Hague Convention. In relation to decisions on recognition and enforceability decreed in Portugal, in 55 cases the vulnerable adults had Portuguese nationality, in six cases French nationality, in one case German, Belgian and Luxembourgish nationality and in 14 cases the vulnerable adults had a non-EU nationality (Angola, Brazil, Cuba, Switzerland and USA). As far as the Central Authority is aware, there were no confirmations of private mandates and no certificates issued on the basis of Article 38 of the 2000 Hague Convention.

Similarly, the number of requests for recognition received by the Czech MSCA was low over the 5-year period – with a total of 24 requests. However, this number has also been increasing, on average by 84 % per year. The majority of requests (16) came from Germany, followed by Switzerland (three), France (two), Austria (one), the Netherlands (one) and Portugal (one).

In Luxembourg, the number of requests for recognition and recognition of foreign protective measures was also low between 2015 and 2020 with only one request for recognition in 2017 and 2019. Only one foreign protective measure was recognised in Luxembourg in 2017 and 2020. In addition, the Luxembourgish MSCA indicated that no certificates were issued on the basis of Article 38 of the Hague Convention during the 5-year period. In Luxembourg, one decision on recognition and enforceability pertained to a vulnerable adult from Greece and one from Portugal.

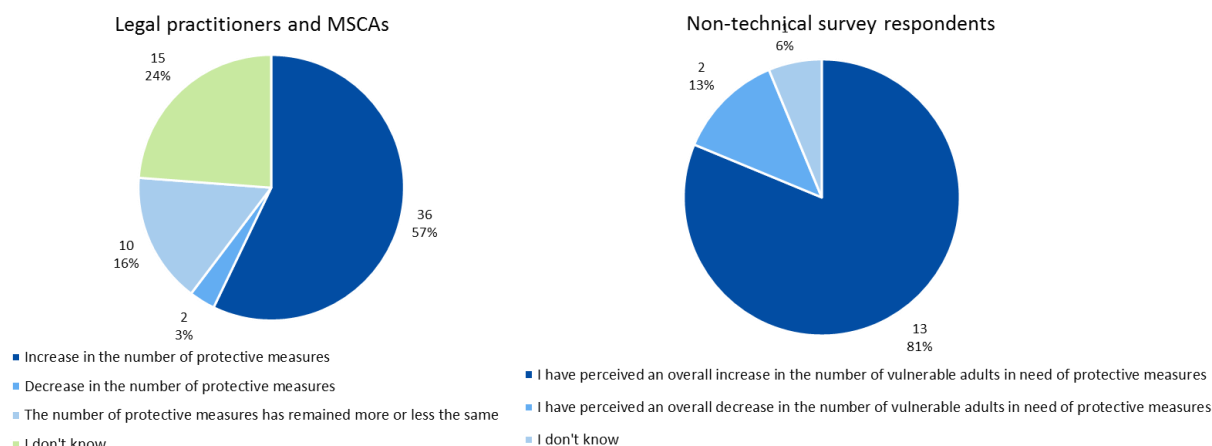
3.1.2 Stakeholder perceptions on the number of protective measures

To mitigate for the limited quantitative data, stakeholders were asked about their perception on overall trends in the number of protective measures and cases with cross-border implications. Although the results are anecdotal, they nonetheless help give a broad picture of the situation and confirm the trends identified in the quantitative data provided by some of the Member States.

The results of the surveys show that the majority of MSCAs and legal practitioners (57 %) have perceived **an increase in the number of protective measures of the past five years**, while 81 % of the non-technical survey respondents have perceived an overall **increase in the number of vulnerable adults in need of protective measures** over the past five years.

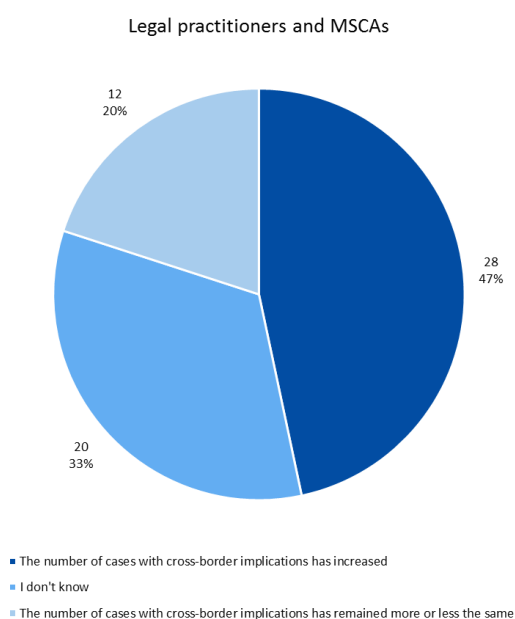
Figure 5: Have you perceived changes in the overall number of protective measures taken for vulnerable adults over the past 5 years? (legal practitioners and MSCAs surveys, N=63) / In your line of work, have you perceived changes in the number of

vulnerable adults in need of protective measures (e.g., guardianship) over the past 5 years? (non-technical survey, N=16)



When asked about trends in the number of **cases with cross-border implications**, **47 % of legal practitioners and MSCAs stated that the number of cross-border cases had increased over the past five years** and 20 % stated that the number of cross-border cases has remained more or less the same. However, 33 % were unable to respond. On an individual level, 33 % of legal practitioners stated that the number of cases with cross-border implications which they have worked on has increased over the past five years, 23 % stated that the number of cases they have worked on has remained more or less the same and only 2 % stated that the number of cases has decreased. The number of cross-border cases on which the surveyed legal practitioners have worked on over the past five years ranges from 0 to 600, with an average of 63 cases – i.e., around 13 cross-border cases per year. At the same time, 67 % of the non-technical survey respondents that were able to provide an answer, stated that in their line of work they have perceived **an increase in the cross-border mobility of vulnerable adults over the past five years**.

Figure 6: In your opinion, how has the number of cases with cross-border implications with EU Member States related to the protection of vulnerable adults evolved over the past 5 years in your country? (legal practitioners and MSCA surveys, N=60)



Average length of cases with cross-border implications

More than half of the MSCAs and legal practitioner respondents (55 %) stated that **cases with cross-border implications are on average longer than similar national cases**, with 16 % stating that they are significantly longer. On the other hand, 27 % were unable to respond; 11 % stated that cases with cross-border implications are on average the same length as national cases; and 7 % stated that they are significantly shorter. The MSCA from Luxembourg indicated that the average length of proceedings for recognising foreign decisions made by the competent authorities of another Member State is 6 to 12 months, while the Lithuanian MSCA indicated an average of 7 months and the Latvian MSCA indicated 1 to 2 months. No other MSCA was able to provide information on the average length of proceedings, as statistical information on cross-border cases is not recorded. Several respondents (18) provided explanations to support their answers.

The majority (12) mentioned that processing cases with cross-border implications takes longer than processing purely domestic cases with similar characteristics due to **difficulties in obtaining information from all parties involved and difficulties in co-operating with foreign institutions**. The need for translation and interpreters was highlighted by two respondents; one respondent stated that adequate systems for co-operation and training of staff are lacking; and one respondent mentions problems in obtaining a response from the other State. An additional six respondents, stated that cross-border cases are longer than national cases due to **differences in jurisdictions** which add a layer of complexity. One respondent mentioned difficulties in obtaining the recognition of decisions appointing representatives abroad; one mentioned the need to obtain permission from a judge for certain procedures in some Member States which is not the case in their Member State; one stated that the limited number of countries party to the Hague Convention leads to complexity; and one respondent mentioned that proceedings were longer because judges need to familiarise themselves with the national law of the other country. The French MSCA indicated that the same process is used for national cases and cases with cross-border implications, therefore, the length of the proceedings vary in the same way depending on the workload of the courts and medical experts and not due to the cross-border nature of a case.

Key findings:

- Limited data is available on the number of protective measures adopted in the Member States between 2015 and 2020 and the majority of MSCAs indicated that they do not record information on cases with a cross-border element.
- Based on the limited data available and on the overall perception of stakeholders, there appears to have been an increase in the number of protective measures adopted between 2015 and 2020 – with an overall increase of 18 % across eight Member States. At the same time, NGOs and medical/social care organisations have perceived an increase in the number of persons in need of protective measures and an increase in their cross-border mobility.
- Similarly, based on the limited data available, the number of private mandates appears to have been steadily increasing over recent years.
- Only Luxembourg and Portugal provided data on cases of recognition and enforcement of foreign protective measures. In Luxembourg the number of requests for recognition and the number of foreign protective measures recognised has been low with less than one case per year over the 5-year period (2015-2020). The number of cases in Portugal over the five-year period is also relatively low (with a total of 89 requests between 2015-2020). However, Portugal has seen a five-fold increase in the number of requests for recognition, going from five requests in 2015 to 26 in 2020. Many legal practitioners have also perceived an increase in the number of cases with cross-border implications in their line of work. The Czech Republic provided data on the number of requests received by other Member States party to the 2000 Hague Convention. The number of requests in the Czech Republic has also been low (24 in total over five years) but

increasing on average by 84 % per year. In addition, several other MSCAs indicated that the number of cross-border cases has been very rare in recent years.

- The majority of MSCAs and legal practitioners indicated that the average length of cases with cross-border implications is longer than similar national cases, citing difficulties in obtaining information from all parties involved and differences in jurisdictions as key reasons behind the complexity of such cases. Two MSCAs provided information on the average length of cross-border proceedings which range between 1 and 12 months.

3.2 Overview of case-law on cross-border cases in the Member States

Case-law was identified for eight Member States (Austria, Belgium, Estonia, France, Italy, the Netherlands and Poland - see Annex IV). Most of the jurisprudence consists of cases handled by lower and middle courts. Nevertheless, important decisions of the higher courts are included, such as the decision of the Dutch Supreme Court, which made the rules of the Hague Convention applicable in the Netherlands.

3.3 Legal and practical challenges in cross-border cases

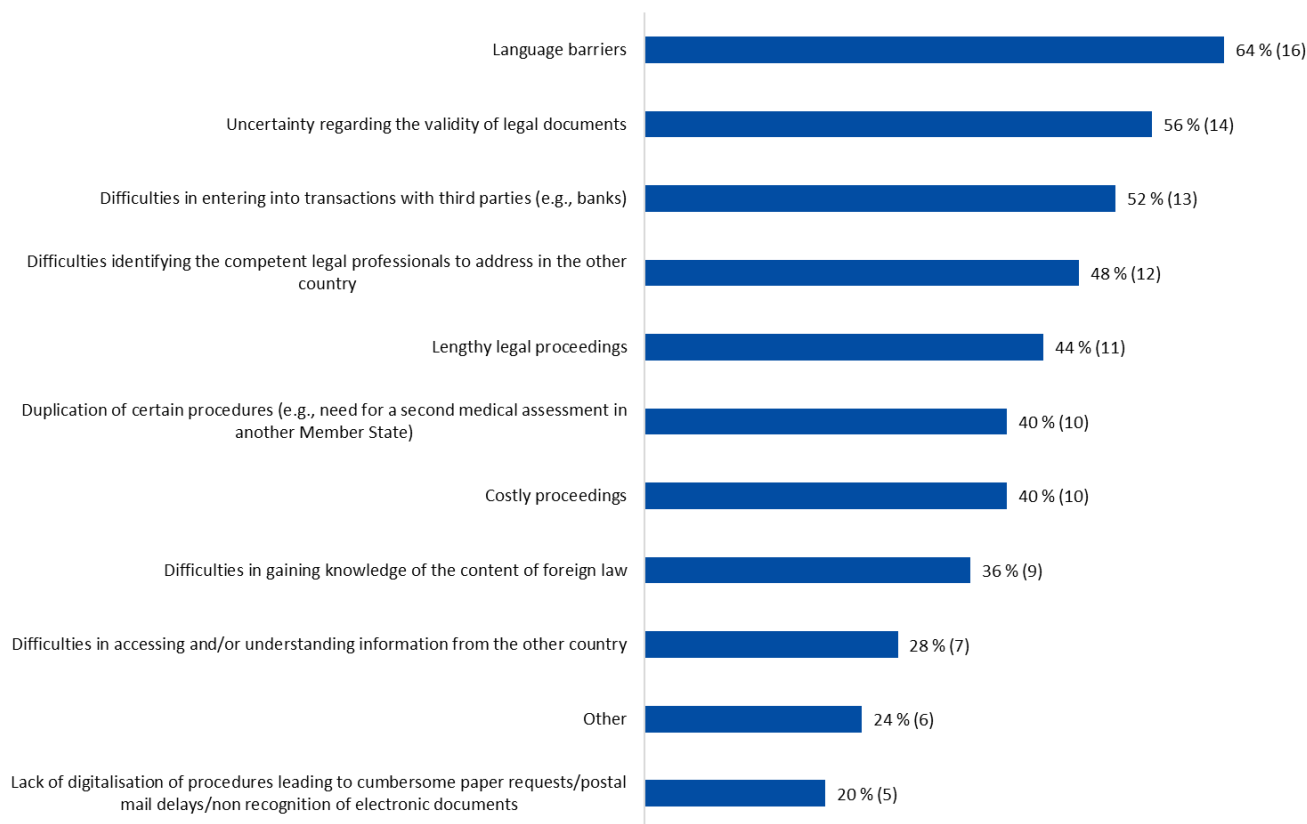
The three different surveys (MSCAs, legal practitioners and non-technical) contained a section addressed to **respondents from all countries** about the legal and practical challenges that occur in cross-border cases. The present section presents the results obtained from the stakeholders.

3.3.1 Main challenges faced by vulnerable adults and their representatives in the context of cross-border cases

Challenges

MSCAs and non-technical survey respondents were asked about the main challenges experienced by vulnerable adults or their representatives in the context of cross-border cases. Out of all respondents who provided an answer (25), more than half mentioned **language barriers** as a key challenge (64 %), followed by **uncertainty regarding the validity of legal documents** (55 %). Other key challenges observed by MSCAs and non-technical survey respondents included costly proceedings, difficulties in entering in transactions with third parties (e.g., banks) (52 %), difficulties in identifying the competent legal professionals to address in the other country (48%) and lengthy legal proceedings (44 % of respondents).

Figure 7: In your experience, what are the main challenges faced by vulnerable adults and their representatives in cross-border situations? (MSCA survey and non-technical survey, N=25)



Other includes, lack of "easy to read" documents, written in plain accessible language and differing definitions of "disability" which can lead to varying levels of support from one Member State to another.

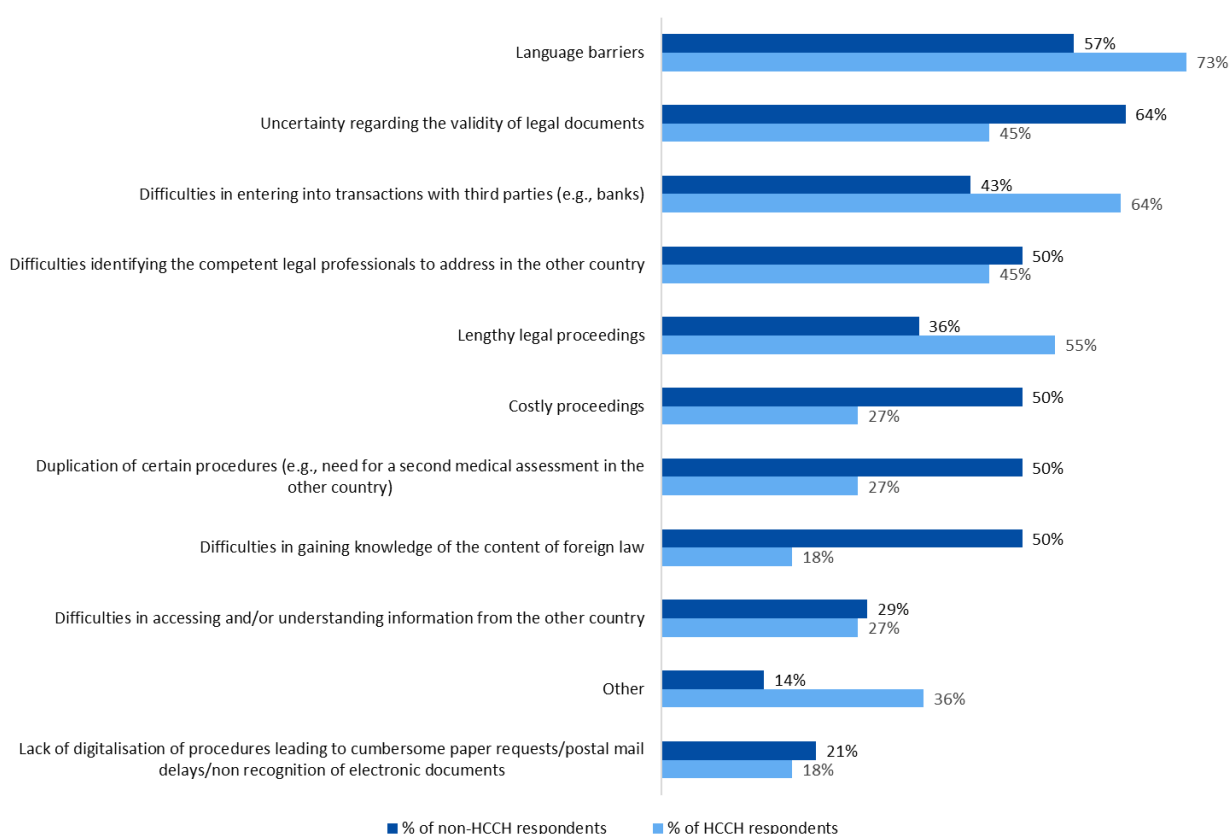
Several stakeholders provided comments in a follow-up question to substantiate their answer. In relation to language barriers, two MSCAs mentioned that these are particularly problematic when a public guardian is appointed in another Member State who often does not speak the language of the vulnerable adult. One NGO active in the protection of vulnerable adults stated that language barriers exacerbate issues over financial decisions and ownership when dealing with third parties such as banks, which already often have limited understanding of vulnerable persons and rules surrounding protective measures. According to this NGO it thus becomes more difficult to respect the wishes of the individual under protection in cross-border situations due to more complex arrangements and significant differences in law from one country to another. One organisation providing social care to vulnerable adults stated that the international element prolongs procedures, leading to higher costs and distress to vulnerable adults and their representatives.

Legal uncertainty and difficulties in legal procedures were mentioned by six non-technical respondents as a key barrier to the free movement of vulnerable persons. These organisations state that the variation in rights of vulnerable adults between countries (including in relation to private international law) creates uncertainty on how the legal rights and wishes of people under protection will be respected and act as a deterrent for travelling abroad. This also extends to the family of the vulnerable adult taking up residence abroad, who often move their vulnerable relative to their country of residence to ensure they are able to provide care. According to several NGOs, **vulnerable adults and their representatives often face difficulties in identifying the country which has responsibility or jurisdiction over specific matters**, such as, determining the law applicable to the protection of the adult; determining whether a non-voluntary measure or private mandate granted in one state will be given effect in

another; and determining whether and how the authorities of one state can be called upon to assist the authorities of another state in providing the protection that the adult may need. The need to have an additional legal representative nominated by a judge in the county to which the vulnerable adult is moving was also stated as a difficulty by one non-technical survey respondent.

Overall, respondents from Member States that have not ratified the 2000 Hague Convention indicated more difficulties than those from Member States that have ratified the Convention, with the former reporting on average five difficulties and the latter three difficulties out of the 12 possible options. A higher proportion of respondents from Member States that have not ratified the Convention indicated costly proceedings; difficulties in identifying the right contact point in the other Member State; duplication of procedures and uncertainty over the validity of legal documents, than respondents from Member States that have ratified the Convention (see Figure 8 below).

Figure 8: In your experience, what are the main challenges faced by vulnerable adults and their representatives in cross-border situations? Breakdown by type of Member State (MSCA survey and non-technical survey, N=22)



How to interpret the graph: this figure shows that 50 % of respondents from Member States that have not ratified the 2000 Hague Convention reported costly proceedings as a key challenge, versus 27 % of respondents from Member States that have ratified the Convention.

Repercussions of the non-recognition of protective measures abroad or of lengthy/complex proceedings

All stakeholder types (MSCAs, legal practitioners and non-technical respondents) were asked about the repercussions of the non-recognition of foreign protective measures or of lengthy/complex proceedings for vulnerable adults and their family.

The majority of respondents (20) stated that vulnerable adults incur **financial losses** and are **unable to manage their financial affairs** as they would wish (e.g., sell or transfer assets) or experience significant delays when foreign protective measures are not recognised or take time to be recognised. Thirteen of these respondents were legal

practitioners, three were organisations active in the protection of vulnerable adults and four were MSCAs. One respondent highlighted that in these cases vulnerable adults face higher risks of litigation, while another respondent stated that it can also lead to difficulties in receiving maintenance allowances from relatives abroad.

Delays in obtaining medical care or receiving inadequate medical care was the second most mentioned repercussion by stakeholders (four– legal practitioners, one MSCA, and one NGO). One stakeholder gave the example of the COVID-19 vaccination, where some vulnerable adults abroad experienced delays or were unable to receive the vaccination due to issues with the recognition of protective measures – in this case linked to the authorisation of their proxy for vaccination. A legal practitioner also mentioned that vulnerable adults can be prevented from receiving treatment due to the inability to get the assets needed to face medical expenses.

Three organisations active in the protection of vulnerable adults mentioned the **violation of rights of the persons under protection** and possible restrictions on their exercise of legal capacity (notably in the case of persons with a disability). These organisations argue that cross-border cases increase the risk of non-respect of the wishes/preferences of vulnerable adults.

Costs of proceedings and need for legal aid

The non-technical survey and the survey to legal practitioners included several questions on the costs of cross-border proceedings and notably on the need for legal aid. When asked how often vulnerable adults need legal aid to meet the costs of court cases / legal representation abroad, the majority of respondents were unable to respond. Out of those who could provide an answer (24), 46 % responded that vulnerable adults very often need legal aid, while 29 % responded that they sometimes need legal aid. 17 % of respondents answered that vulnerable adults always need legal aid, 4 % answered that vulnerable adults never need legal aid and 4 % said that they rarely need legal aid.

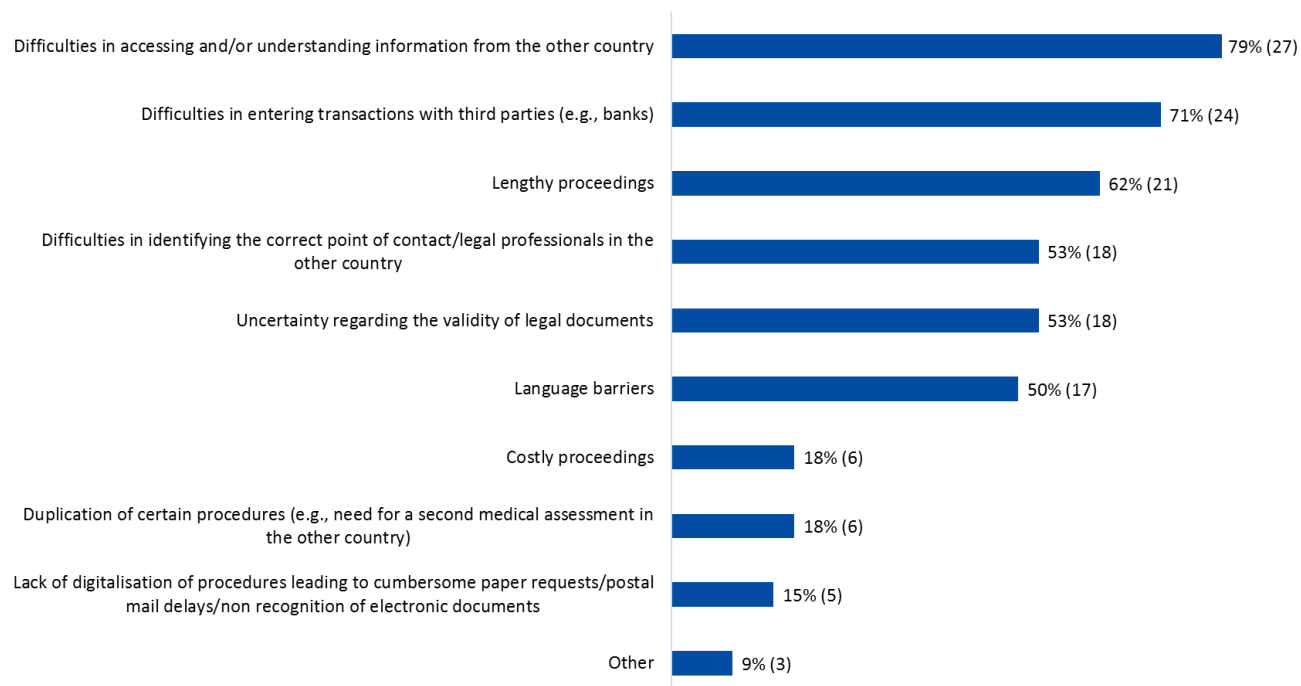
On the question of whether legal aid is sufficient to cover all of the costs linked to court cases/legal representation in cross-border situations, 55 % of respondents (out of 33 in total) believe that legal aid is not sufficient, while 45 % believe it is sufficient.

Twelve respondents further explained that legal aid usually only covers court expenses and lawyer fees, **it does not cover the costs of translating or certifying documents nor travel and accommodation costs** linked to certain interventions. Five of these respondents also highlight the **difficulties for vulnerable adults to obtain legal aid in the first place**, which is exacerbated in cross-border cases. One NGO explained that support and advice is offered in the first instance by civil society organisations, which then signal the persons towards national legal services and explain procedures for obtaining aid. Difficulties in obtaining legal aid act as an additional barrier to free movement and access to justice of vulnerable adults, all the more as persons with disabilities often already face extra costs for accessing the justice system in general linked to the need for a personal assistant or support person.

3.3.2 Main challenges faced by legal practitioners in the context of cross-border cases

Legal practitioners were asked about the main challenges they encounter in obtaining the recognition and/or enforcement of foreign protective measures. Out of all respondents that provided an answer (34), the main challenge stated is the **difficulty in accessing/understanding information from the other country** (79 %), followed by **difficulties in entering into transactions with third parties** (71 %). More than half of the respondents also stated that they encounter lengthy proceedings (62 %), difficulties in identifying the correct point of contact in the other country (53 %) and uncertainty over the validity of legal documents (53 %).

Figure 9: What are the main practical challenges you encounter as a practitioner in obtaining the recognition and /or enforcement of foreign protective measures? (N=34)



Other includes lack of judicial training; UNCPRD requirements and understanding of measures of protection and powers of representation.

No statistically significant differences by country of practice of the respondents or by type of practitioners could be identified. Respondents from Member States that have ratified the 2000 Hague Convention and from those that have not ratified the Convention highlighted similar types of challenges and both indicated on average five difficulties out of the 10 options.

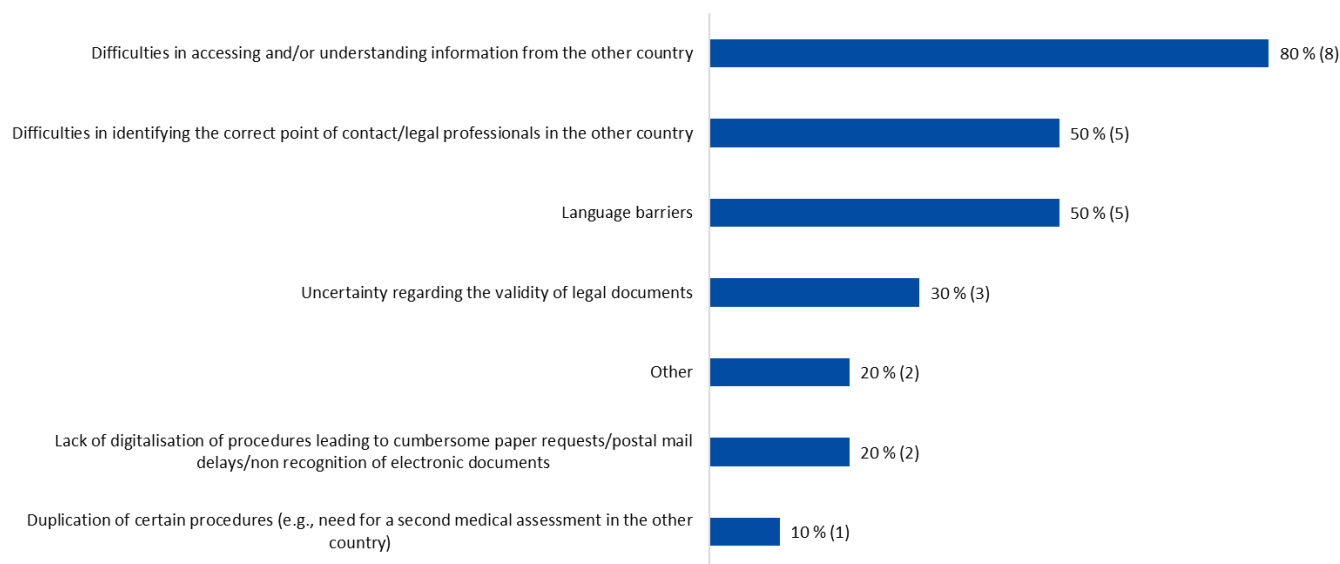
In a follow-up question, several stakeholders provided anecdotal examples of difficulties which they faced in specific cases. One respondent from the Netherlands explained that **certain documents are not recognised nor accepted in other countries**. For example, a procuration that the Dutch practitioner had drafted so that a medical assessment in France would not be necessary was rejected by the French authorities. Another respondent highlighted that even in cases of emergency (e.g., hospitalisation without consent) it is **impossible to access and check information from other countries** and identify the relevant professionals to contact. Two Italian notaries mentioned cases where the vulnerable adult abroad faced **very long delays** due to the legal uncertainty of their situation and difficulties for authorities to communicate among themselves. A Slovenian notary gave the example of the family of an elderly Slovenian residing in a Croatian retirement home who abandoned plans to rent the real estate of their elderly relative due to the complexity of the procedure.

3.3.3 Main challenges faced by competent ministries and central authorities in the context of cross-border cases

Member States' competent ministries and central authorities (hereinafter MSCAs) were asked about the main challenges they face as competent authorities in cross-border cases. Similar to legal practitioners, out of all respondents (ten), the majority mention **difficulties in accessing/understanding information from the other country** (80 %). Other challenges such as difficulties in identifying the correct point of contact / legal professionals in the other country, and language barriers were mentioned by half of the

respondents, while uncertainty regarding the validity of legal documents was mentioned by less than half of the respondents (30 %).

Figure 10: What are the main challenges that you, as a competent authority, face in your country in cross-border cases? (N=10)



Other includes the absence of adoption of implementation rules, in particular on recognition and enforceability and the fact that a very limited number of countries have ratified the Hague Convention

The Czech MSCA argued that promoting e-mail communication between the central authorities would facilitate communication between the Contracting States of the Hague Convention, which would speed up procedures and reduce postal delays. The MSCA from a state that is not party to the Hague Convention⁸³ mentioned that difficulties occur as it is often necessary to gather information on foreign laws. This is due to their domestic Private International Law rules, which state that the national law of the vulnerable adults applies to their protection. On the other hand, the Austrian MSCA stated that the difficulties mentioned result from cross-border situations in general and do not reflect a need to amend the law on the protection of adults, while the Dutch MSCA stated that they have not faced obstacles regarding the recognition and enforcement of protective measures, notably because courts apply the 2000 Hague Convention in anticipation of its ratification. The French MSCA indicated that the limited number of countries that have ratified the Hague Convention leads to numerous situations that are not covered by any international instrument, which in turn leads to complexity, the absence of contact points and difficulties in accessing necessary information.

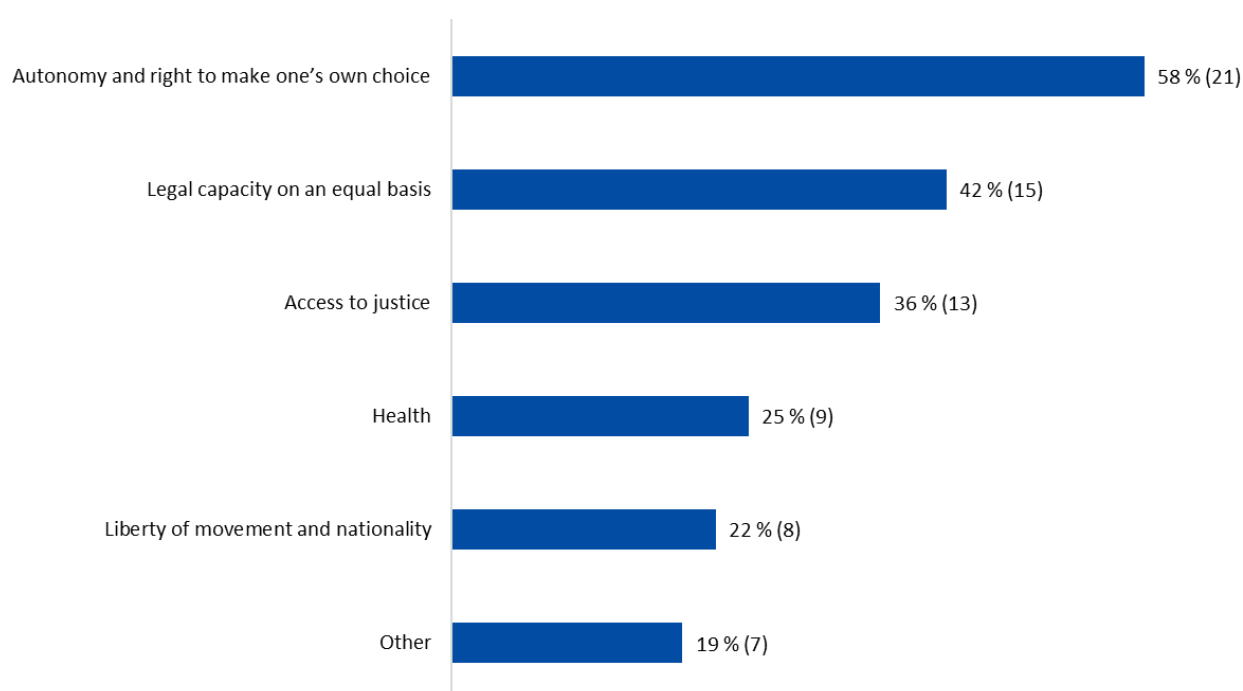
Overall, MSCAs from Member States that have ratified the 2000 Hague Convention and from those that have not ratified the Convention highlighted similar types of challenges. A higher proportion of MSCAs from Member States that have not ratified the Convention, however, indicated difficulties in identifying the correct point of contact/legal professionals in the other country as a challenge, compared to MSCAs from Member States that have ratified the Convention (75 % (3/4) versus 33 % (2/6)). Similarly, MSCAs from Member States that have not ratified the Convention indicated uncertainty regarding the validity of legal documents as a challenge, compared to MSCAs from Member States that have ratified the Convention (50 % (2/4) versus 17 % (1/6)).

⁸³ The responding authorities requested anonymity.

3.3.4 Breaches of the fundamental rights of persons with intellectual disabilities linked to the UNCRPD occurring in cross-border cases

All stakeholder types (MSCAs, legal practitioners and non-technical respondents) were also asked whether they are aware of breaches of the fundamental rights of persons with intellectual disabilities linked to the UNCRPD occurring in cross-border cases. Out of all respondents (36), more than half (58 %) stated that breaches had occurred in relation to the person's **autonomy and right to make their own choice**. It should be noted that only legal practitioners and non-technical survey respondents mentioned this type of breach, except for the Latvian MSCA. The majority of MSCAs did not mention any breaches.

Figure 11: Are you aware of breaches of the fundamental rights of persons with intellectual disabilities, linked to the UNCRPD, that would have occurred in cross-border cases, in particular:
(All surveys, N=36)



Other includes, inability to certify that the adult has been heard for in some cross-border cases; no breaches; and right to employment, voting and education.

In a follow-up question, several notaries/notary bodies mentioned that **not all Member States have set up extra-judicial mechanisms and solutions** provided by non-judicial public authorities or public office holders (such as notaries) to appoint a representative or provide other supporting measures in the case of loss of capacity of an adult.

A pan-European NGO active in the protection of vulnerable adults argued that in cross-border situations, issues of competing jurisdiction and lack of mutual recognition of protective measures often result in **the wishes of the person not being considered or given effect**, particularly when the vulnerable person is not involved/represented in the decisions which affect them. This can also be supported by the response provided by an MSCA which states that in some cross-border cases it is not always possible to certify that the vulnerable adult has been heard. In the same vein, two other NGOs argue that persons with disabilities often face **issues in accessing justice and extra costs**, which are exacerbated in cross-border situations, hindering their right to free movement.

In relation to health, an NGO stated that due to the delays experienced in cross-border cases, it is **difficult to arrange health insurance and financial help**, leading to situations where no care can be provided as there is no guarantee for the care-provider that costs will be covered.

Finally, another pan-European NGO argued that the recognition of guardianship and curatorship in cross border healthcare constitutes a violation of Article 12 of the UNCRPD and that it is against the right to legal capacity and autonomy of the person. Furthermore, this NGO argued that in some cases, the Hague Convention and recognition of substituted decision making could be used for practices not compliant with the UNCRPD such as moving a person from one institution to another.

Key findings:

- Language barriers and uncertainty regarding the validity of legal documents were cited as key challenges faced by vulnerable adults and their representatives in cross-border situations. Legal uncertainty and varying rights from one Member State to another were mentioned as key barriers to the cross-border mobility of vulnerable persons by NGOs active in the field of protection of vulnerable adults. According to stakeholders, vulnerable adults and their families often face difficulties in identifying which country has jurisdiction over specific matters in cross-border situations. Overall, respondents from Member States that have not ratified the 2000 Hague Convention indicated more difficulties than those from Member States that have ratified the Convention.
- Lengthy legal proceedings and the non-recognition of foreign protective measures have adverse repercussions on and cause distress to vulnerable adults and their families. The majority of stakeholders stated that in such cases, vulnerable adults often face financial losses and the inability to manage their financial affairs, along with delays in receiving adequate medical care and breaches to their fundamental rights through the non-respect of their wishes/preferences.
- More than half of all survey respondents (58 %) stated that they are aware of breaches of the fundamental rights of persons with intellectual disabilities linked to the UNCRPD occurring in cross-border situations, particularly in relation to autonomy and the right to make one's own choice.
- Half of the non-technical survey respondents and legal practitioners indicated that vulnerable adults often or always need legal aid to meet the costs of court cases/legal representation abroad, while more than half believe that legal aid is not sufficient to cover all costs. Legal aid notably does not cover costs of translation, certification of documents or travel and accommodation costs.
- Over 70 % of legal practitioner respondents indicated that they face difficulties in understanding/accessing information in other countries and difficulties in entering into transactions with third parties in the context of cross-border cases. More than half also experienced lengthy proceedings, legal uncertainty and difficulties identifying the correct contact point in the other country. Respondents from Member States that have ratified the 2000 Hague Convention and from those that have not ratified the convention highlighted similar types of challenges – with no statistically significant differences among both groups.
- MSCAs appear to face fewer challenges. The main challenge reported is the difficulty in understanding/accessing information in other countries (80 % of respondents). A higher proportion of MSCAs from Member States that have not ratified the Hague Convention reported difficulties in identifying the correct contact point in the other country and uncertainty regarding the validity of legal documents compared to MSCAs from Member States that have ratified the Convention.

3.4 Legal and practical challenges related to the Functioning of the 2000 Hague Convention

The surveys addressed to both MSCAs and legal practitioners contained questions on the practical application and challenges linked to the application of the 2000 Hague Convention for respondents from Member States party to the 2000 Hague Convention. Overall, seven MSCAs (Austria, Belgium, the Czech Republic, France, Germany, Latvia, Portugal) party to the Convention and 18 legal practitioners (on average per question) provided answers to these questions.

Awareness of the 2000 Hague Convention

MSCAs were asked whether they consider that the relevant legal practitioners are sufficiently aware of the application of the Hague Convention in their Member State. The majority (five) consider that legal practitioners are not sufficiently aware of the Convention, while two believe they are. The Czech MSCA stated that further action should be taken to promote greater awareness of the Hague Convention among legal practitioners and that more training is required. Two others (Germany and Latvia) highlighted the very limited number of cases where the Convention is applied, which results in a weak base of experience among practitioners, although they are aware of the Convention. The French MSCA indicated that while judges have improved their knowledge of the application of the Hague Convention, awareness among lawyers and notaries remains low.

Challenges in applying the general and specific provisions on jurisdiction (Articles 5-12 of the 2000 Hague Convention)

The majority of **MSCAs** that responded to the survey (five out of seven) stated that they are **not aware of any practical issues or challenges** in applying the general provisions on jurisdiction of the Hague Convention. Only the Czech and German competent authorities stated that they are aware of challenges.

Both the Czech and German competent authorities, along with two legal practitioners, mentioned uncertainties over the notion of "habitual residence", especially when there are indications that the vulnerable adult has been taken abroad without consent / against their will or in cases when the residence abroad lasts less than one year. The Czech competent authority indicated that this results in decisions over whether to exercise jurisdiction under **Article 5** of the Convention being taken on a case-by-case basis. In Germany, when the habitual residence of a vulnerable adult changes, the procedure remains pending in Germany until a new one is introduced in the host country. The German competent authority also indicated that, in practice, the "transmission", including with contracting parties, does not work properly, as after a certain point, the person concerned can no longer be reached by the German authorities.

In the same vein, both the Czech and German competent authorities also stated that they are aware of practical challenges and issues applying the specific provisions on jurisdiction of the Convention, while the other four MSCAs are not. Both the Czech and German authorities indicated that in practice it is difficult for the competent authority to have knowledge about any measures already taken by competent authorities **under Articles 5 to 8 of the Convention**. According to the German MSCA, this brings the question of how the conflict about parallel measures taken by competent authorities under Articles 5 to 8 and those under Article 9 of the Convention (not having knowledge of other measures) can be resolved. Both the Czech and German authorities also indicated that **Article 9** of the Convention is too broad and does not contain enough details which can also lead to difficulties. In addition, the Czech authority highlighted the lack of mutual information duty. During an interview, the Belgian MSCA reported that nothing in the Convention is provided for regarding transfer mechanisms when the principal

residence is modified⁸⁴ and nothing is provided for in relation to the forum in relation to Articles 8 and 9 of the Convention. The Belgian MSCA pointed out that the ongoing protective measures in Belgium may continue even when a person has moved abroad, which means that the protected person will continue to pay an administrator who is in practice not in function.

None of the legal **practitioners** reported issues directly linked to applying the specific provisions on jurisdiction of the Convention. One French judge mentioned difficulties in relation to Article 443§2 of the French Civil Code and the Hague Convention: while French law states that if the vulnerable adult lives outside France, the judge can end the protection, he argued that there is no provision in the Hague Convention that clearly states that the national judge can divest the judicial file of a vulnerable adult to another European judge⁸⁵. According to the respondent, mutual recognition is not enough, as it is necessary for judges in other Member States to be aware of all relevant decisions taken in relation to the vulnerable adult through the transfer of judicial files.

Challenges in applying the provisions on applicable law (Articles 13-21 of the 2000 Hague Convention)

The vast majority of **MSCAs** that responded to the survey (six out of seven) are **not aware of any practical issues or challenges** in applying the provisions on applicable law of the Convention. The Portuguese competent authority, however, indicated that some decisions still apply the domestic rules of private international law of the vulnerable adult's nationality instead of the rules provided for in the Convention. When asked whether they have experienced issues resulting from the application of Article 13 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), four MSCAs (Austria, France, Germany and Portugal) responded that they did not experience issues, Latvia indicated that the national regulations do not provide for the automatic (ex lege) application of protection measures or the limitation of legal capacity, while two other MSCAs (Belgium and the Czech Republic) responded that they did not know.

Furthermore, several legal **practitioners** indicated that they have faced challenges applying the provisions on applicable law. An **Austrian** notary indicated that the Hague Convention is not directly applicable in Austria and that the Austrian PIL provides that the law of the nationality of the adult is applicable. However, the respondent stated that the Austrian government has recently submitted a proposal to redraft the relevant provision (§ 15 IPRG) of the national PIL so that the law of the habitual residence at the time of establishment of the representation of a person would be applicable. According to the respondent, this would bring more clarity and could even serve as an example for future EU legislation. A **Finnish** practitioner highlighted several uncertainties in relation to the Finnish law and Articles 14 and 15 of the Convention. In cases where a vulnerable adult resides in another Contracting Party, according to the Finnish law, the guardian appointed to represent them in their country of habitual residence needs authorisation from Finnish authorities to enter into transactions in Finland. However, the

⁸⁴ On that point, it should be mentioned that Article 5(2) of the Hague Convention provides the rules regarding the change of residence. Articles 8 and 12 define competence in case of change of residence, and Articles 30, 32 and 34 ensures cooperation and the transmission of information in case of change of residence.

⁸⁵ On that point, it should be noted that Article 12 of the Hague Convention does provide that 'the measures taken in application of Articles 5 to 9 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures'; in the situation mentioned here, the authorities would have terminated the measure. On the other hand, Chapter V of the Convention provides for cooperation between authorities, and Article 34 ensures that 'In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration'.

practitioner believes that paragraph 94 of Lagarde's Explanatory Report⁸⁶ suggests that transactions can also be subject to authorisation by the authorities of the state of habitual residence. The respondent argues that this can create the need for double authorisation which can be cumbersome for the guardian. In addition, the Finnish practitioner highlighted uncertainties concerning conflict of interests and making a gift/donation of the adult's property – notably regarding whether these issues are governed by the law of the state where the guardian was appointed or whether this can be considered a "condition of implementation". A **Belgian** notary indicated that there were uncertainties regarding the relationship between Articles 14, 15(1) and 15(3). The practitioner stated that when a measure is taken in one state, with a choice of law for that state, but that it needs to be exercised in another state, there is some unclarity as to which law applies. In the example faced by the practitioner, the law of the first state did not require prior judicial consent for a certain transaction, but the law of the second state where the mandate was executed provided for prior judicial consent for the particular transaction. However, the chosen law was that of the first state. The practitioner argued that the difference between 'extent of the mandate' and the manner in which it is exercised and the manner in which a measure is implemented, was not very clear, and that a clarification on the content of these concepts would be welcome. In addition, during an interview, the **Portuguese** MSCA stated that the number of requests it receives from Courts to provide them with the rules of foreign legislation indicates that there is still confusion on which law to apply, although as a rule the applicable law should be the law of the country of residence – i.e. Portuguese law when the vulnerable adult resides in Portugal. Finally, a **French** judge argued that it was important to preserve the rule of *lex fori* in Article 13, as it is easier and more efficient for the national judge to enforce its national law, - with the exception of assets (especially real estate), which can be submitted to where the assets are held (*lex situationis*).

Recognition of cross-border measures (Articles 22-24 of the 2000 Hague Convention)

Three **MSCAs** indicated that they **are not aware of any practical issues or challenges** regarding the recognition of cross-border measures, while four stated that they are aware of challenges (the Czech Republic, France, Germany, and Portugal). The **Czech** competent authority indicated that they experienced a case where the requesting authority demanded the appointment of a new guardian by the Czech court despite the fact that a guardian had already been appointed in the requested state, which is contrary to Article 22 of the Convention. The **French** competent authority indicated that certain banks require a declaration of enforceability in France of the foreign measure, in some cases this requirement applies even in order for the guardian to obtain a simple bank statement. The **German** competent authority indicated that although Article 22 stipulates that measures taken in one Member State are recognised by operation of law in another Member State, a formal procedure of recognition is often required in practice.

The **Portuguese** competent authority indicated that the Public Prosecution Service takes the view that for foreign decisions to be enforced in Portugal, they need to be reviewed and confirmed by Portuguese courts – according to Articles 22 and 25 of the Convention and Portuguese law. The Portuguese authorities understand that the Convention does not exclude, for the purposes of implementing measures, the *exequatur* procedure (Articles 23 and 25). The MSCA indicated that although the purpose of the review is not to obtain a national judgment identical to the foreign judgment, but to allow the foreign decision to operate in the national legal order, it is still, however, a judicial procedure that runs in a Court of Appeal. This court will only confirm the decision when there is no doubt as to the authenticity of the document containing the decision and that it is *res judicata* under the law of the country where the ruling was delivered, with all the formalities involved. The MSCA thus argues that the approval of the

⁸⁶ Lagarde, P. 2017, Explanatory Report on the 2000 HCCH Protection of Adults Convention. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2951>.

Convention's "simple and rapid" recognition and enforcement procedure still needs to improve.

Two legal **practitioners** highlighted difficulties due to the differences in legislation from one country to another, notably in relation to the duration of the measures and their imputation. A Portuguese judge also indicated that it is unclear whether recognition and declaration of enforceability should be made by courts of first instance (competent to declare the recognition and enforceability of decisions whenever required by EU Regulations) or by second instance courts (competent to deal with the exequatur when conditions provided for in national law are different from those laid out in the Convention).

Enforcement of cross-border measures (Articles 25-27 of the 2000 Hague Convention)

Only the French and Portuguese **MSCAs** stated that they are **aware of practical issues or challenges with the enforcement of cross-border measures**. Both MSCAs provided the same explanation as in the case of recognition of cross-border measures above. The French MSCA also noted that the absence of simple and rapid procedures in France leads vulnerable adults to apply for longer and more expensive common law procedures (e.g., exequatur in front of a judge with an obligation to have a lawyer).

None of the legal **practitioners** reported issues directly relevant to the enforcement of cross-border measures. A **French** judge stated that there is a need for a legal instrument that would allow a judge in one Member State to directly divest a case to a judge in another Member State without impediment.

The vast majority of legal practitioners (16) stated that they have not experienced the application of "rapid and simple procedures" under Article 25 of the Convention.

Only the **Czech, French, and Portuguese** competent authorities have encountered the issue that financial institutions require a declaration of enforceability for the enforcement of cross-border measures under the Convention, instead of applying Article 25. The Czech authority indicated that they have noticed issues with the recognition and enforcement of foreign measures by financial institutions which tend to be overly formal. The Portuguese authority indicated that there was one case where the banking institution recognised the powers of the "guardian" appointed by a foreign court under the terms of Article 22 of the Convention.

Denial of recognition (Article 22(2)(a) of the 2000 Hague Convention)

None of the **MSCAs** could provide data on the number of cases where the recognition of a measure was denied on the basis of Article 22(2)(a) and the Portuguese competent authority indicated that they are not aware of any such cases.

Similarly, all the legal **practitioners** who responded to the survey questions (19 in total) stated that they have not experienced a case where recognition was denied on the basis of Article 22(2)(a).

Possible conflicts between the jurisdiction rules and applicable law regarding confirmation of powers of representation (Article 15)

None of the survey respondents, neither **MSCAs** (seven in total) nor legal **practitioners** (20 in total), have experienced conflicts between the jurisdiction rules and the applicable law regarding confirmation of powers of representation, except one legal practitioner. A French notary observed that the French "*mandat de protection future*" cannot be activated if the vulnerable adult is abroad (i.e. by other authorities than the French ones) as the medical examination can only be carried out in France.

Similarly, none of the MSCAs have experienced issues in other States regarding the recognition of powers of representation issued by their State on the ground that the formal requirements were not fulfilled.

Certification of powers of representation (Article 38 of the 2000 Hague Convention)

None of survey respondents, neither **MSCAs** (seven) nor legal **practitioners** (18), reported issues when requesting, issuing or presenting the certificates under Article 38, except the Czech central authority and a Finnish legal practitioner. The **Czech** competent authority indicated that problems sometimes occur when presenting the certificate to financial institutions, which are unwilling to accept/recognise the certificates, on the ground that they are insufficient as legal documents. The **Finnish** legal practitioner stated that issuing the certificates is quite complicated, as the relevant Finnish law contains a long list of transactions subject to authorisation and a long list of family members with whom the guardian cannot enter into a transaction, due to conflict of interests⁸⁷. Finnish law also forbids making donations of the adult's property and stipulate that the guardian/attorney shall not be competent for a series of actions, including giving consent to marriage or adoption or acknowledging paternity or revoking the will of the vulnerable adult. All of which must be taken into consideration and, according to the respondent, create complication when issuing a certificate under Article 38 of the Convention. Furthermore, during an interview, the Portuguese MSCA indicated that some necessary mechanisms for a full implementation of the Convention are still not in place or not fully in place, namely, the automatic recognition of foreign decisions (not possible under the current system) and the issuance of the certificate provided for in Article 38 of the Convention (no authority has yet been designated for this purpose).

In the same vein, none of the legal **practitioners** who responded to the survey question (18) have been faced with a situation where the capacity and powers indicated in the certificate issued by another Member State have been challenged or denied requiring recognition/enforcement proceedings pursuant to Articles 23 and 25 of the Convention.

The **Austrian, Czech and Portuguese** competent authorities indicated that no other provisions in national law have been adopted regarding the certificate under Article 38 of the Convention, although Portuguese courts require a certificate of the decision issued in another State subject to recognition/enforcement as a guarantee of its authenticity. In Austria and Belgium, it is the competent court who is responsible for drawing up the certificate under Article 38, while in Germany it is the registrar of the office of the adult guardianship court ("Betreuungsgericht"), or if the case is pending in a higher instance, the clerk of the registry of such a court is responsible. In the Czech Republic and Portugal there is currently no competent authority for drawing up the certificate.

Key findings:

- One MSCA argued that further promotion of the Convention towards legal practitioners is necessary, while two highlighted the limited number of cases where the Convention has been applied which leads to a general **lack of experience** among practitioners.
- Most MSCA and legal practitioner respondents have not experienced particular issues in applying the general and specific provisions on jurisdiction (**Articles 5-12**). The main issues highlighted were the unclarity over the notion of "habitual residence" and difficulties for competent authorities to obtain knowledge about any measures already taken by competent authorities under Articles 5 to 8 of the Convention; and the uncertainties related to the transfer of residence (transmission of information and of competence between the authorities of the two countries involved).

⁸⁷ Finish Guardianship Services Act (442/1999).

- Most MSCA and legal practitioner respondents have not experienced particular issues in applying the provisions on applicable law (**Articles 13-21**). Several legal practitioners, however, did indicate that in practice it can be difficult to determine which national law should be applicable in certain cases.
- The position of MSCAs is more mixed regarding the recognition of cross-border measures (Articles 22-24), with three respondents stating that they have experienced issues and four stating they have not. The issues highlighted are notably the need for additional procedures despite Article 22 of the Convention.
- No significant issues were reported regarding the enforcement of cross-border measures (**Articles 25-27**), although three MSCAs indicated that difficulties have been experienced in obtaining recognition and enforcement of foreign measures by financial institutions. Similarly, the vast majority of legal practitioners have not experienced the application of “rapid and simple procedures” under Article 25 of the Convention.
- None of the MSCAs could provide data on the number of cases where the recognition of a measure was denied on the basis of **Article 22(2)(a)** and none of the legal practitioners have experienced such cases.
- None of the survey respondents, neither MSCAs nor legal practitioners, have experienced conflicts between the jurisdiction rules and the applicable law regarding confirmation of powers of representation, except one legal practitioner.
- None of the survey respondents, neither MSCAs nor legal practitioners, reported issues when requesting, issuing or presenting the certificates under **Article 38**, except one MSCA and a legal practitioner. The MSCA indicated that financial institutions are sometimes unwilling to accept the certificate, while the legal practitioner highlighted that it is complicated to issue a certificate due to different national provisions that must be taken into consideration.

4 Analysis of the potential for EU intervention

4.1 Analysis of the need for EU intervention

The general need for intervention at EU level on the question of the protection of vulnerable adults in cross-border cases (regardless of the form of such intervention) is increasingly acknowledged among the stakeholders involved in this discussion. This is illustrated by the activities recently undertaken by EU institutions, and is vastly supported by the stakeholders surveyed in the context of this study. It is also justified by challenges specific to the EU posed by the current regulation only ensured under the Hague Convention.

4.1.1 Acknowledgment of the need by stakeholders

The European Union is committed to maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. Several legislative measures have been enacted in view of this objective, including measures in the field of judicial cooperation in civil matters pursuant to Article 81 TFEU. The existing measures in this field, however, fail to address the whole range of issues that the cross-border mobility of persons entails. Specifically, no measures have been enacted so far by the Union to address the specific needs faced by vulnerable adults. Over the last fifteen years, EU institutions, stakeholders, legal practitioners and academics have repeatedly expressed their concerns about this gap.

The general idea underlying those concerns may be resumed as follows: Adults who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties have a fundamental right to obtain the support they may require in order to exercise their legal capacity, including in cross-border situations. Unless such support can be effectively relied upon across the Member States, the full realisation of the rights of the adults concerned and their ability to enjoy on an equal basis with others the benefits of European regional integration are seriously at stake.

4.1.1.1 EU institutional activity

Since 2008, the need for action in this field has been noted on numerous occasions by a variety of EU institutions. By conclusions approved on 24 October 2008, the Council of the Union invited the Member States which had already concluded that it would be in their interest to accede to the 2000 Hague Convention to begin as quickly as possible, or actively continue with, procedures for its signature and/or ratification, and asked the Commission to follow closely the experience with the application of the Convention, bearing in mind relevant discussions in the Hague Conference and in the Council of Europe⁸⁸.

In a resolution of 18 December 2008 on the cross-border implications of the legal protection of adults⁸⁹, the European Parliament noted the existence of cases 'in which the implementation of legal protection [of vulnerable adults] concerns two or more Member States', as well as cases that 'concern two or more Member States and concern Member States and non-EU States'. Acknowledging that 'the legal protection of vulnerable adults must be a pillar of the right of free movement of persons', the Parliament congratulated those Member States which had signed and ratified the Hague Convention, and encouraged 'those Member States which have not yet signed or ratified it to do so'. The Parliament also requested the Commission, 'as soon as sufficient experience of the operation of the Hague Convention has been acquired, to submit to Parliament [...] a

⁸⁸ Council of the European Union, Press Release 2899th Council meeting, Justice and Home Affairs, Luxembourg, 24 October 2008, 14667/08 (Presse 299), p.21 <https://data.consilium.europa.eu/doc/docu-ment/ST-14667-2008-INIT/en/pdf>

⁸⁹ 2008/2123(INI), OJ C 45E, 23.2.2010, p. 71–74.

legislative proposal on strengthening cooperation between Member States and improving the recognition and enforcement of decisions on the protection of adults and incapacity mandates and lasting powers of attorney’.

The Parliament called again on all Member States ‘to ratify without delay’ the Hague Convention in a resolution dated 19 February 2009⁹⁰. In a resolution of 7 July 2016 on the implementation of the UNCRPD⁹¹, the Parliament ‘[r]ecognise[d] the multiple ways in which the Hague Convention on the International Protection of Adults can functionally assist in implementing and supporting the international obligations of the parties to the CRPD’.

In the Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, adopted in 2009⁹², the European Council encouraged the Member States which had not done so yet to join the Convention “as soon as possible”, noting that the need for additional proposals regarding vulnerable adults should be assessed in the light of the experience acquired in the application of the Convention by the Member States. Both the Commission (as announced in its Action Plan Implementing the Stockholm Programme, dated 20 April 2010)⁹³ and the Secretariat of the Council have since been active monitoring the steps taken by Member States towards the ratification of the Hague Convention. Questionnaires were circulated for this purpose among Member States in 2010, 2014, 2015 and 2016⁹⁴.

On 1 June 2017, the European Parliament adopted a new resolution⁹⁵ specifically concerning the protection of vulnerable adults. Relying on Article 225 of the TFEU, it asked the Commission to prepare a proposal for a regulation regarding the protection of vulnerable adults. In August 2017, the Commission expressed the view that the focus should rather be on ensuring that the Member States that have not yet done so, ratify, or accede to, the Hague Convention⁹⁶. In the Strategy for the Rights of Persons with Disabilities 2021-2030, issued on 3 March 2021⁹⁷, the Commission expressed its intention to ‘work with Member States’ to implement the Hague Adults Convention ‘in line with the UNCRPD’. The Portuguese Government included the protection of vulnerable adults among the priorities of the Portuguese Presidency of the Council, in the first half of 2021⁹⁸. A High-level Conference was convened on 30 March 2021 to discuss the matter.

In its seminal Conclusions on the protection of vulnerable adults across the European Union, adopted at the Justice and Home affairs meeting of 7 and 8 June 2021⁹⁹, the Council observed at the outset that, as a ‘human rights instrument with an explicit social development dimension’, the UNCRPD ‘brought about a paradigm shift in relation to the legal capacity of persons with disabilities by affirming that all persons with disabilities should enjoy legal capacity on an equal basis with others’. Specifically, the Council, having recalled that the CRPD requires that appropriate measures be taken to support persons with disabilities in the exercise of their legal capacity, stressed that the

⁹⁰ 2008/2209(INI), OJ C 76E , 25.3.2010, p. 23–30.

⁹¹ 2015/2258(INI), OJ C 101, 16.3.2018, p. 138–162.

⁹² OJ C 115, 4.5.2010, p. 1–38.

⁹³ COM(2010) 171 final.

⁹⁴ See the following documents of the Council: no. 18083/10 of 20 December 2010; no. 11659/14 of 11 July 2014; no. 5381/15 of 5 February 2015, as complemented by document no. 5864/15 of 25 February 2015; no. 13969/16 of 4 November 2016 and 13969/2016 REV of 21 December 2016.

⁹⁵ 2015/2085(INL), OJ C 307, 30.8.2018, p. 154–160.

⁹⁶ European Commission, Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults, SP(2017)510.

⁹⁷ COM(2021) 101 final.

⁹⁸ <https://eu2021.justica.gov.pt/en-gb/>

⁹⁹ OJ C 330I , 17.8.2021, p. 1–6.

implementation the CRPD itself and the 2000 Hague Convention 'shares the objective of promoting and protecting the rights of persons with disabilities'.

Based on the foregoing, the Council: (a) invited the Member States that are already parties to the Hague Convention to promote greater awareness of the Convention among courts, practitioners and all stakeholders involved in its implementation; (b) invited the Member States that are engaged in procedures to ratify the Convention to advance such procedures 'with a view to finalising the ratification as swiftly as possible, in particular in view of the upcoming Special Commission on this Convention organised by the Hague Conference on Private International Law', due to take place in 2022; (c) invited all other Member States to commence and/or advance domestic consultations on a possible ratification 'as swiftly as possible'.

4.1.1.2 Stakeholders, practitioners and academics

Pressure to take legislative action in this field has also been noted outside EU institutions. From 5 to 7 December 2018 a conference took place in Brussels organised jointly by the European Commission and the **Hague Conference on Private International Law**. Approximately 130 experts from more than 35 States representing all continents gathered to stress the practical importance of the topic. A number of recommendations and conclusions were reached including: (a) an invitation to States that are not yet contracting parties to the 2000 Hague Convention to assess the possibility and benefits of joining, (b) a note of the complementary nature of the Hague Convention and the UNCRPD, (c) that cross-border transportability of measures under the 2000 Hague Convention could be improved by the development of a public country Profile for each Contracting State.

The voice for urgent action in this field was also reiterated in 2020 in a report from the European Law Institute (ELI). The **ELI project** began in 2017, coordinated by Pietro Franzina and Richard Frimston, and was approved by the ELI Membership in March 2020. The Report encourages the EU to consider both external action and the enactment of legislation in the field of the protection of adults, as well as providing detailed analysis on the protection of adults in international situations¹⁰⁰.

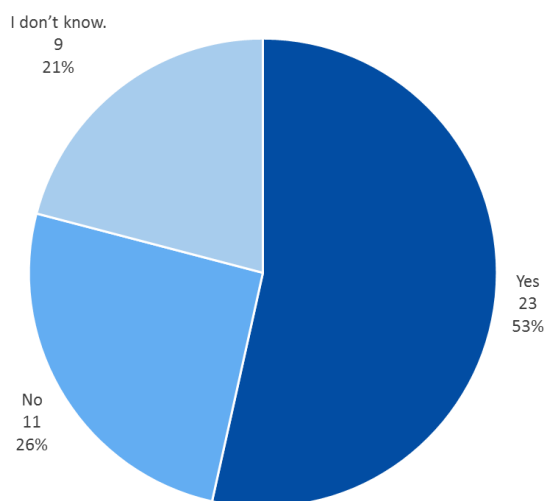
Also in the context of this study, stakeholders from all EU Member States (parties and non-parties to the Hague Convention) expressed the need for more harmonisation, through their answers to several questions of the **survey**.

Stakeholder opinions on the need for more harmonisation of the jurisdiction rules

Legal practitioners were asked whether they believe there is a need for more harmonisation of the jurisdiction rules (regardless of the question of its form, i.e. ratification of the Hague Convention or adoption of an EU instrument). Out of 43 respondents, more than half (53 %) responded positively, while 26 % believe there is no need for more harmonisation of the jurisdiction rules.

¹⁰⁰ Franzina, P., Frimston, R., The Protection of Adults in International Situations, European Law Institute, Vienna 2020: 59 <http://hdl.handle.net/10807/150070>

Figure 12: Do you believe there is a need for more harmonisation of the jurisdiction rules? (legal practitioners survey, N=43)



Among those who responded positively, several mentioned that this would simplify and speed up procedures. Three practitioners argued that the differences in legislation across Member States make it difficult to access and understand information and creates difficulties for the application of the Hague Convention. They believed it would be easier to acknowledge the decision from other Member States and provide all information needed if all Member States had the same rules. A French judge argued for a regulation enforcing clear rules for international jurisdiction, to avoid judge shopping and embezzlement in cross-border situations. Among those who do not believe there is a need for more harmonisation of the jurisdiction rules, two stated that the Hague Convention is clear enough. Three notaries also stated that the rules on jurisdiction in the Hague Convention are complete enough to tackle all specific situations at individual level and to avoid situations of non-protection.

Stakeholder opinions on the need for more harmonisation of the rules on applicable law

In the same vein, legal practitioners were also asked whether they believe there is a need for more harmonisation of rules on applicable law. Out of 37 respondents, the vast majority (89 %) responded positively, while only 11 % responded negatively. Among those that responded positively many of the same arguments mentioned in relation to the question above were repeated, mainly that it would simplify procedures. In addition, several respondents argued for more flexibility for persons to choose the applicable law while they are capable. Four notary respondents mentioned that “*professio juris*” could be extended to other aspects of the law on safeguarding vulnerable adults than the powers of representation (Article. 15) within the scope of the Hague Convention, which would strengthen the autonomy of citizens. Similarly, a notary also argued that it would be useful to introduce rules on adaptation, due to national variations in the instruments of protection of vulnerable adults. This respondent argues that there is a need for a rule inspired by Article 31 of Regulation (EU) No 650/2012 of 4 July 2012 on matters of succession¹⁰¹ (hereinafter, the European Succession Regulation) aiming to apply the closest adult protection instrument available under the applicable national law in the Member State in which the representation right is invoked. Only one practitioner who responded negatively provided an explanation, stating that “*lex fori*” is sufficient.

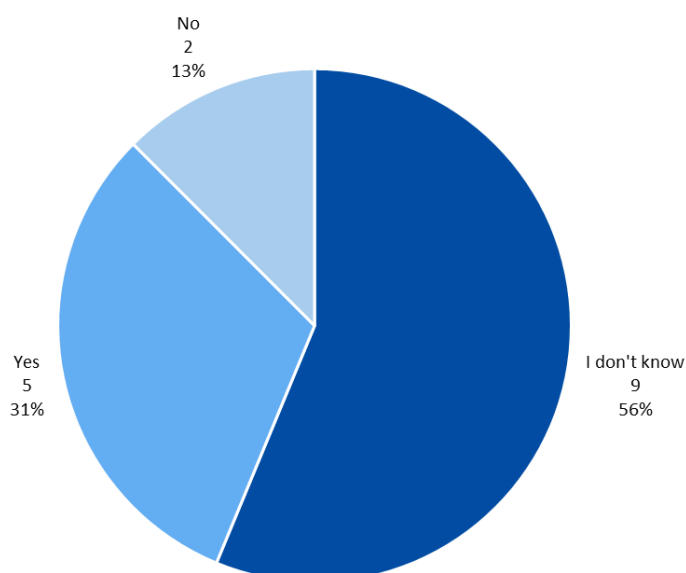
¹⁰¹ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

Stakeholder opinions on the need for more harmonisation of recognition and declaration of enforceability

When asked whether they believe there is a need for more harmonisation of recognition and declaration of enforceability proceedings, the vast majority of legal practitioners who were able to respond to the question answered positively (94 % out of 36 respondents). Only 6 % responded negatively. Seven notary respondents argued that the Convention (Article 22) only provides for recognition and enforcement of protection measures (judicial or administrative protection measures). However, they believe that harmonisation should be extended to the acceptance and execution of authentic acts comprising powers of representation or documenting other self-protective measures based on the principle of party autonomy.

Similarly, MSCA authorities were asked whether there would still be a need for additional harmonisation of the rules on the recognition and enforcement of measures of protection if all Member States were party to the 2000 Hague Convention. The majority (9 out of 16) stated that they did not know, five responded yes, and two responded no.

Figure 13: Do you believe that if all EU Member States were party to the 2000 Hague Convention there would still be a need for additional harmonisation of the rules on the recognition and enforcement of measures of protection, so as to further improve the movement of measures of protection between Member States? (MSCAs survey, N=16)



One of the MSCAs that responded positively stated that cooperation would be closer and that it could also enable the circulation of private mandates and other documents to expedite procedures. Another indicated that the ratification of the Convention by all Member States is becoming increasingly necessary in light of increasing cross-border mobility of EU citizens and an ageing population. The two MSCAs that responded negatively argued that additional rules inside the EU would be less beneficial than the application of the same rules to all parties of the Convention and that an EU legislative act would lead to an unnecessary co-existence of applicable legal regimes. Among those that responded, 'I do not know', three mentioned the need for further discussions at EU level with all Member States on the possibility of introducing harmonised rules and the need to wait for the evaluation of the implementation of the Hague Convention planned in 2022. Another argued that the need for additional harmonisation cannot be established before there is experience with the 2000 Hague Convention ratified by all Member States. One MSCA also emphasised that any action at EU level should not diminish efforts to extend the membership of the Hague Convention, not only within the EU, but also to third countries.

Abolition of declaration of enforceability (exequatur) requirements

Out of 32 legal practitioners, the vast majority (88 %) believed that the abolition of declaration of enforceability (exequatur) requirements would be beneficial for the cross-border protection of vulnerable adults, while 13 % did not. Several respondents (eight) highlighted that mutual trust/recognition has been a growing trend in EU law, notably in the context of completing the EU's Area of Freedom, Security and Justice. According to these stakeholders, the benefits of the abolition of exequatur have been shown in numerous legal areas at EU level. Another five stakeholders argued that the abolition of exequatur would greatly speed up procedures and reduce costs. These stakeholders argued that the need for quick and responsive judicial decisions are all the more important for vulnerable adults who often require urgent care. A French judge in favour of the abolition of exequatur nonetheless highlighted the very limited use of exequatur in practice, as it is generally easier to open a new legal protective measure in front of a national judge, notably as third parties do not fully understand the procedure and tend to ask for national decisions. On the other hand, one stakeholder who was against the abolition of exequatur stated that it would completely bypass the authority of local courts.

4.1.2 Existing shortcomings justifying EU intervention

At this stage, it is important to draw attention to two important aspects of the Union's power based on Article 81: firstly, that the protection of adults does not fall within the topic of family law (and is therefore not subject to the special procedure provided for under article 81(3) TFEU), and secondly that the Union also has a parallel 'external' competence based on Article 216 TFEU which includes the possibility to conclude international conventions as well as to entertain international relations.¹⁰²

The lack of harmonised private international law rules in this field results in various shortcomings. These may be grouped under the following five headings.

4.1.2.1 Gaps and inconsistencies in the protection of the adults concerned

The lack of harmonised rules of private international law across the Union entails a risk of gaps and inconsistencies in the protection of adults in cross-border cases. The diversity of the rules on jurisdiction, for example, means that the authorities of two or more Member States may come to assert their jurisdiction as regards the protection of the same adult.

Illustration

If the adult whose protection is at issue is a national of one Member State but habitually resides in another Member State. If the authorities of the first Member State claim jurisdiction based on the nationality of the adult, whereas the authorities of the second Member State rely on the latter's habitual residence, then a **"positive" conflict of jurisdiction** arises.

Problem: the problem lies not so much in the fact that jurisdiction could be asserted on different grounds, but in the fact that, due to the lack of harmonised rules on parallel proceedings in Member States which are not (both) parties to the Convention (see Section 2.3.2.1 above), the described conflict **would prove very difficult to manage under the domestic rules of private international law**. The likely outcome is that the authorities of the first Member State and those of the second Member State would remain seized of the matter, and possibly grant the measures they deem appropriate. The protection of the adult in question would then be shaped in each of the two Member States by the measures rendered by the local authorities. Those

¹⁰² See for example the findings of the ELI report, p. 19-20, as well as the EU Parliament Report, European Added Value Report, Protection of Vulnerable Adults, 2016, p. 72-85.

measures may of course be different, content-wise, and thus lead to problems in cross-border recognition and enforcement.

The resulting situation would be even more serious if the measures of protection given in the two States aimed, as it is customary, to protect the interests of the adult wherever they arise (i.e., they are not territorial in nature).

Additional practical difficulties could occur, in the described scenario, if the interests of the adult happen to be located also in a third Member State. The question will then arise whether **recognition should be granted in the third State** to the measures of protection given either in the first or in the second Member State. Should neither measure qualify for recognition, the authorities of the third Member State will have no option but to adopt their own measures of protection.

All of this is hardly **consistent with the fundamental rights** of the adults concerned, as enshrined in the UNCRPD, the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights (CFR). Article 12(3) of the **CRPD** requires that State parties 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. Those measures could hardly be characterized as appropriate if the protection they provide is spatially limited or is likely to conflict with the protection provided by foreign measures. The **ECHR**, the respect for which is ensured as a matter of Union law under Article 6 of the Treaty of the European Union (TEU), does not refer specifically to the protection of adults. However, the European Court of Human Rights has stressed on numerous occasions that protecting adults with disabilities from undue influence, safeguarding their personal autonomy and ensuring their social inclusion is crucial to the realisation of the fundamental rights that the ECHR is meant to protect¹⁰³. Since the measures of protection given in one State are meant precisely to arrange for those needs, a lack of coordination among States is likely to frustrate the effectiveness of the protection provided to the adult in question. Similar remarks apply to Article 26 of the **CFR**, whereby '[t]he Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.

One possible issue for discussion is the right of the vulnerable adult to be given the opportunity to be heard and express his or her views with regard to the measure to be taken. Although Article 22(2)(b) of the Hague Convention refers to the opportunity to be heard as a ground for non-recognition, this can only be invoked where the absence of such an opportunity would lead to a breach of the fundamental rights of the vulnerable adult concerned. **Further issues** have also been signalled in legal literature. However, some of these issues could be regarded as temporary issues, in the sense that they would be solved if all EU Member States were to become Parties to the Hague Convention. For instance, problems may arise as regards situations at the intersection of children's and adults' protection, notably where measures of protection are taken in respect of a person aged less than 18, which are meant to stay in place after the person concerned has reached the age of 18. The 1996 and the 2000 Hague Convention, where they are both applicable, ensure those situations are dealt with properly. Uncertainties exist, by contrast, if a similar situation arises in a State that is only bound by the former instrument.

4.1.2.2 Limited reliability of advance planning

Pursuant to Article 12(4) of the UNCRPD, the measures relating to the exercise of legal capacity must, among other things, respect the will and preferences of the person concerned. As observed by the Committee of Ministers of the Council of Europe in its Recommendation 11 of 9 December 2009 on continuing powers of attorney and advance

¹⁰³ See, among others, the Court's judgments in *Glor v Switzerland* of 30 April 2009, *Shtukaturov v Russia* of 27 March 2008, *Stanev v Bulgaria* of 17 January 2012, and *AN v Lithuania* of 31 May 2016.

directives for incapacity, “self-determination is essential in respecting the human rights and dignity of each human being”¹⁰⁴. The survey conducted for the purposes of the present report suggests that a significant (and growing) number of persons in the EU plans for their own incapacity or are ready to do so. In the absence of a body of harmonised rules of private international law, the risk exists that the **arrangements made by an adult in conformity with the law of one country may not be enforced, in whole or in part, in another country.**

Illustration

A private mandate has been entered by an adult in accordance with the law of Member State X, at the time when the adult lived in X. The adult moves to Member State Y, and only there does the need arise for the adult in question to obtain support for the exercise of legal capacity

Problem: if the conflict-of-laws rules in force in Y (not party to the Hague Convention) provide that the law applicable to the mandate is the law of a State other than X, this may hinder the enforceability of the mandate, or alter its scope and effects. All in all, the mandate may not be operational in Member State Y, or it may produce effects that do not correspond in full to those envisaged by the adult. In either case, this would frustrate the self-determination of the adult concerned. A number of stakeholders have raised practical issues linked to the change of residence of the adult between the establishment of the mandate and its entry into force (see Sections 3.3 above)

Problems such as this are likely to arise after the adult concerned is no longer in a position to protect their interests, that is, at a time when the adult is precluded, by definition, from reviewing and adjusting the planning, so as to conform with the applicable law. In the end, the absence of harmonised rules of private international law may, in cross-border cases, prevent the adults concerned from making full use of their right to self-determination, as required, again, by the CRPD, the ECHR and the CFR.

4.1.2.3 Obstacles to the free movement of persons across borders

The diversity of law in this area makes it difficult for vulnerable adults, as well as for those involved in their protection and for any interested third parties to assess the legal implications of cross-border elements. The transfer of the adult concerned from one Member State to another, or the fact that the property of the adult is in two or more Member States, give rise to legal issues the assessment of which may change depending on the State from the standpoint of which those issues are addressed. The resulting **uncertainty could deter mobility and entail extra costs**, namely to obtain legal information.

Illustration

If a guardian is appointed in Member State X is to discharge some of his duties in Member State Y and Z, where property belonging to the protected adult is located: the guardian would need to seek legal assistance to determine the conditions subject to which the relevant measures given in X may be recognized (and enforced) in Y and Z.

Problem: Unless the same rules apply to the recognition of foreign measures of protection in Y and Z, which is not necessarily the case in all EU Member States (see Section 2.3.2.2 above), the guardian will have to seek legal assistance in each of those States, and accordingly incur extra costs.

¹⁰⁴ <https://www.coe.int/en/web/cdcj/activities/powers-attorney-advance-directives-incapacity>

Mitigating the above uncertainty and costs would enhance the freedom of movement of EU citizens across the Union and make the advantages of the construction of an area of freedom, security and justice more readily accessible to all those concerned.

4.1.2.4 Obstacles to the proper functioning of the internal market

The protection of vulnerable adults may involve, as observed, measures relating to the property of the adult concerned. The appointed guardian or the grantee of powers of representation may, depending on the circumstances, have authority to assist or represent the adult in connection with transactions entered into on behalf of the latter. In cross-border cases, the assessment of the existence, scope and manner of exercise of the guardian's or the attorney's authority involves the application of private international law rules. Lack of uniformity in the latter rules results in uncertainty.

Uncertainty as to who is entitled to manage an adult's assets may be detrimental not just to the adult in question but also to any third parties involved. The harmonisation of private international law rules would enhance **legal security in cross-border cases** for the benefit of all those interested in those rights, including any relevant third parties.

Without an appropriate degree of cross-border legal security, the mobility of a vulnerable adult and the transfer of the latter's property could result in additional costs for the creditors of the adult in question and, generally, those having an interest in the adult's property.

4.1.2.5 Difficulties in the practical cooperation between Member States

The lack of harmonised rules may prevent the authorities of individual Member States to **perform some of their tasks relating to the protection of adults as efficiently** as the circumstances require. Cooperation between the authorities of different States is often practically impossible, and overall little effective, if the States in question do not share, at least, some common rules.

Illustration

If, under a measure of protection given in Member State A, a young adult is placed in an establishment, in that State, where his protection may be ensured. The establishment is close to where his brother lives. Now suppose that the man's brother decides to settle in Member State B. Ensuring that the two brothers continue to enjoy their mutual company may be crucial to the well-being of the young adult in question. This may involve a transfer of the adult from the establishment in A to a similar establishment in B. A smooth, rapid and unproblematic transfer will hardly be possible without a regulatory framework common to the two States: a transfer of this kind presupposes that the authorities of the two States make a number of practical arrangements, and that the jurisdiction of one State ceases as soon as the adult enters the jurisdiction of the other, without gaps.

Problem: In practice, the risk exists, in the absence of harmonised rules, that a transfer from A to B may prove difficult and time-consuming, or be precluded outright, no matter whether the authorities in A consider that the transfer is in the best interest of the adult in question, and irrespective of whether the establishment in B would be ready to welcome him.

Key findings:

- No legislative measures have been enacted so far by the European Union to address the specific needs faced by vulnerable adults.
- Over the last fifteen years, EU institutions, stakeholders, legal practitioners and academics have expressed repeatedly their concerns about this gap. Since 2008, the Council of the EU and the European Parliament have regularly underlined **the need for action in that area**, inviting Member States to ratify the Hague

Convention. Both the European Commission and the Secretariat of the Council have since been active monitoring the steps taken by Member States towards the ratification of the Convention. The EU institutions have continued being active in that area, most recently with the Council conclusions of the Justice and Home Affairs meeting of June 2021, which invited Member States parties to the Convention to raise awareness and Member States non-parties to ratify the Convention.

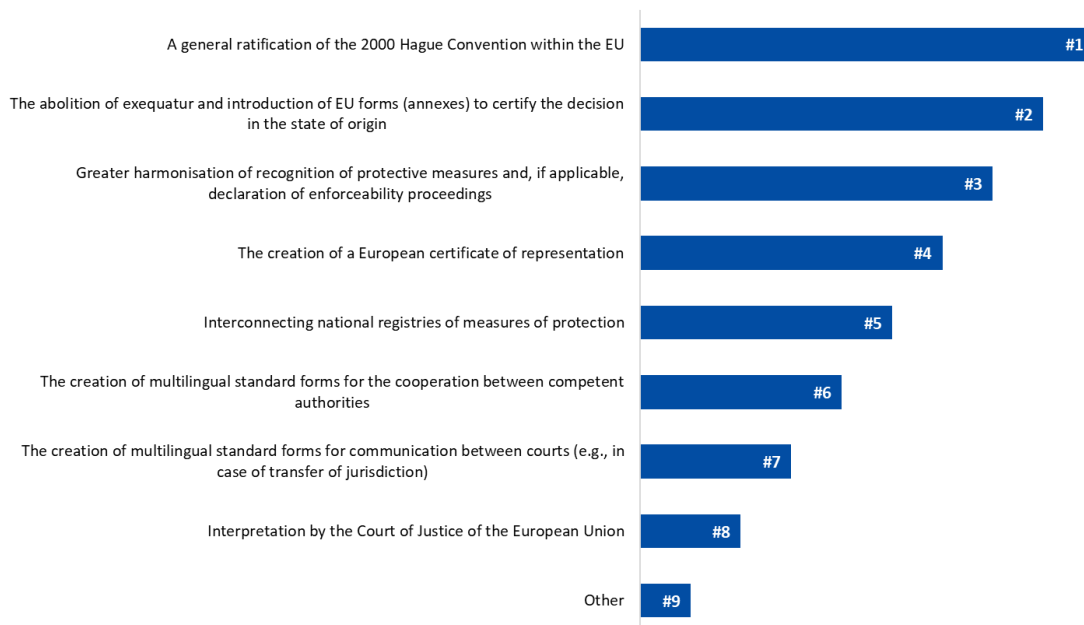
- Similar actions have been undertaken by other stakeholders, including the Hague Conference on Private International Law and academia.
- More than half of the legal practitioner respondents to our survey believed there is a **need for more harmonisation** of the jurisdiction rules and of the rules on applicable law, to simplify and speed up procedures. The majority of legal practitioners also believed there is a need for more harmonisation of recognition and declaration of enforceability. MSCAs on the other hand have a more mixed position. The majority believed that there is a need for further discussions at EU level to evaluate the necessity of EU action.
- Although the EU has, in principle, no competence to harmonise substantive and procedural law in the area of justice, the **harmonisation of private international law rules does fall within the scope of the powers vested in the Union** by Article 81 of the TFEU.
- With regard to the protection of vulnerable adults in the EU, the harmonisation of the private international law rules **would address a number of issues**. This includes gaps and inconsistencies in the protection of the adults concerned (e.g. in case of unresolved conflict of jurisdiction), a limited reliability of future mandates (e.g. in case arrangements made in one Member States are not enforced in a second one), obstacles to the free movement of persons and to the proper functioning of the internal market (the absence of legal certainty affects mobility and exchanges), as well as in difficulties in the practical cooperation between Member States (the lack of common rules affect efficiency where more than one authority is involved).

4.2 Analysis of the instruments for EU intervention

There is a persistent need for a common framework in the protection of vulnerable adults in cross-border cases within the EU.

The surveys to MSCAs and legal practitioners carried out in the context of this study included several questions on potential methods/tools to facilitate the cross-border protection of vulnerable adults. Stakeholders were asked to rank nine options from their most preferred (1) to least preferred (9). The outcome is presented in Figure 14 below.

Figure 14: In your opinion, which of the following options would facilitate the cross-border protection of vulnerable adults the most? Please rank by preferred option from 1 (best option) to 9 (worst option) (MSCAs and legal practitioners surveys, N=49)



Across all respondents (49 in total) the preferred option to facilitate the cross-border protection of vulnerable adults is a **general ratification of the 2000 Hague Convention by all EU Member States**. Three MSCAs emphasised that a general ratification of the 2000 Hague Convention would be the most effective way to ensure the cross-border protection of vulnerable adults by consolidating the legal framework the Convention already established and for relations with third countries.

The **abolition of exequatur and the introduction of EU forms to certify the decision in the state of origin** was ranked second, followed by a greater harmonisation of recognition of protective measures. One MSCA stated that EU law could harmonise the exequatur procedure and also consider the abolition of exequatur among Member States, while another indicated that abolishing exequatur and replacing it with a certificate would be the most effective way of simplifying and speeding up proceedings. Another MSCA did not support parallel legislation and/or duplication of rules as they believe it would lead to confusion in an already complex environment.

Interconnecting national registries of measures of protection was ranked fifth by the stakeholders. One legal practitioner argued that national registries are the most efficient way of avoiding litispendence and that a national jurisdiction should be assigned to each individual situation. This practitioner believes that the transfer of jurisdiction should be implemented, with all the relevant elements of the dossier included within, without an obligation to be translated. On the other hand, an MSCA argued that interconnecting national registries of measures of protection would likely add extensive administrative barriers and burden that outweigh the practical benefits, notably as not all certificates of representation are registered and not all Member States have such a registry. For this MSCA, the current general practice of granting access to existing registries applicable in their Member State is easier.

The least preferred option is reliance on **interpretation by the CJEU**. Several stakeholders suggested other options, which included providing practitioners with information on substantive law; providing legal aid for vulnerable adults which covers the costs of translation; and creating country profile information sheets.

Two main instruments may be considered for the EU to intervene and cater for such framework: the ratification of the Hague Convention by all Member States and/or the adoption of an instrument at EU level.

4.2.1 Ratification of the 2000 Hague Convention

As illustrated above, stakeholders, practitioners and academics largely agree that a broad ratification of the Hague Convention would significantly enhance the protection of vulnerable adults across the Union. This also comes out of the question specifically asked on this point in the consultation carried out for this study, the result of which is presented in Section 4.2.1.1 below.

If the EU is to take any measure relating to the protection of adults in international situations, those measures must arguably aim, *inter alia*, to ensure that more Member States – or, indeed, all of them – join the Convention. The various options to ensure ratification and of their feasibility, as well as the added value of such ratification are presented respectively in Sections 4.2.1.2 and 4.2.1.3 below.

4.2.1.1 Perception of stakeholders on ratification

Legal practitioners and MSCAs were asked whether they believe that all EU Member States should ratify the 2000 Hague Convention. **The majority of respondents who provided an answer (31 legal practitioners and 12 MSCAs) responded positively, two MSCAs indicated that further reflexions are needed.** Many stakeholders stated that this would lead to **uniformity and harmonisation of jurisdiction norms and rules on the applicable law**, in turn greatly **simplifying procedures**, ensuring **better cooperation** among all parties involved, **increased legal certainty**, and ultimately leading to a **better protection of vulnerable adults**.

Several notaries (five) argued that the Convention is a step forward in the field of protection of vulnerable adults mainly by appointing the authority charged of adopting the relevant protection measures and by determining the law applicable to the powers of representation and to the exercise of the representation of the vulnerable adult. A French legal practitioner stated that although they have not needed to apply the Convention often, they have found it useful and necessary in cases when they had to use it, while another respondent stated that Article 38 certificates are useful for practitioners. One MSCA highlighted the **increasing mobility of citizens within the EU** and a steady increase in the number of cases falling within the scope of the Convention, which will increase the necessity of the Convention. Another MSCA stated that a general ratification of the Convention would contribute to the real protection of adults and lead to a 'free circulation of decisions', thus also contributing, in a complementary way, to the realisation of some of the procedural rights and guarantees enshrined in the UNCPRD. Finally, one MSCA stated that it could lay the ground for possible further discussions on future cooperation within the EU, if these are deemed necessary.

The doubts voiced by a minority of stakeholders regarding the compatibility of the Hague Convention with the UNCPRD appear to be unjustified. As it arises from a joint statement by the Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, and the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, dated 8 July 2021,¹⁰⁵ nothing in the Hague Convention is intrinsically inconsistent with the UNCPRD. A study authored by Sonia Rolland and Alex Ruck Keene,¹⁰⁶ commissioned by the Special Rapporteur on the rights of persons with disabilities, concluded that there are a number of ways in which the framework of the 2000 Hague

¹⁰⁵ 'Toward Greater Coherence of International Law: Reflections on the Hague Convention (2000) on the International Protection of Adults', available at <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/CommentsLegislationPolicies.aspx>.

¹⁰⁶ 'Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the UN Convention on the Rights of Persons with Disabilities', 3 June 2021, available at <https://t.co/3t5uBdpugN?amp=1>.

Convention is capable of evolving to reflect the 'operationalisation' by both current and future Contracting States of the UNCPRD within their domestic legal systems. For the same reasons, the institution of an EU common framework of private international law rules would not be likely to undermine the UNCPRD.

4.2.1.2 Legal feasibility of the ratification

Legal feasibility under the Convention

The Union cannot itself become a party to the 2000 Hague Convention. Articles 53 and 54 of the Convention make it clear that the latter is only open to sovereign States, not to international organisations. Where the Union is willing to join international agreement that is open only to States, **the practice consists for the Union in authorizing (and in fact obliging) the Member States to ratify or accede to the agreement in question 'in the interest of the Union'**. This means that, as a matter of international law, the agreement – once ratified or acceded to by the Member States concerned – will bind those Member States and operate as a source of rights and obligations for the latter, not for the Union, whereas, as a matter of Union's law, the agreement will form part, in principle, of the *acquis* of the Union.

Legal feasibility under the TFEU

The Union cannot join an international convention – be it directly or through its Member States – unless it has the competence to do so. **Article 216 TFEU determines the cases in which such a competence exists.** The Union's external competence may be either exclusive or non-exclusive. Conventions falling within the scope of the **exclusive external competence** of the Union may only be concluded by the Union itself: individual Member States cannot, without the authorization of the Union, become a party to those conventions. Conversely, **the individual Member States remain free to ratify or accede to such conventions as fall within the scope of the non-exclusive external competence** of the Union, **as long as the Union does not avail itself of such a power.**

Views differ as to whether the conclusion of the 2000 Hague Convention falls within the external competence of the Union. Various arguments may be put forward to support the view that the Union has indeed the non-exclusive power to join the 2000 Convention, through its Member States. Those arguments are presented below.

According to Article 216(1) TFEU, the Union may conclude an international agreement in any of the following cases: (a) where the Treaties or a legally binding act so provide, (b) where the conclusion of an agreement 'is likely to affect common rules or alter their scope', and (c) where the conclusion of such an agreement 'is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties'.

It may be argued that the conclusion of the 2000 Hague Convention fits into case © above. It is convenient to discuss each of the above scenarios separately.

(a) Neither the Treaties nor EU legislation provide for the conclusion of the Convention

The conclusion of the 2000 Hague Convention clearly falls outside case (a), for neither the Treaties nor any legally binding acts make specific provision to that effect.

(b) The Convention does not affect the operation of any existing EU rules

The conclusion of the Convention similarly falls outside case (b). Actually, nothing in the Convention would seem to affect the operation of common EU rules or alter their scope, at least in the manner required to establish external competence.

This point deserves to be examined more in detail. The Union has made use of its external competence on various occasions in the field of judicial cooperation in civil matters. So far, it has invariably relied on the fourth and last ground listed in Article 216(1) TFEU. In fact, all international agreements concluded by the Union in this area related to matters within the scope of existing EU legislation. The conclusion of those agreements would have accordingly affected the “common rules” set forth in such legislation or altered their scope. This is also why the external competence of the Union in the field of private international law has always presented itself as exclusive in nature: pursuant to Article 3(2) TFEU, the external competence of the Union is *exclusive, inter alia*, in so far as the conclusion of the international agreement concerned “may affect common rules or alter their scope”¹⁰⁷. That is not the case with respect to the 2000 Hague Convention, since none of the legislative measures enacted so far by the Union to regulate jurisdiction, applicable law and the recognition and enforcement of judgments apply to matters within the scope of the Convention. **The provisions of the Convention do not accordingly affect the operation of any existing EU rules, nor alter their scope.**

Admittedly, some of the Convention’s provisions maybe have a role to play in cases that fall within the scope of legislative measures of the EU, such as cases within the scope of Article 13, on incapacity, of Regulation (EC) No 593/2008 of 17 June 2008¹⁰⁸ on the law applicable to contractual obligations (hereinafter, Rome I Regulation), or cases relating to torts committed by a vulnerable adult, where the issue arises of the liability of the person or institution in charge of their protection, in accordance with Article 15(g) of Regulation (EC) No 864/2007 of 11 July 2007¹⁰⁹, on the law applicable to non-contractual obligations (hereinafter, Rome II Regulation). However, this does not appear to mean that the latter measures are “affected” or “altered” by the Convention within the meaning of Article 216(2) TFEU.

The latter finding may be further illustrated by the following remarks, referring the European Succession Regulation. According to Article 24(1) of the Regulation, a disposition of property upon death, such as a testament, “shall be governed, as regards its admissibility and substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made”. Article 26(1)(d) Succession Regulation lists among the elements that pertain to substantive validity for the purposes of Article 24, “the admissibility of representation for the purposes of making a disposition of property upon death”. In practice, it is for the *lex successionis*, as determined by the European Succession Regulation, to decide whether a disposition of property upon death regarding a person is admissible if done by the representative of that person, rather than the person herself.

In principle, the above provision covers the situation where a disposition of property upon death is made by the representative of a vulnerable adult, e.g., the adult’s attorney under a private mandate. In this case, however, the application of the 2000 Hague Convention would have no impact, as such, on the operation of the European Succession Regulation. The Hague Convention would indeed determine, *inter alia*, the law applicable to the existence, extent, modification and extinction of the powers of representation granted by the adult (Article 15), but its provisions are not meant to determine whether a disposition of property upon death made by the adult’s attorney is admissible as a

¹⁰⁷ It should be stressed that Article 3(2) of the TFEU does not set forth an exhaustive list of grounds on which the Union’s external competence may rest. Its purpose is to single out the cases in which the Union’s external competence is *exclusive*. As acknowledged by the Court of Justice, “the European Union may have an external competence that falls outside the situations laid down in Article 3(2) TFEU”: see Case C-600/14, *Federal Republic of Germany v Council of the European Union* [2017], ECLI:EU:C:2017:935, para. 51.

¹⁰⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

¹⁰⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

matter of succession law: indeed, the Convention, as stated in Article 1(1)(d), does not apply to successions.

(c) The conclusion of the Convention is necessary to achieve the Treaties' objectives

Rather, the view may reasonably be advanced that the (shared) external competence of the Union to join the Hague Convention rests on the ground that the conclusion of the Convention (i.e., its ratification by the Member States that have not yet done so) would be **'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties'**.

The roots of this part of Article 216 TFEU are in the case law of the Court of Justice of the European Union, specifically in Opinion 1/76.¹¹⁰ In that Opinion, the Court began by recalling that the external competence of the Community, as it was then, 'may flow implicitly' from the provisions of the Treaties, meaning that 'whenever Community law has created for the institutions of the community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection'. The Court went on to say that the described scenario does not only cover cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It observed that, '[a]lthough the internal community measures are only adopted when the international agreement is concluded and made enforceable ..., the power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the community'.

Two conditions must be fulfilled for the Union to have the power to conclude an international agreement on this basis. The conclusion of the agreement **must come with the purview of the policies of the Union**, and it must appear to be **necessary to achieve one or more of the objectives referred to in the Treaties**.

There is little doubt that the conclusion of the Hague Convention would fit in the framework of the Union policies, as shaped by Part three of the TFEU. Specifically, the conclusion of the Convention would fit in the policies relating to the construction of an area of freedom, security and justice, namely those concerning judicial cooperation in civil matters. It follows from Article 81(2) TFEU that, in the latter field, the Union may adopt measures 'aimed at ensuring', among others, the recognition of judgments and the compatibility of the rules governing conflicts of laws and of jurisdictions. The Hague Convention set forth uniform rules that perform precisely those functions: they deal with the jurisdiction of courts and administrative authorities to give and modify measures of protection, they regulate the law applicable to the protection of adults and set out the conditions for the recognition and enforcement of foreign measures of protection.

The assessment of whether the conclusion of the Hague Convention would be 'necessary' to achieve the objectives set out in the Treaties comes in two steps.

The first step consists in identifying the objectives, among those referred to in the Treaties, that the Convention would serve if it were in force for all the Member States.

The Convention, it is contended, would make it easier for the Union to ensure the protection of the fundamental rights of those concerned, in line with Article 6 of the TFEU; it would foster the free movement of citizens, consistent with Article 3(2) of the TEU; and it would help combat social exclusion and discrimination, while promoting solidarity

¹¹⁰ Opinion 1/76 of the Court of Justice of 26 April 1977, given pursuant to Article 228(1) of the EEC Treaty 'Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECLI:EU:C:1977:63.

between generations, as required by Article 3(3) of the TEU. The functioning of the internal market, it is submitted, would likewise be more effectively and more thoroughly secured if the Convention were in force for all Member States.

The above objectives would benefit from the Convention because the latter, as explained throughout this report would increase legal security in cross-border situations for all those involved in the protection of a vulnerable adult (the adult themselves, their deputy or attorney, the parties to a legal relationship to which the adult concerned is also a party, etc.), and would enable the relevant authorities to cooperate more effectively between themselves whenever they are seized of matters touching the personal or property interests of one and the same adult.

The second step consists in determining whether the conclusion of the Hague Convention would be needed to attain the said objectives.

Various rulings of the Court of Justice provide guidance regarding the way in which the requirement of 'necessity' ought to be understood for the purposes of Article 216 TFEU. The precise implications of those rulings remains debatable. One key element is whether a distinction can be made, within the framework of the agreement concerned, between situations that solely affect the EU, on the one hand, and situations that affect a Member State of the Union and a third country, on the other. If a clear distinction can be made between intra-EU situations and extra-EU situations, then the conclusion of the agreement can hardly be deemed to be 'necessary' to attain the objectives of the Treaties. Conversely, where purely intra-European situations are not practically distinguishable from extra-EU situations, then the conclusion of the agreement appears 'necessary' to achieve the pertinent objectives.

The described approach is exemplified by three rulings of the Court of Justice. All three concluded that the Union had external competence to conclude the agreement concerned on the ground that the conclusion could be considered to be 'necessary' to attain the relevant Treaty objectives.

Opinion 1/76, mentioned above,¹¹¹ concerned the conclusion of an agreement regarding inland waterway transport 'in a geographical region in which transport by inland waterway is of special importance within the whole network of international transport', i.e., in a scenario where both the common transport policy of the European Community (as it was then) and international transport, more generally, were at issue.

The judgment rendered by the Court on 5 December 2017 in the *COTIF* case,¹¹² was about the proposed amendment to an agreement designed to establish common rules applicable to international transport, including with respect to transport to or from the territory of a Member State, or passing across the territory of one or more Member States, as regards parts of the journey that take place outside EU territory and, generally, also as regards parts of the journey that take place on EU territory.

Finally, Opinion 2/15, of 16 May 2017, concerned the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore. The Court resorted to the 'necessity' test with respect to the provisions in the latter agreement relating to non-direct foreign investment, a matter for which the external competence of the Union is not provided for in the Treaties or in a legislative act of the Union. The Court held that the conclusion of the agreement was 'necessary' to achieve the objectives referred to in the Treaties on the ground that, since 'the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which

¹¹¹ Opinion 1/76 of the Court of Justice of 26 April 1977, given pursuant to Article 228(1) of the EEC Treaty 'Draft Agreement establishing a European laying-up fund for inland waterway vessels, ECLI:EU:C:1977:63.

¹¹² Case C-600/14, *Federal Republic of Germany v Council of the European Union* [2017], ECLI:EU:C:2017:935

contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to achieve fully such free movement, which is one of the objectives [...] of the FEU Treaty’.

The protection of adults, it is contended, involves situations where a clear distinction between intra-EU and extra-EU situations would hardly make sense. Vulnerable adults increasingly move from one country to another, both within the territory of the Union and outside of it. The property of a vulnerable adult, for its part, may consist of assets located in several States: these, too, may be Member States of the Union or third countries. A broad range of diverse situations may need to be considered when it comes to the international protection of an adult. Since an adult may experience a condition of vulnerability for several years, if not decades, situations may well arise where the personal or property interests of the person concerned move from within the Union to a third country, and vice-versa, several times during the life of the adult concerned.

Arguably, the conclusion of the Hague Convention would make sure that the above scenarios are dealt with under one and the same set of rules, no matter whether (and the extent to which) the situation is connected, or becomes connected, to a third country. The objectives of the Treaties mentioned above would not be thoroughly fulfilled if such a unitary basic framework were lacking.

Practical problems could arise in cases involving a ‘highly-mobile’ vulnerable adult if the 2000 Hague Convention were in force for some, but not all, Member States. The following examples provide an illustration of such problems.

Example No 1

As a result of a car accident, Lina – a national of Lithuania living in Prague – suffers severe brain damage and is no longer in a position to protect her interests. She benefits from measures of protection given by the competent Czech courts. The latter decide that Lina should be relocated in Zurich, where she would undergo a 12 to 15-month long rehabilitation treatment in an establishment where protection can be provided. Relocation takes place in accordance with Article 33 of the Convention, since Switzerland and the Czech Republic are both parties to the Hague Convention. All ties between Lina and the Czech Republic are severed as a result of the transfer. The rehabilitation is partly successful, and the Swiss doctors suggest that Lina be transferred to an establishment in Vilnius, where she would enjoy the company of her family members before a second rehabilitation treatment in Zurich begins, six months later. Since Lithuania is not a party to the Hague Convention, the envisaged transfer from Zurich to Vilnius, and then back to Zurich, would not benefit from the provisions of the Convention and might turn out to be problematic and time consuming

Example No 2

Luigi is an Italian national living in France. He owns assets in France, Germany and Italy. He becomes unable to take care of his interests. Giulia, Luigi’s daughter, seizes the competent French court with a request for a measure of protection. The court, which possesses jurisdiction in accordance with Article 5(1) of the Convention, learns that Giulia, who lives in Edinburgh, is prepared to undertake her father’s protection, and considers that, in the circumstances, a transfer of the case to Scotland in accordance with Article 8(2)(e) of the Convention would be in the interest of Luigi (note that the UK, too, is a party to the Convention, albeit only in respect of Scotland).

As long as the Hague Convention is not in force for Italy, such a move could prove problematic. If indeed the case were transferred to Scotland, the measures taken by Scottish courts would be recognised (and enforced, as the case may be) in France and in Germany under the Hague Convention, but would not be recognised in Italy, for those measures do not originate in a country that the Italian rules of private international law regard as possessing jurisdiction. Giulia would eventually be able to

manage Luigi's assets located in France and Germany, not those located in Italy. Moreover, Italian courts would possess jurisdiction to rule on Luigi's protection on the ground of his nationality, and might appoint on this basis a person other than Giulia as his administrator.

All in all, the above analysis would seem to suggest that an effective protection of the fundamental rights of those involved and an appropriate management of cross-border situations within the internal market and the area of freedom, security and justice would hardly be secured if the Member States were not also parties to the Hague Convention.

A finding that the conclusion of the Convention is necessary in order to attain the objectives of the Treaties, for the purposes of Article 216 TFEU, could arguably rest on the above arguments.

4.2.1.3 Added value of the ratification

Mutual recognition and enforcement of decision are based on the principle of reciprocity, and require a uniform and systematic application of common rules. The diversity of approaches taken in the Member States legal systems, and the solutions adopted in Member States such as the Netherlands (analogous application of the 2000 Hague Convention) or Romania (in which inspiration is drawn from the Convention without its direct application) do not allow for such reciprocity.

Therefore, the question is not whether action should be taken, but what form such action should take and who should take such action. The exercise of the Union's external competence with a view to ensuring the ratification of the 2000 Hague Convention involves basically **the same process followed for the 1996 Hague Children Convention**, under Council Decision 2008/431/EC of 5 June 2008¹¹³. Article 218 TFEU would apply. Unanimity would not be required, pursuant to a combined reading of Article 218(8) and Article 81 TFEU, since the protection of adults does not belong as such to family law.

Key findings:

- Stakeholders, practitioners and academics largely agree that a broad ratification of the 2000 Hague Convention would significantly enhance the protection of vulnerable adults across the Union. In general, they consider that this would address the needs mentioned above.
- A general ratification of the 2000 Hague Convention was ranked as the preferred option for facilitating cross-border cooperation by the respondents to the survey carried out for this study. All MSCAs and legal practitioner survey respondents believed that a general ratification of the 2000 Hague Convention by all EU Member States would facilitate cross-border cooperation. Stakeholders believed this would lead to a greater harmonisation of jurisdiction norms and rules on the applicable law, in turn greatly simplifying procedures, ensuring better cooperation among all involved parties, increased legal certainty, and ultimately leading to a better protection of vulnerable adults. Several stakeholders highlighted that a general ratification of the Hague Convention is all the more important given the increasing mobility of EU citizens.
- The intervention of the EU to ensure ratification is legally feasible. The Union cannot itself become a party to the 2000 Hague Convention, as Articles 53 and 54 of the Convention make it clear that the latter is only open to sovereign States, not to international organisations. Therefore, for the Convention to form part of the EU acquis, the EU would need to authorise (and in fact oblige) the Member States to ratify or accede to the agreement in question 'in the interest of the Union'. Such intervention would be in line with EU law, insofar as the conclusion of the 2000 Hague Convention would fall within the **non-exclusive**

¹¹³ OJ L 151, 11.6.2008, p. 36–48.

external competence of the Union. Indeed, in accordance with Article 216 TFEU, the conclusion of the Convention could be regarded as “necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties”, and in this case, the objective of judicial cooperation in civil matters. Different views have been expressed in literature as regards re interpretation of the latter provision. The case law of the Court of Justice, it is argued, does not appear to preclude the above finding.

- Mutual recognition and enforcement of decision are based on the principle of reciprocity, and require a uniform and systematic application of common rules. The ratification of the Convention by all Member States would either fix or significantly mitigate many of the shortcomings mentioned above, as well as ensure such reciprocity.
- The exercise of the Union’s external competence with a view to ensuring the ratification of the 2000 Hague Convention involves basically the same process followed for the 1996 Hague Children Convention, under Council Decision 2008/431/EC of 5 June 2008. Article 218 TFEU would apply. Unanimity would not be required, pursuant to a combined reading of Article 218(8) and Article 81 TFEU, since the protection of adults does not belong as such to family law.

4.2.2 Adoption of an EU instrument complementing the 2000 Hague Convention

4.2.2.1 Need for a complementary EU instrument

Overall, the Hague Convention appears to work very well in practice. Its practical operation, however, could still be improved in some respects. Such improvements would be especially beneficial in the relations between the Member States of the EU, given the size and intensity of the cross-border mobility of individuals and assets in Europe, compared to other regions of the world.

Admittedly, some improvements may come from discussion within the Hague Conference on Private International Law, by way of clarifications through the Practical Handbook on the Convention currently under preparation, or through such recommendations as may be adopted on the occasion of the 2022 Special Commission devoted to the Convention¹¹⁴. This is true, in particular, of improvements consisting in a better understanding of the notions employed by the Convention (e.g., the habitual residence of a vulnerable adult, transmission of information and cooperation mechanisms in case of change in the residence of the vulnerable adult) and the functioning of its provisions.

That said, some improvements cannot be brought about otherwise than through legislation, based on the (internal) competence of the EU under Article 81 TFEU. Regulation at EU level would among other things result in the possibility to raise awareness and train practitioners on the EU instrument using existing EU tools (e.g., the European Judicial Network, the European Judicial Training Network, the e-Justice portal). It would also enable enforcement at EU level, with the infringement procedure, in case of breach of its obligations by a Member State.

For these reasons, **the enactment of a legislative measure regarding the international protection of adults should complement the Hague Convention**, and not serve as a substitute to it, for the reasons presented under Section 4.2.1.3 above. Accordingly, if indeed a legislative measure were enacted, its operation would arguably need to be delayed for as long as the Hague Convention is not in force for all Member States (or limited to such Member States as are already bound by the Convention).

It is important to note that the adoption of an EU legislative measure **would not involve a violation by the Member States of the international obligations they undertook** (or will have undertaken, by the time the measure enters into force) under

¹¹⁴ See Annex VII- interview with the Permanent Bureau of the Hague Convention for more information on this point.

the 2000 Hague Convention. The Hague Convention does not prevent Contracting States from furthering their cooperation beyond the provisions of the Convention itself or even departing from its rules in their mutual relations. The relevant provisions are Article 49(2) and Article 49(3) of the Convention. Both refer to the relationship between the Hague Convention and other agreements or “international instruments”, including, as stated in Article 49(4), “uniform laws based on special ties of a regional nature”. The latter formula, though initially meant as a reference to cooperation among Nordic States, also applies, it is believed, to legislative measures adopted by the European Union. According to Article 49(2), the Hague Convention does not affect the possibility for one or more Contracting States to conclude agreements or take part in regional rules which contain, “in respect of adults habitually resident in any of the States Parties to such agreements”, or in any of the States bound to such regional rules, “provisions on matters governed by [the Hague] Convention”. Article 49(3) adds that the said agreements or regional rules “do not affect, in the relationship of such States with other Contracting States, the application of the provisions of [the Hague] Convention”. In practice, this means that by applying a legislative measure adopted by the Union to deal with issues within the scope of the Hague Convention, the Member States would not be acting in breach of the Hague Convention insofar as the measure in question applies to a person whose habitual residence, at the material time, is in a Member State. In addition to that, it appears that the Member States would not violate the Hague Convention if they applied an EU legislative measure, instead of the Hague Convention, to the recognition in a Member State of a measure of protection given in another Member State, or to proceedings for the declaration of enforceability of such a measure. Arguably, the same is true, if the authorities of a Member State declined their jurisdiction in favour of the courts of another Member State pursuant to that regulation, or if they asserted their jurisdiction, based on such a regulation, in a situation where they would normally need to defer, under the Hague Convention, to the jurisdiction of the courts of another Member State.

Undoubtedly, for particular issues, it may prove difficult to draw a clear and workable distinction between situations that the Union may regulate without hindering the operation of the Hague Convention and situations where the Union’s legislation would instead frustrate the functioning of the Convention. This is true, in particular, of the issue of applicable law, which is universal in nature and does not rest on reciprocity. Similarly, if different rules apply regarding the obligations of the competent authorities under the two instruments, this could cause interpretation issues, as has been seen with regard to the Maintenance Convention and the Maintenance Regulation.

4.2.2.2 Form of the instrument

The question to then consider is the form that an EU instrument would take, and in particular, whether it should be a legislative or non-legislative (soft law) measure.

A non-legislative action or soft-law action would support the protection of the rights of vulnerable persons through, for example, monitoring and evaluation, training and good practice examples dissemination, but **its impact would be rather low compared to the problems encountered and faced in practice**. “Soft law” refers to international norms that are deliberately non-binding in character, but still have legal relevance, located “in the twilight between law and politics.”¹¹⁵ Therefore, although soft law options would in and of themselves be positive measures, they would probably be unsatisfactory to solve the issues identified in this report. To fully appreciate the disadvantages of soft law in the field of private international law, it is also necessary to analyze the advantages of possible hard law options.

- Hard law instruments allow states to commit themselves more credibly to international agreements. They ensure that state commitments are regarded as more credible, because they increase the cost of reneging, whether on account of legal

¹¹⁵ D. Thürer, “Soft Law”, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Elsevier: Amsterdam 2000, Volume 4, p. 452-454.

sanctions or on account of the costs to a state's reputation where it is found to have violated its legal commitments.¹¹⁶

- Hard-law instruments are more credible because they can have direct legal effects in national jurisdictions ("self-executing"), or they can require domestic legal enactment. Where treaty obligations are implemented through domestic legislation, they create new tools that mobilize domestic actors, increasing the audience costs of a violation and thus making their commitments more credible.¹¹⁷
- Hard-law instruments also provide better options for the long term, in providing routes for interpretation and implementation monitoring. The enforcement of such commitments through dispute-settlement bodies, such as courts, is also advantageous.¹¹⁸

Nevertheless, defenders of soft law instruments argue that such instruments offer significant offsetting advantages over hard law alternatives. They find, in particular, that:¹¹⁹

- Soft-law instruments are easier and less costly to negotiate. Hard law options entail significant costs, whilst also creating formal commitments that can affect the behaviour of States. The idea has been proffered that states are less willing to agree to impose legally binding commitments due to the implications of state budgets, and therefore all more willing to negotiate fiercely in achieving such hard law options.¹²⁰
- Additionally, hard-law agreements can be more difficult to adapt to changing circumstances,¹²¹ as it oftentimes presupposes a fixed condition when actually the legal field requires constant adjustment.¹²²
- Soft-law instruments allow states to be more ambitious and engage in "deeper" cooperation than they would if they had to worry about enforcement.
- Soft-law instruments cope better with diversity.
- Soft-law instruments are directly available to non-state actors, including international secretariats, state administrative agencies, sub-state public officials, and business associations and nongovernmental organizations (NGOs).¹²³

With respect to the field of private international law, **solutions can only realistically be achieved through hard-law options** as the flexibility afforded to States by virtue of soft-law mechanisms (which is the very same advantage of such instruments) is not suited to the field, especially when dealing with international procedural law aspects (i.e., jurisdiction and recognition and enforcement of judgments).¹²⁴ Nevertheless, although soft law could lead to improvement as regards information dissemination, it would not lead to solutions being proffered for to address the permanent issues listed

¹¹⁶ K.W. Abbott and D. Snidal, "Hard and Soft Law in International Governance", (2000) 54 *International Organisations* p. 421 at p. 428 .

¹¹⁷ K.W. Abbott and D. Snidal, *ibid*, p. 433.

¹¹⁸ K.W. Abbott and D. Snidal, *ibid*, p. 427.

¹¹⁹ G.C. Shaffer and M.A. Pollack, "Hard vs. soft law alternatives, complements and antagonists in international governance", (2010) *Minnesota Law Review* p. 706.

¹²⁰ K.W. Abbott and D. Snidal, *ibid*, p. 434.

¹²¹ K.W. Abbott and D. Snidal, *ibid*, p. 433.

¹²² See, for example, G. de Búrca & J. Scott, Introduction, (2007) 13 *Columbia Journal of European Law* p. 513 (arguing that a lack of fixed conditions "necessitates a degree of experimentation with different kinds of public policy-making strategies").

¹²³ For good discussions on the purported strengths of soft law, see, for example, J.J. Kirton & M.J. Trebilcock, 'Introduction', in: J.J. Kirton and M.J. Trebilcock (eds.), *Hard Choices, Soft law: Voluntary Standards in Global Trade, Environment and Social Governance*, 2004, p. 3, at 9; K.W. Abbott and D. Snidal, *ibid*, at 434–54; F. Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, (2006) 19 *Leiden Journal of International Law*, p. 829, at 832; See also H. Hillgenberg, *A Fresh Look at Soft Law*, (1999) 10 *European Journal of International Law*, p. 499, at 501 and 504.

¹²⁴ A position that is also supported in the field of civil procedure in general, see, EPRS, *Europeanisation of civil procedure. Towards common minimum standards?*, European Parliamentary Research Service: Brussels 2015, p. 12

in this report. For example, the abolition of the barriers to the recognition and enforcement of powers of representation would not be solved with soft-law instruments. The majority of legal systems require some form of reciprocity for the mutual recognition of decisions.¹²⁵ A soft-law instrument would not solve this issue, as reciprocity requires an international legal obligation, which can only be achieved by means of hard-law instruments. Although a recent decision of the Dutch Supreme Court would appear to suggest that mutual recognition can also be achieved without ratification of the 2000 Hague Convention¹²⁶, this is certainly not the principle of private international law applied in the vast majority of countries around the world, as has also been noted in Dutch literature criticising this decision¹²⁷. Therefore, the only possible solutions would be with the introduction of an EU hard-law instrument in the form of a directive or regulation.

The gaps and problems identified in this report require a strictly defined and harmonised set of rules of private international law. Rules on the cross-border recognition and enforcement of judgments will simply not work if these rules are to be implemented on a voluntary basis. **The rules required must, therefore, constitute a set of precise, unconditional provisions that are directly and uniformly applicable in a mandatory manner and, by their very nature, require no action by the Member States to transpose them into national law.** As has been seen in other areas of private international law, the use of Regulations has been highly successful to achieve this aim. In the field of family law, reference can be made to the Brussels IIa Regulation¹²⁸, Rome II Regulation, Maintenance Regulation¹²⁹, European Succession Regulation. In the field of civil and commercial matters, one can point to the Brussels I (recast) Regulation¹³⁰, the Insolvency Regulation¹³¹, Rome I Regulation, Rome II Regulation, the Order for Payment Regulation¹³², Small Claims Procedure Regulation¹³³, European Order Uncontested Claims Regulation¹³⁴, Service of Documents Regulation¹³⁵, and Evidence Regulation¹³⁶.

¹²⁵ See J. Carlos Martinez, "Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted", (1995) 4 Journal of Transnational Law and Policy p. 49 and Y. Zeynalova, "The law on recognition and enforcement of foreign judgments: is it broken and how do we fix it?", (2013) 31 Berkeley Journal of International Law p. 151.

¹²⁶ Dutch Supreme Court, 2nd February 2018, ECLI:NL:HR:2018:147, §3.3.4.

¹²⁷ See for example the critical annotation of this decision, by T. de Boer, *Nederlandse Jurisprudentie*, 2018/409, §4.

¹²⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

¹²⁹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1–79.

¹³⁰ 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, OJ L 351, 20.12.2012, p. 1–32.

¹³¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72.

¹³² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1–32.

¹³³ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1–22.

¹³⁴ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15–39.

¹³⁵ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79–120.

¹³⁶ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1–24.

4.2.2.3 Content of the instrument

General approach

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

A similar problem has arisen in the context of the jurisdictional rules contained in the Brussels IIa Regulation and the Hague Child Protection Convention 1996. Although both instruments contain rules of direct jurisdiction, these rules are different both in terms of principle (e.g. the Brussels IIa Regulation departs from the principle of *perpetuatio fori*, whereas the Hague Child Protection Convention 1996 does not), as well as the actual grounds of jurisdiction (e.g. the Brussels IIa provides for prorogation in procedures not ancillary to divorce proceedings, whereas the Hague Child Protection Convention 1996 only provides for prorogation in ancillary matters). It is, therefore, essential in any given case to know which set of jurisdictional rules apply. In practice, even if two systems are implemented alongside one another, the interaction between these systems remains difficult. Take for example the difference between Article 8(1) of the Brussel IIa Regulation and Article 5(1) of the 1996 Hague Child Protection Convention. If the child has an habitual residence in a 1996 Hague Convention State, it would be considered under the Convention that jurisdiction ceases if the child changes its habitual residence, whereas if the child moves to an EU Member State, that state would consider that the jurisdiction remains with the original state on the basis of the *perpetuatio fori* principle in accordance with the Regulation.

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

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

Specific provisions

Choice of court by the adult

It has been suggested in literature, notably by the ELI Report mentioned above, that the cross-border enforcement of private mandates would be easier and more effective if the adult concerned were enabled, subject to appropriate safeguards, to **choose in advance, at a time when they are capable, the Member State whose courts are to have jurisdiction over their protection**; this should include the power to supervise guardians, persons appointed by a court or by the adult concerned (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs.

Under the Hague Convention, a choice of court by the adult does not, as such, confer jurisdiction on the chosen court. Article 8 of the Hague Convention provides that the authorities of a State having jurisdiction under Articles 5 or 6, "if they consider that such is in the interests of the adult", may request the authorities of another Contracting State "to take measures for the protection of the person or property of the adult", with respect to all or some aspects of such protection. The Contracting States whose authorities may be addressed for that purpose are, among others, those of "the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection". A transfer of jurisdiction under the latter provision is by definition outside the control of the adult in question. It is, in fact, for the court possessing jurisdiction to assess in its discretion whether to uphold the choice, or not. Should the court consider that jurisdiction ought in fact to be transferred to the chosen court, the transfer will only become effective, as it arises from Article 8(3), with the consent of the chosen court.

Based on the survey conducted for the purposes of the present report, stakeholders do not seem to be especially concerned by this state of affairs. Still, the picture is not satisfactory, especially if one considers the key role played by self-determination in this area. Actually, it is hard to see why self-determination should enjoy only indirect recognition when it comes to an adult's protection, whereas self-determination is fully (or more fully) recognised in other areas, such as in matters of succession or as regards maintenance obligations. Providing the adult concerned with the right to make choices relevant to his or her interests translates the principle according to which people with disabilities ought to be empowered to enjoy their rights on an equal basis with others. This is a key objective of the UNCRPD and the main focus of the European Disability Strategy 2010–2020, adopted by the European Commission (COM(2010) 636 final).

Furthermore, as regards the financial interests of the adults concerned, one should consider that, whilst a succession upon death or family support are subject to the interests of various parties that may conflict, it is, generally, solely the interests of the adult concerned that are paramount in dealing with their affairs. Therefore, although various other parties may have conflicting ideas of what is in the "best interests" of the adult concerned, this is no different to the principle that the interests of the child are a paramount consideration in cases involving them, but that the persons involved in the child's life may well have different views as to what is in the child's best interests.

Based on the foregoing, it is considered that **Union legislation could be enacted to ensure that, subject to suitable safeguards, the adults concerned enjoy a significant amount of autonomy and be able to designate the court with jurisdiction.** It is acknowledged that party autonomy in this field should be subject to limitations, notably in order to prevent abuse. As a consequence, choice of court should be admitted in situations where it would clearly advance the fundamental rights of the adult concerned.

This occurs, in particular, where, by virtue of the choice, jurisdiction over the protection of the adult is conferred on the authorities of the State whose law is applicable to a private mandate made by the adult. Convergence between *forum* and *ius* has a two-fold

advantage. To begin with, it enhances **legal certainty**, for the will of the adult, as expressed in a private mandate, will be enforced by authorities which are, by definition, familiar with the law governing the substance of the mandate itself, and are, as such, particularly well placed to realise, in due course, precisely the same effects that the adult concerned had envisaged. Secondly, where a private mandate is administered and enforced by the courts of the State whose rules govern the substance of the mandate itself, the chances are high that those courts will discharge their duties rapidly and efficiently, thereby enhancing the **effectiveness** of the protection provided to the adult.

The above advantage would not be achieved, at least not systematically, absent a provision on choice of court. Under the combined operation of Article 5 and 15 of the Hague Convention, a private mandate governed by the law of country X may end up being dealt with by the authorities of country Y. In fact, Article 5 confers jurisdiction on the courts of the Contracting State where the adult concerned is habitually resident at the time where his or her protection is at issue, whereas Article 15 provides that the powers granted under a private mandate are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the following laws has been designated: a State of which the adult is a national; the State of a former habitual residence of the adult; a State in which property of the adult is located, with respect to that property. Thus, if the adult in question entered into a private mandate when he or she was habitually resident in country X, but the issue of his or her protection under the mandate arises at a time when he or she is habitually resident in country Y, only the authorities of the latter country will be entitled, pursuant to the Hague Convention, to take measures for the protection of the adult in question, including such measures as may be necessary to bring the mandate into effect through registration or confirmation, or to adapt the powers granted by the adult to any supervening need or circumstance.

In the end, choice of court should be possible where powers of representation have been granted by an adult to be exercised when such adult is not in a position to protect his or her interests. The courts that the adult should be able to choose are those of the Member State whose law is applicable pursuant to Article 15 of the Hague Convention. The provision should come with requirements as to form. Its operation would be limited to the protection of adults who, at the time the authority is seized, are habitually resident in a Member State. Such a choice of court clause could operate easily within any future EU instrument, even if the EU instrument itself was only to refer to the jurisdictional rules provided for in the 2000 Hague Convention. In a similar fashion to the interaction between the Brussels IIa Regulation and the 1980 Hague Child Abduction Convention, the EU regulation could refer to the applicability of the Hague instrument, whilst at the same time supplementing these rules with additional provisions. In the case of the interaction between a future EU instrument in the field of vulnerable adults and the 2000 Hague Convention, the supplemental provisions could be in the form of providing the possibility to create a choice of court clause. In the absence of a choice of court clause, one would then fall back on the general jurisdictional provisions laid down in the 2000 Hague Convention.

An EU certificate of powers of representation

Both MSCAs and legal practitioners were asked whether they believe the creation of a European certificate of representation, i.e. a standard certificate providing evidence of the powers conferred on the person(s) charged with representing a vulnerable adult by the adult themselves or by a competent authority, would be beneficial for the cross-border protection of vulnerable adults. **Out of 30 legal practitioner respondents, 70 % answered positively while 30 % answered negatively.**

Among those that responded **positively**, four stated that a European certificate of representation would create standardisation, which would facilitate cross-border cases and lead to speedier procedures. One practitioner argued that the certificate should be designed as an optional instrument (similar to the European Succession Regulation) and

that it would be a useful additional instrument to present to authorities or banks. A judge argued that the certificate is not enough if it cannot be modified or jurisdiction cannot be clearly established when an ancillary matter must be judged. Five MSCAs believed the creation of a certificate would be beneficial as it could contribute to uniformity and reduce translation costs. One argued that the certificate should be accompanied by the necessary regulation for its effectiveness. Two MSCAs did not provide a position as they believe it should be subject to further consideration. One MSCA believed that a European certificate of representation would need to be very detailed with respect to the scope of representation, which may differ greatly between Member States and that it should not lead to a lowering of the current standards for legal representation in certain Member States. The MSCA believed that it would require common conflict-of-laws rules, as the content of such a certificate would need to be based on a (substantive national) legal framework. According to the MSCA, such a process would require national legislators to implement stark changes in their laws but would not be in the interest of the persons concerned, as most cases of representation do not pose a cross-border implication. In addition, the MSCA argues that the impact which the Rome I and Rome II Regulations already have in this context should be examined carefully. For this MSCA, harmonised conflict-of-law rules are a necessary basis for any possibility for such a certificate, which could be achieved notably through a general ratification of the 2000 Hague Convention by all Member States.

Among the respondents that answered **negatively**, four argue that the creation of a standard European certificate of representation could strongly undermine the principle of freedom of choice and self-determination of the vulnerable adult. According to these respondents, the field of protection of vulnerable adults is too sensitive to be subject to a standardised form, as a key element of protection is preserving a tailor-made answer of the vulnerable adult's will and preferences, in accordance with Article 12 of the UNCRPD. The criticism would seem to rest on a misunderstanding. The purpose of a certificate of powers of representation is merely to make it easier for the adult's attorney or administrator to provide evidence of his or her powers in a country other than the country where such powers were granted. The certificate would not undermine the self-determination of the adult for the simple reason that it would not affect, as such, the scope of the adult's autonomy or the manner in which the adult's autonomy would need to be exercised. A certificate would only be issued after the powers have been conferred, and would do no more than providing standardised information as regards the extent and intended conditions of operation of the powers granted. A standard certificate would accordingly not undermine the self determination of the adult concerned, just like the European Certificate of Succession does not undermine testamentary freedom.

An additional two practitioners argued that it would make more sense to harmonise rules than create a European certificate. Another argument raised by some stakeholders is that the EU certificate would merely duplicate the certificate issued together with the decision. The former objection seems to disregard the fact that the EU lacks a general competence to harmonise the substantive law of the protection of adults. The latter would seem to rest on the understanding that a European certificate would correspond, in terms of content and legal effects, to a Certificate issued in accordance with Article 38 of the Convention. In fact, that is not necessarily the case. A European certificate could and should do more than an Article 38 Certificate. As explained below in more detail, the model for a European certificate would be the European Certificate of Succession, which is by far more elaborate than an Article 38 Certificate.

Finally, the cross-border transportability of powers conferred under a judicial or administrative measure of protection or under a private mandate represents one of the main concerns surrounding the operation of the Hague Convention. This is confirmed, inter alia, by the responses of States to the questionnaire prepared by the Permanent Bureau in preparation for the Special Commission of 2022, mentioned above, and from the replies collected through the survey circulated for the purposes of this report.

The **certificate provided for by Article 38 of the 2000 Hague Convention is only**

seldom used. Whilst certificates under Article 38 of the Hague Convention may be available, their utility is somewhat restricted. The State with jurisdiction is under no obligation to produce such a certificate. Furthermore, the latter certificates produce a presumption of the validity of the limited matters stated, but no further binding effects. Article 38 Certificates are not in multilingual format and there is considerable doubt as to whether they can validly be produced unless a private mandate has been subject to a form of judicial confirmation.

The **European Succession Regulation provides several examples** that could serve as inspiration for any future European instrument in the field of vulnerable adults. One of the areas in which the two fields display similarities is with respect to the free circulation of documents attesting the scope and content of the rights of those concerned (e.g., the deceased's heirs and legatees, in the case of succession; the administrator or the grantee of a private mandate, as regards the protection of adults).

The manifest advantages of the European Certificate of Succession in the Union and the manner in which they have made easier the administration of cross border estates, clearly demonstrate the value that the existence of a European Certificate of Powers of Representation, to be created by means of EU legislation, would bring to reducing cross-border discrimination against vulnerable adults in the Union. In addition, the use of an ECPR can ensure the protection of third parties who rely on it.

The provisions that deal with the European Certificate of Succession in the European Succession Regulation could serve as a model to regulate the issuance and effects of such a European Certificate of Powers of Representation.

The proposed European Certificate would not take the place of national certificates (if any) which may still be issued in the Member States. Rather the European Certificate would represent a sort of **development of the Certificate provided for under Article 38 of the Hague Convention**. It would in fact be an Article 38 Certificate with extra effects (the latter will only be relied upon in the Member States).

Steps in that direction were welcomed by all those interviewed for this report, including the central authorities. All interviewees noted that standard forms would aim to improve transparency and mutual trust, provide for more efficient solutions to cross-border problems and at the same time would reduce costs in cross-border litigious situations, as well as extra-judicial settings. Such a form could gain inspiration from the standard forms that are also used in other Regulations such as the Brussels IIa and Maintenance Regulations. Furthermore, the aim of the certificate would be to create a document that could be used outside of judicial proceedings, in a similar fashion to the European Successions Certificate. It would consist in a single certificate, encompassing the article 38 certificate, to ensure simplicity. Such forms would assist in the cross-border recognition of documentation, but would also simplify the entire field for citizens across the European Union. A citizen living in Latvia would be able to use the standard form to draft a power of attorney, which could then be recognised and enforced in all other EU Member States. The form itself would be easily recognisable because citizens in other EU Member States would use the same form.

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

Different recognition regimes

As noted earlier in this report, the **recognition regime provided for under the 2000 Hague Convention is not sufficient for the EU context**. The recognition regime

provides for multiple grounds for non-recognition and could be removed within the EU context (in a similar fashion to the grounds for recognition in the Maintenance Regulation, as compared to the Hague Maintenance Convention 2007).

Furthermore, the requirement to obtain a declaration of enforcement under the Hague Convention does not appear to be necessary within the EU context, as is already the case for decisions within the scope of the Maintenance Regulation (in cases where the Hague Protocol applies) and the Brussels I (recast) Regulation, *inter alia*. Therefore, it would be advisable to create a **separate regime for the enforcement of measures originating in a Member State, and apply the 2000 Hague Convention to measures emanating from contracting States other than EU Member States**.

Should **exequatur** be maintained, it would be crucial to clarify in which circumstances exequatur would in fact be needed. In this connection, it should be made clear that a declaration of enforceability is not required unless the implementation of the provisions of a foreign measure of protection involves, as such, some form of coercion. In situations when recognition is sufficient, then a declaration of enforceability would not be required. Exequatur would accordingly not be needed (and may not be requested) where the person in charge of representing and/or assisting the adult merely wishes to exercise their powers in a State other than the State under whose law, or based on whose measures, such powers were conferred (e.g., where the grantee of a private mandate seeks to withdraw monies held in a bank account opened by the adult).

It is important to stress that, under a harmonised body of rules governing the cross-border movement of judicial and administrative decisions, whether the implementation of a foreign measure of protection requires a declaration of enforceability in the State of enforcement is a question that calls for a uniform answer. It is true that the scope and content of a protective measure depend on national law, namely the law of the State in which the measure originates. It is also true that the enforcement of a measure of protection is to take place in accordance with national law, this time the law of the State in which enforcement is sought. Instead, in a system like the 2000 Hague Convention, the *enforceability* of a protective measure is subject to uniform standards. It is for uniform standards to determine whether a particular measure, having regard to its scope and content, must be declared enforceable in another State as a pre-requisite for its implementation in that State, or not. If things were otherwise, the uniform application and the practical effect of the harmonised rules on the cross-border circulation of protective measures would be frustrated.

Authentic instruments

In the field of succession and matrimonial property rights, the use of authentic instruments is widespread. Such instruments oftentimes create claims between the parties concerned, for example in the form of matrimonial property contracts.

Authentic instruments have also an important role to play in the field of adult protection. Specifically, private mandates are often established in the form of authentic instruments. The Hague Convention fails to include provisions that make it possible to claim, in one Contracting State, the effects of an authentic instrument originating in another, i.e. the particular effects that arise from those instruments by virtue of their authentic character (the substantive effects of those instruments may, instead, already be covered by the Convention: thus, Article 15 of the Convention applies to powers of representation granted in contemplation of a loss of autonomy regardless of whether those powers are granted under an authentic instrument or otherwise).

EU legislation aimed at complementing the Hague Convention should provide for the **acceptance and, where appropriate, the enforceability, of such authentic instruments** as are established in a Member State for the purposes of protecting an adult.

Various legislative measures have been adopted by the Union to deal with the cross-border acceptance of authentic instruments and their enforceability. These include the European Succession Regulation on matters of succession and Regulations (EU) 2016/1103¹³⁷ and (EU) 2016/1104¹³⁸ on matrimonial property regimes and the property consequences of registered partnerships. However, none of these measures applies to private mandates. This gap should accordingly be filled by introducing rules on the acceptance and enforceability of authentic instruments, modelled on the existing measures of the Union.

Direct Communication

The 2000 Hague Convention provides for cooperation to be mostly channelled through the Central Authorities designated by the Contracting States. The Convention, in Article 32, contents itself with providing that the authorities of one State may get in touch with the authorities of another State for the purpose of discharging some of their duties under the Convention. The provision, however, makes clear that individual Contracting States may declare that all requests must rather be made through their Central authorities (Belgium, Estonia and France, for example, issued declarations to that effect).

Cooperation would be more effective, it is contended, if the **potential of direct communications were fully exploited**.

EU legislation in the field of judicial cooperation promotes direct communication between Member States' authorities. For example, the Taking of evidence Regulation (EU) No 1206/2001 (soon to be replaced by Regulation (EU) 2021/1783¹³⁹) provides that a court in a Member State, seeking to obtain evidence located in another Member State, must, as a rule, transmit a request directly to the competent court of the latter State. Article 86(1) of Regulation (EU) 2019/1111¹⁴⁰ (hereinafter Brussels II-ter Regulation) on matrimonial matters and the matters of parental responsibility provides that the courts of Member States 'may cooperate and communicate directly with, or request information directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information'. A similar provision is found in Article 42 of the Insolvency Regulation. All in all, EU legislation appears to regard direct communication as a tool to make judicial cooperation easier, faster and more efficient.

In the same manner, a legal basis for direct judicial co-operation could be set up, which could in many cases form the link in the context of expert judicial co-operation. Furthermore, providing a legal basis for direct judicial co-operation could aid in increasing the digitalisation of cross-border judicial co-operation.

Cooperation in the protection of adults would similarly benefit, it is submitted, from direct contacts between the authorities of the Member States concerned. One scenario where direct communication could prove particularly beneficial is when the transfer of a case from the courts of one State to another pursuant to Article 8 of the Hague Convention. In assessing whether the transfer would be in the interest of the adult, the

¹³⁷ 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, OJ L 183, 8.7.2016, p. 1–29.

¹³⁸ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30–56.

¹³⁹ Commission Delegated Regulation (EU) 2021/1783 of 2 July 2021 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards containing a template document for cooperation arrangements with third countries (Text with EEA relevance), C/2021/4786, OJ L 359, 11.10.2021, p. 1–5

¹⁴⁰ 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, ST/8214/2019/INIT, OJ L 178, 2.7.2019, p. 1–115.

court seized of the matter will normally need to exchange with the authorities of the country to which the transfer itself is contemplated. Direct communication will often improve the effectiveness of such an exchange.

Truly enough, direct communication will not always be possible, e.g., due to language barriers or other practical difficulties. Central Authorities should accordingly retain an important role to play, and should be ready to intervene whenever the authorities concerned are not in a position to entertain a direct exchange, or as their dialogue proves problematic. Allowing for flexible and informal channels of co-operation would also contribute to increase cooperation, where the creation of highly formalistic, bureaucratic channels could end up slowing down the process.

Right to be heard

Another element that could be regulated in an EU instrument is the right for the vulnerable adult to be heard. A comparison with the right given to be a child to express his or her views is easily made. As stated in recital 39 in the new Brussels II-ter Regulation, the opportunity of a child to express his or her views freely is protected by Article 24(1) of the Charter of Fundamental Rights of the European Union, as well as Article 12 of the UN Convention on the Rights of the Child. Although the Regulation does not determine who will hear the child or how the child is to be heard, the Regulation does lay down a general protection that the child should be given the opportunity to be heard. This is subsequently reflected in Article 21 of the Brussels II-ter Regulation. A similar approach could also be taken with regard to vulnerable adults, whereby a future EU instrument could provide for a minimum obligation to provide the vulnerable adult with an opportunity to be heard, except in exceptional circumstances which would then need to be indicated on any future certificate (in a similar fashion to the annexes to the Brussels IIa and II-ter Regulations).

Legal aid

Also legal aid is an important and essential component in any the implementation of any future instrument. Looking at maintenance payments, the Maintenance Regulation imposes a very high burden on States to provide free legal aid in these cases. Recital 36 of the Regulation specifically identifies the fact that a very favourable legal aid scheme needs to be created regarding maintenance payments in respect of children under the age of 21. Specific rules were therefore added on legal aid to the regime currently already in existence in the context of Directive 2003/8/EC. In this context, if the choice is made to provide for a favourable legal aid system, reference could be made to Articles 44 through 47 of the Maintenance Regulation. Furthermore, due to a number of content-related restrictions imposed by Directive 2019/19 (Legal Aid Directive), it would be preferable to create a more specific system particularly applicable in the context of any future instrument.

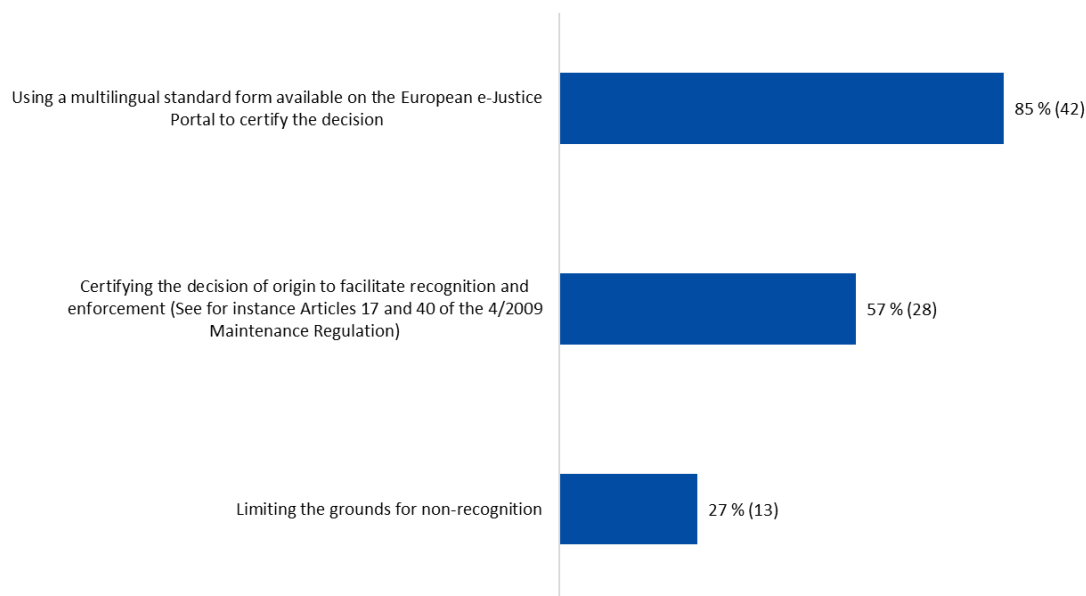
Other elements

Other elements that could also be dealt with in the context of, or in connection with, a European instrument include aspects which would build upon the heightened level of mutual trust and cooperation within the EU. Reference is made, inter alia, to: the **creation of an electronic European registry, or interconnection of electronic national registries of protection measures; the use of (electronic) standard multilingual forms** (certificates, requests, acknowledgement of receipt etc.); **the notification of information in relation to national law or judicial cooperation to be published on the e-Justice Portal; the facilitation of legal aid application in cross-border cases**, including relevant adaptations to the legal framework provided by the Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; and **digitalisation of the communications between central and competent authorities**.

The **survey** carried out in the context of the study gathered the views of stakeholders on two of these elements: the use of standard multilingual forms and the notification of information in relation to national law or judicial cooperation to be published on the e-Justice Portal.

On the **multilingual dynamic forms on the European e-Justice portal**, when asked which method(s) would be best to harmonise recognition proceedings, most respondents (85 %), both MSCAs and legal practitioners, chose the option of using a multilingual standard form available on the European e-Justice Portal to certify the decision.

Figure 15: In your opinion, what would be the best(s) method(s) to harmonise recognition proceedings (MSCAs and legal practitioners surveys, N=49)

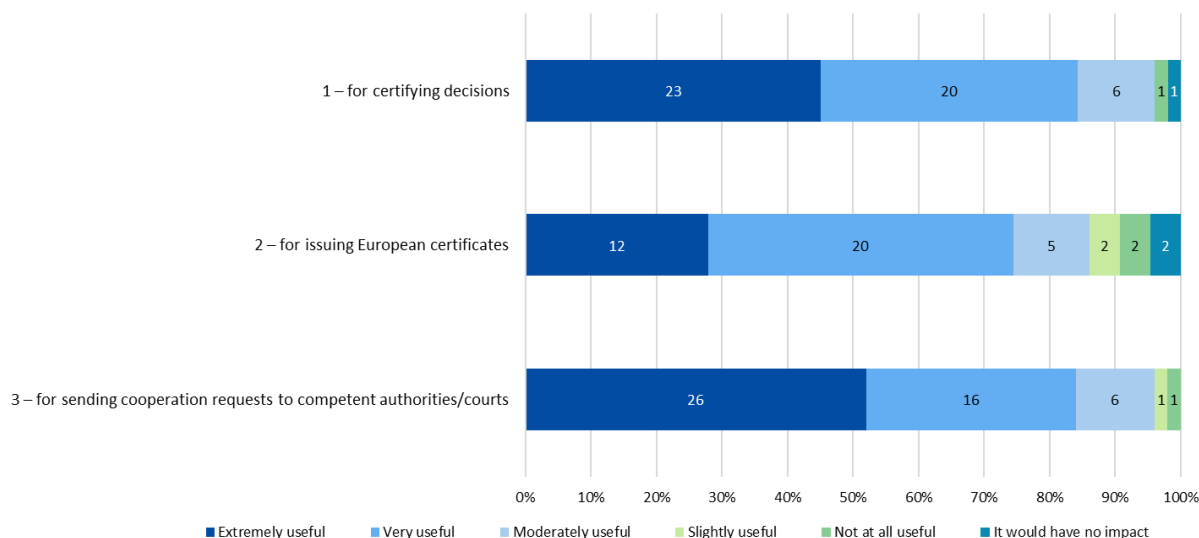


An MSCA and two legal practitioners argued that multilingual standard forms would speed up the proceedings as it would introduce more standardisation and reduce translation costs. One practitioner stated that the e-Justice portal has proven to be an efficient and easily accessible source of information for civil matters. One practitioner argued that the multilingual standard form on the e-Justice portal should be accompanied by a verification number, as in the case of apostille, as it would make the verification of the decision easier in the Member State in which the judgment is to be enforced. One MSCA indicated that in addition to these options a mechanism to facilitate the translation requirements of documents circulating under the Convention should be developed.

The majority of stakeholders, both MSCAs and legal practitioners, believed it would be useful to add the possibility of filling out multilingual dynamic forms on the e-Justice portal for different types of procedures. 84 % believed that it would be extremely useful or very useful for certifying decisions, 84 % for sending cooperation requests to competent authorities/courts and 74 % believed it would be extremely useful or very useful for issuing European certificates. Very few stakeholders provided comments to substantiate their answers. One MSCA expressed reluctance to create a specific certificate only for EU Member States.

Figure 16: In your opinion, how useful would it be to add the possibility of filling out multilingual dynamic forms on the European e-Justice portal for each of the following

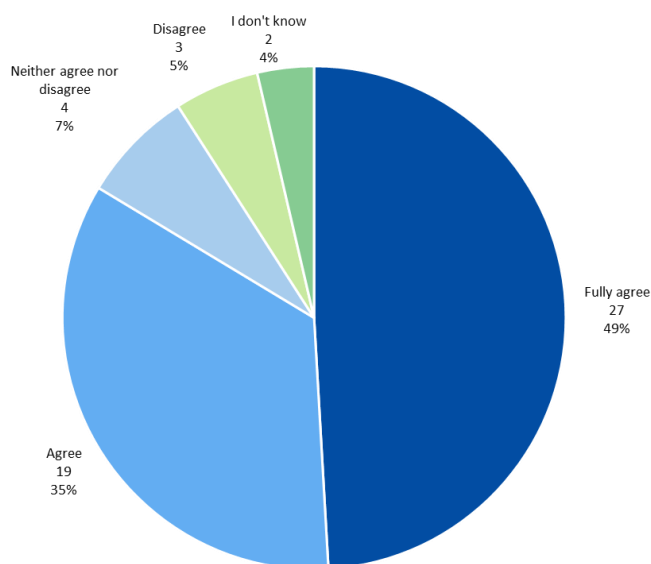
procedures? (These forms would also contain guidance and automatic filling of certain types of information) (MSCAs and legal practitioners surveys, N=52)



In relation to the **factsheets per country on the Atlas of the e-Justice portal**, most of the stakeholders (84 %), both MSCAs and legal practitioners, fully agreed or agreed that providing general information on the applicable instruments and fact-sheets per country on the Atlas of the e-Justice portal would greatly facilitate cross-border cooperation procedures.

Figure 17: To what extent do you agree with the following statement?

“Providing general information on the applicable instruments and fact-sheets per country on the Atlas of the e-Justice portal would greatly facilitate cross-border cooperation and procedures.” (MSCAs and legal practitioners surveys, N=55)



Several stakeholders mentioned that the e-Justice portal is a useful tool and that the provision of information on national laws would help practitioners. One MSCA highlighted, however, that this should be complemented by training and support of professionals and another MSCA stated that in their experience this would be of only limited added value. Several legal practitioners point to the work carried out by the Council of the Notariats of the European Union (CNUE) which makes available information for practitioners and citizens in 22 Member States, published on the website <http://www.the-vulnerable.eu/>.

The latter improvements would not necessarily require the adoption of a legislative measure. They would however represent a crucially useful complement to such a measure.

Key findings:

- Provided that all Member States have ratified the Hague Convention, even though the Convention works well, it could still be improved in some respects, and does not necessarily address sufficiently the specific needs pertaining to the relations between the Member States of the EU, given the size and intensity of the cross-border mobility of individuals and assets in Europe. **The enactment of a legislative measure regarding the international protection of adults should therefore be considered to complement** the Hague Convention.
- The adoption of such EU legislative measure would in principle be **compatible with the international obligations of the Member States under the Convention**, even though, for particular issues, it may prove difficult to draw a clear distinction between situations that the Union may regulate without hindering the operation of the Convention and situations where the EU legislation would instead frustrate the functioning of the Convention.
- With regard to the **form** of the instrument, with respect to the field of private international law, solutions can only realistically be achieved through legislative options as the flexibility afforded to States by soft-law mechanisms is not suited to the field, especially when dealing with international procedural law aspects (i.e., jurisdiction and recognition and enforcement of judgments). Based on the instruments already existing at EU level to regulate private international law matters, **a Regulation would be most suited** to ensure that the relevant rules are directly and uniformly applicable in a mandatory manner and require no action by the Member States to transpose them into national law.
- With regard to the **content** of the instrument, the experience drawn from the application of other private international law instruments adopted at EU level shows that the creation of a set of rules that are virtually identical to the Convention is not advisable and should only be used as a last resort. Instead, additional, complementary rules in an EU instrument should be considered, as has been done in the field of international child abduction with the Brussels II-bis Regulation. Such an instrument would then cover address the shortcomings, develop specific aspects or complement the Convention.
- Provisions would include a **key set of measures**, such as the choice of the court by the adult in advance (before the incapacity occurs), the creation of an EU certificate of powers of representation (based on the example of the European Certificate of Succession and recent development in the field of maintenance), the adoption of common **enforcement rules** among Member States (with clear rules on exequatur), the acceptance and enforceability of **authentic instruments**, rules on **legal aid**, and measures to facilitate **communication** between Member States competent authorities.
- Other measures could also be **considered**, such as the creation of an electronic European registry, or interconnection of electronic national registries of protection measures, the use of standard multilingual forms, the notification of information in relation to national law or judicial cooperation to be published on the e-Justice Portal; the facilitation of legal aid application in cross-border cases, and digitalisation of the communications between central and competent authorities.

5 Conclusions and recommendations

5.1 Recommendations on mandatory ratification

Ratification of the Convention by all Member States would either fix or significantly mitigate many of the shortcomings discussed in the previous section. If the EU limited itself to draw inspiration from the Convention to enact legislation in this field, only some of the above shortcomings would be addressed, and difficulties would persist. Vulnerable adults move across borders both within and outside the EU. Their assets and financial interests may happen to be located both in a Member State and in a third country. The 2000 Hague Convention is a global instrument. It is already in force for some States outside the Union, and several others have expressed an interest in joining it. Arguably, the best way to approach the challenges posed by such a phenomenon is, for the Union and its Member States, to make sure that cross-border cases are dealt with under the same principles, no matter whether they involve only two or more EU Member States or have ramifications in a third country.

The 2000 Hague Convention only provides for the ratification by States and thus does not allow the EU to accede. However, the Council, under a proposal from the Commission, could, based on the findings illustrated above, adopt a decision both authorising and obliging Member States to ratify the Convention, within a specific deadline, subject to the demonstration of the external competence of the EU in that field. As indicated above in this report, various arguments can be put forward to support that such competence exists. Therefore, this route should certainly be pursued. Such a step would ensure the best possible solution for several current issues in this field.

5.2 Recommendations on the adoption and content of a possible EU instrument

Utilising its internal competence, the EU should also enact measures aimed to improve the operation of 2000 Hague Convention within the intra-EU context. As discussed in this report, this could include drafting a complementary EU instrument in the form of a regulation which would serve to further strengthen the operation of the 2000 Hague Convention. Special attention would however need to be paid to ensuring that such an instrument does not jeopardise the operation of the 2000 Hague Convention. The EU has the task to develop the European area of justice in civil matters based on the principles of mutual trust and mutual recognition of judgements. The establishment of the area of justice requires the adoption of measures further facilitating the judicial cooperation in civil matters having cross-border implications. While many areas of civil justice are covered by the European *acquis* and have instituted common rules for the recognition of decisions or abolished *exequatur* for instance, the cross-border protection of adults is currently not covered by an EU instrument. Such an EU initiative coupled with the ratification of the Hague Convention could be similar to what has been done in the area of child abduction or maintenance recovery.

The working of such an instrument is not excluded by the 2000 Hague Convention. According to Article 49(2) and 49(3) of the Convention the convention does not affect the possibility for one or more contracting states to conclude agreements or take part in regional rules which contain "in respect of adults habitually resident in any of the States Parties to such agreements, nor do these agreements affect the relationship of such states with other contracting states. This would therefore ensure that once all EU Member States have ratified the 2000 Hague Convention, the Convention would apply throughout the EU and would be supplemented by a future EU-wide instrument which would apply in intra-EU cases. In this manner a similar solution could be achieved as has been achieved with regard to international child abduction by means of the interaction between the Brussels IIa Regulation (as of 1 August 2022 the Brussels II-ter

Regulation) and the 1980 Hague Child Abduction Convention. In this respect, the question is what elements could be included in such an instrument.

The various elements raised in this report with regard to the interpretation issues that could arise if the substantive scope of the instruments were to be different outweighs the benefits of such an extension of scope. Therefore, it is not recommended to alter the substantive scope of any future EU instrument. The only exception to such a possibility would be in relation to any possible choice of court clause that a future EU instrument may include.

Various techniques could be utilised to ensure that the problems identified in this report could be addressed in a future EU instrument. The problems can be best dealt with by ensuring that a variety of legislative techniques are utilised (e.g., creation of additional subsidiary rules of jurisdiction, the incorporation of the 2000 Hague Convention with regards to jurisdiction and applicable law rules, the creation of a separate recognition regime etc.).

Overall, there are solutions in order to present an EU regulation that could provide for temporary solutions to the patchwork map of adult protection at this moment in time, as well as providing a template for future action within the EU could serve to operate as an additional set of rules that would complement and further enhance the operation of the 2000 Hague Convention, without ensuring that the application of the Convention would become more difficult within the Union.

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