

THE PROTECTION OF ADULTS IN THE EUROPEAN UNION

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ABSTRACT

A far-reaching freedom of movement of persons in the European Union imposes the EU legislator's obligation to create a legal framework for regulating an increasing number of aspects arising from cross-border movements. The current legal arrangement of these aspects is to a great extent related to the protection of family life and the rights of children. However, strong migrations have also affected people who are considered vulnerable in terms of their disability or age. Travelling that has become easier, medical treatments available abroad, a desire to live in more attractive or more affordable countries in retirement, and a change of lifestyle in general, have made the elderly move more frequent during the past decade. Cross-border proceedings arising from the movement of older people have become more common before the courts of Member States. It is necessary to ensure that protective measures directed at vulnerable adults, which have been imposed by the authorities of one Member State, have their effect in another Member State. This situation implies the adoption of the rules of private international law that will regulate the issues as to authorities of which Member States are responsible for adopting protective measures, which law is applicable to such measures, under which conditions these measures are to be recognized in that other Member State and the cooperation of the competent authorities. These issues are regulated by the Convention on the International Protection of Adults, adopted within the framework of the Hague Conference on Private International Law. While, on the one hand, the European Union is a Contracting State to the UN Convention on the Rights of Persons with Disabilities and is obliged to take its standards into account in its policies and legislation, on the other hand, very few Member States are Contracting Parties to the Convention on the International Protection of Adults. At EU level, there are currently only recommendations for the regulation of private international law aspects related to mobility of vulnerable adult persons, which also include the adoption of a special regulation that will govern these issues. However, among the existing recommendations, the winning attitude is the one that calls for Member States to ratify the Convention on the International Protection of Adults. Starting with the hypothesis that the European Union does not provide any effective legal framework for the protection of vulnerable adults in cross-border cases, this paper will examine whether there is room for the introduction of enhanced mechanisms for the protection of adults at EU level and make proposals accordingly.

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1. INTRODUCTION

More than 80 million people in the European Union (hereinafter: the EU) have some kind of disability, which to a certain extent limits their participation in social and economic life.¹ Disability is universal, and the risk of a certain kind of physical disability due to injury or disease threatens all persons in different proportions and time periods.² There is no consensus about a unique and fully appropriate term for a “person with disability”.³ Guided by the definition provided by the World Health Organization, disability is an umbrella term, which, in the context of health experience, implies any restriction or lack of ability to perform an activity in the manner or within the range considered normal for a human being. Disability is a wider term than impairment. While impairment is concerned with individual functions of particular parts of the body, disability refers to the body as a whole, with emphasis placed on the ability to perform the activity.⁴ What is unquestionable is the fact that people with disabilities belong to a group of vulnerable persons.⁵ Discrimination of persons with disabilities throughout history and their marginalized position in society makes them a particularly vulnerable group in society. Vulnerability implies greater exposure to the risk of harm and human rights violations, given their cognitive, intellectual and physical impairments.⁶

¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, 15.11.2010, p. 3

² Weisbrock, A., *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, in: Ippolito, F.; Iglesias Sánchez, S. (eds.), *Protecting Vulnerable Groups*, Hart Publishing, London, 2015, p. 71

³ See: Marinić, M., *Jesu li osobe s invaliditetom „invalidi“? Pitanje konceptualne naravi, ali i potreba izjednačavanja mogućnosti*, Društvena istraživanja: časopis za opća društvena pitanja, Vol. 17, No. 1-2, 2008, pp. 93-94

⁴ World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps, A manual of classification relating to the consequences of disease*, Published in accordance with resolution WHA29.35 of the Twenty-ninth World Health Assembly, May 1976, [https://apps.who.int/iris/bitstream/handle/10665/41003/9241541261_eng.pdf;jsessionid=67608BFED5E7593D-1015133963FDB238?sequence=1] Accessed 15.02.2019

⁵ Poretti, P., *Vulnerable Person*, in: Bartolini, A.; Cippitani, R.; Colcelli, V. (eds.), *Dictionary of Statuses within EU Law*, Springer International Publishing, 2019, p. 622

⁶ Nifosi-Sutton, I., *The Protection of Vulnerable Groups under International Human Rights Law*, Routledge, London, 2017, p. 4

Disability has traditionally been seen only as a purely medical issue, not the issue of human rights protection. The legal framework for the protection of persons with disabilities has long lagged behind the protection of human rights of other vulnerable groups - the protection of women and children. Although attention was paid to persons with disabilities very early within the Council of Europe, i.e., in the European Social Charter,⁷ this framework remained legally non-binding. By significantly promoting the human rights of persons with disabilities, the 2006 United Nations Convention on the Rights of Persons with Disabilities (hereinafter: the UN Convention 2006)⁸ has been the significant milestone in protection of their rights. Since then there has been a shift in the protection of individual rights of persons with disabilities and the inclusion of the protection of the rights of persons with disabilities in international and regional human rights instruments.⁹

Real challenges for competent authorities, and hence the need for an appropriate international and national legal framework, arise when the issues of the protection of persons with disabilities leave the public law framework as a result of the cross-border movement of natural persons. European countries are faced with the challenge of the growing number of older people. Improved medical technology has increased life expectancy. An increase in life expectancy has resulted in more and more people suffering from age-related diseases such as Alzheimer's disease and dementia.

Strong migration flows within the EU have also affected persons who can be considered vulnerable by their age or disability. There are common situations in which younger people, when searching for a job, leave their country of origin and decide to spend the rest of their lives in the state of their new habitual residence. On the other hand, many people choose to leave their homes after retirement. Such migration at older ages is caused by various reasons; e.g. these people want to avoid paying high taxes, circumvent national succession law, or spend the rest of their lives in a more temperate climate or in a more affordable place.¹⁰ In addition to the aforementioned mobility trends of the elderly, young adults with disabilities

⁷ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35

⁸ The United Nations Convention on the Rights of Persons with Disabilities, Treaty Series 2515 (2006): 3

⁹ Weisbrock, *op. cit.*, note 2, p. 72

¹⁰ Von Hein, J., *Chapter A.4: Adults, protection of*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.) *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar Publishing, 2017, pp. 298-300

or those who are incapable of making decisions for themselves due to e.g. injury are also in need of protection.¹¹

The rules of private international law rules should be responsive to significant demographic and social changes in developed countries, including the examples of cross-border movement of adults.¹² The Convention on the International Protection of Adults (hereinafter: the Hague Convention 2000)¹³ was adopted within the framework of the Hague Conference on Private International Law (hereinafter: HCCH), and it regulates the issues of jurisdiction, applicable law, recognition and enforcement, including the cooperation between competent authorities. At EU level, there are no uniform rules of private international law in these situations. Unlike the UN Convention 2006, which was ratified by the European Union as a whole, the Hague Convention 2000 has been ratified by only 10 EU Member States.¹⁴ A lack of uniformity in dealing with cross-border situations leads to legal insecurity and unpredictability. A large number of difficulties arising from cross-border movement of vulnerable adults will be solved if the EU ratifies the Hague Convention 2000. In spite of ratification, some issues may remain ambiguous, but there is room for their regulation within the framework of European private international law.

The paper consists of two parts. In the first part, the standards for the protection of persons with disabilities in the EU will be analyzed and the EU's efforts to adopt a private international law framework for the protection of vulnerable adults will be presented.¹⁵ The second part includes an analysis of the solution offered by the Hague Convention 2000 with an emphasis placed on its scope of application,

¹¹ Curry-Sumner, I., *Vulnerable Adults in Europe*, EPRS European Parliamentary Research Service, Protection of Vulnerable Adults. European Added Value Assessment. Accompanying the European Parliament's Legislative Initiative Report (Rapporteur: Joëlle Bergeron), Study, [[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU\(2016\)581388_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf)] Accessed 15.01.2019

¹² See: Weller, M., *Mutual trust: in search of the future of European Union private international law*, Journal of Private International Law, Vol. 11, No. 1, 2015, pp. 64-102

¹³ HCCH, Convention of 13 January 2000 on the International Protection of Adults, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>] Accessed 17.01.2019

¹⁴ The Convention has been ratified by Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia, Portugal and the United Kingdom. HCCH, Convention of 13 January 2000 on the International Protection of Adults – Status table, [<https://www.hcch.net/en/instruments/conventions/status-table/?cid=71>] Accessed 05.03.2019

¹⁵ The legal instruments elaborated within this paper use a different terminology. The UN Convention 2006 uses the term “persons with disabilities” while the Hague Convention 2000 uses only the term “adult”. When elaborating the specific legal instrument, the terminology from this instrument will be used in respective chapter. In general part of the paper the term “vulnerable adults” will be used as a term which corporates aforementioned terminology

jurisdiction criteria, law applicable to the mandates in case of incapacity and conditions for the recognition and enforcement.

The hypotheses of the paper are that at EU level there is no legal framework for the effective protection of vulnerable adults in cross-border cases and that the adoption of uniform private international law rules at EU level will contribute to the level of protection of this vulnerable group of people. In addition to presenting the current level of protection, the aim of the paper is to point to legal gaps currently in place and to check if there is a possibility of adopting enhanced adult protection mechanisms at EU level and offer solutions accordingly.

2. STANDARDS FOR THE PROTECTION OF ADULTS IN THE EUROPEAN UNION

The existing legal framework on cross-border protection of adults is dispersed and consists of a complex mosaic of diverse instruments which include international, European and national legal sources.¹⁶ This chapter will show various international and EU instruments currently applicable to adult protection situations.

In addition to classification into international and EU instruments, these instruments may also be classified in the light of the nature of public or private international law and with regard to whether these instruments are specifically related to the protection of adults. It is also important to note that certain international agreements that will be mentioned have not necessarily been ratified by all Member States.

2.1. UN Convention 2006

The UN Convention 2006 is the first international legally binding instrument setting minimum standards for the protection of the rights of persons with disabilities,¹⁷ and it is also the first human rights convention to which the EU is a contracting party. The EU signed the Convention in March 2007, and it entered into force on 22 January 2011. In accordance with the binding nature of the UN Convention 2006, all European legislation, policies and programs must comply with the obligations established by the Convention. The obligation to implement

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¹⁷ MacKay, D., *The United Nations Convention on the Rights of Persons with Disabilities*, *Syracuse Journal of International Law and Commerce*, Vol. 34, 2007, pp. 323-331

the Convention is divided between the EU and the Member States, given the scope of their respective competencies.¹⁸

The aim of the UN Convention 2006 is to protect and promote the rights and dignity of persons with disabilities.¹⁹ The UN Convention 2006 does not create any new right, but confirms and ratifies the existing ones.²⁰ Its importance derives from the fact that it imposes obligations on the Contracting States as to how to ensure the full realization of individual rights of persons with disabilities.²¹ In order to ensure that the Contracting States act in accordance with the UN Convention 2006 and implement it effectively, they are required to establish a framework to promote, protect and monitor its implementation.²² As a party, the EU has defined such a framework for issues within its competence. The EU framework complements the national monitoring mechanisms, which are responsible for promoting, protecting and monitoring the implementation of the Convention in EU Member States.

Following the EU Convention Initial Report,²³ in 2015, the Committee on the Rights of Persons with Disabilities adopted its Concluding observations on the implementation of the UN Convention 2006 in the EU. In view of access to justice and the freedom of movement for adults, the Committee recommended the EU to take appropriate action to combat discrimination against persons with disabilities when accessing justice, in such a way as to ensure full process adaptation and funding of training for those working in the field of administration of justice.²⁴ The Committee expressed its concern about the obstacles faced by persons with disabilities and other persons whose family members are persons

¹⁸ The UN Convention 2016 is a mixed agreement. Each of the parties involved, i.e. contracting states, should have ratified the Convention. All EU Member States signed and ratified the Convention, while 22 EU countries have also signed and ratified the Optional Protocol. United Nations, Treaty Collection, Status. [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4] Accessed 22.02.2019

¹⁹ Hendricks, A., *UN Convention on the Rights of Persons with Disabilities*, European Journal of Public Health, Vol. 14, 2007, p. 276

²⁰ Korać Graovac, A.; Čulo, A., *Konvencija o pravima osoba s invaliditetom - novi pristup shvaćanju prava osoba s duševnim smetnjama*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 61., No. 1, 2011, pp. 65-109

²¹ UN Convention 2006, *op. cit.*, note 8, Art. 3

²² *Ibid.*, Art. 33

²³ United Nation, Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial report of States parties due in 2012 European Union, CRPD/C/EU/1, Distr.: General 3 December 2014, [<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>] Accessed 17.02.2019

²⁴ United Nations Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, CRPD/C/EU/CO/1, Distr.: General 2 October 2015, paras 38 and 39. [<https://daccess-ods.un.org/TMP/4831370.41330338.html>] Accessed 17.02.2019

with disabilities when moving to another Member State, regardless of the length of their stay. It also recommended that urgent action be taken at EU level to ensure that persons with disabilities and their families enjoy the right to freedom of movement at the same level as other persons do.²⁵

Although the UN Convention 2006 is a legal instrument of public law, and the rights provided for and obligations imposed on the Contracting States are of substantive legal nature, one should not overlook the dimension of private law.²⁶ The Hague Convention 2000 has adopted a number of provisions laid down in the UN Convention 2006, in particular the rights to autonomy and independence of persons with disabilities, equality before the law, access to justice, freedom of movement and nationality, health and international cooperation.²⁷ Although the aim of the UN Convention 2006 is not to harmonize substantive law, these two instruments still interact since the Hague Convention 2000 ensures that the rights acquired by a person under the relevant national law of a Contracting State which are in accordance with the UN Convention 2006, are recognized in the other Contracting State.²⁸

2.2. Regulation of Private International Law Issues of Adult Protection in the EU

In relation to the protection of adults in the EU from the perspective of private international law, there are currently various international, European and national instruments which apply, to some extent, to cross-border aspects of the protection of vulnerable adults. At the international level, the following three conventions of the HCCH deal with cross-border cases related to the protection of vulnerable adults: the Convention on the Prohibition and Related Protection Measures,²⁹ the Convention on the Law Applicable to Agency³⁰ and the Hague Convention 2000.

The EU does not provide for the legal framework on the adults protection. Some of the existing EU legislative can be applied to certain aspects that may arise from

²⁵ *Ibid.*, paras 48 and 49

²⁶ Curry-Sumner, *op. cit.*, note 11, p. 37

²⁷ HCCH, Outline Hague Protection of Adults Convention, [<https://assets.hcch.net/docs/a3920f8f-ee66-470e-943b-cf6865af8226.pdf>] Accessed 25.01.2019

²⁸ *Ibid.*, p. 38

²⁹ Unofficial translation of the title. HCCH, Convention du 17 juillet 1905 concernant l'interdiction et les mesures de protection, [<https://www.hcch.net/en/instruments/the-old-conventions/1905-deprivation-of-civil-rights-convention>] Accessed 27.01.2019

³⁰ HCCH, Convention of 14 March 1978 on the Law Applicable to Agency, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=89>] Accessed 27.01.2019

the situation of cross-border movement of adults. These instruments are however not specifically related to the protection of adults, i.e., 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),³¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Regulation Recast),³² Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (Protection Measures Regulation)³³ and 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 (Succession Regulation).³⁴

The most important instrument for the protection of vulnerable adults in cross-border situations is the Hague Convention 2000, a complementary private international law instrument that contains the rules referring to jurisdiction, applicable law and the international recognition and enforcement of protection measures. It was concluded on 13 January 2000 and it entered into force on 1 January 2009 between France, Germany and the United Kingdom (extend to Scotland only). The Hague Convention 2000 has been ratified by 12 states, of which 10 are EU Member States. Eight Member States have signed the Hague Convention 2000, but have not ratified it yet.³⁵

Following the data presented above, there is concern that there are deficiencies in the protection of vulnerable adults in Europe in cross-border situations. In as early as 2008, in its resolution the European Parliament (hereinafter: the Parliament)

³¹ 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) [2008] OJ L177/6

³² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/ 1

³³ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4

³⁴ 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 [2012] OJ L201/ 107

³⁵ The Convention was signed by Belgium, Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland. HCCH, Convention of 13 January 2000 on the International Protection of Adults – Status table [<https://www.hcch.net/en/instruments/conventions/status-table/?cid=71>] Accessed 05.03.2019

called on all Member States to ratify the Hague Convention 2000.³⁶ The European Commission (hereinafter: the Commission) is requested by the Resolution to report back to the Parliament and the EU Council on the implementation of the Hague Convention 2000 in the Member States, assess the possibility of the EU accession to the Hague Convention 2000 and submit a legislative proposal aimed at strengthening cooperation and improving recognition and enforcement of protection measures. In its reply, the Commission stated that the possibility of conducting a study on the Hague Convention 2000 with a view to considering other measures involving EU legislation would exist only when it were in force for more than a few years.³⁷ In the absence of the Commission's report on the implementation of the Hague Convention 2000, the Parliament launched its own new initiative for the protection of adults in 2015. It resulted in a report provided by the European Parliament's Committee on Legal Affairs, which included Added Value Assessment.³⁸

In June 2017, the Parliament adopted a new Resolution on the Protection of Vulnerable Adults.³⁹ In this resolution, the Parliament emphasizes that the differences existing between the applicable law and a large number of competent courts jeopardize the right of vulnerable adults to the freedom of movement and residence in the Member State of their choice, as well as to have adequate protection for their property where such property is located in more than one Member State.⁴⁰ The Parliament calls on the Commission again to encourage those Member States which have not yet ratified the Hague Convention 2000 to do so as quickly as possible.⁴¹ It calls on the Commission to submit to the Parliament and the EU Council, before 31 March 2018, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and man-

³⁶ European Parliament, European Parliament resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)) [<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-638>] Accessed 27.02.2019

³⁷ European Commission, Follow-up to the 2008 European Parliament resolution with recommendations to the Commission on the legal protection of adults: cross-border implications, SP(2009)988

³⁸ European Parliament, Protection of Vulnerable Adults European Added Value Assessment Accompanying the European Parliament's Legislative Initiative Report (Rapporteur: Joëlle Bergeron), [[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU\(2016\)581388_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf)] Accessed 27.02.2019

³⁹ European Parliament, European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)) [<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0235>] Accessed 28.02.2019

⁴⁰ *Ibid.*, para G

⁴¹ *Ibid.*, para 1

dates in anticipation of incapacity.⁴² In its answer to this Resolution, the Commission states that the potential legislative initiative would be complementary to the Hague framework and that it would bring the desired results only if a sufficient number of Member States acceded to the Hague Convention 2000. It states that it will encourage Member States to accede the Hague Convention 2000, but also warns that consultations showed that the main reasons Member States have for the non-accession to the Hague Convention 2000 are a small number of cases the Convention applies to and the costs that the operation of the Convention may entail.⁴³

The analysis of the Parliament's long-standing efforts to make the Commission adopt a legislative initiative for a special instrument aimed at regulating the international protection of adults does not indicate whether and when such an instrument is likely to be adopted. The only activity carried out by the Commission in this respect is to encourage Member States to ratify the Hague Convention 2000, as confirmed at the joint European Commission and HCCH on this topic, which was held in Brussels at the end of 2018.⁴⁴ Improvements in relation to the existing Hague Convention 2000 that could be brought by a specific instrument at EU level will be included in the description of the Hague Convention 2000 provisions in the next chapter.

3. HAGUE CONVENTION 2000

The Hague Convention 2000 can be linked to the Convention on the Prohibition and Related Protection Measures dating back to 1905. This Convention contained provisions on the applicable law and jurisdiction for personal status, where the nationality was primary connecting factor for identifying the applicable law and the criteria for establishing the jurisdiction. This Convention was ratified by only a few European countries and soon it became obsolete, primarily because of the nationality criterion.⁴⁵ After a long break in the regulation of protection measures, the HCCH dedicated themselves to the protection of children. Concepts developed in these conventions⁴⁶ have found their place in the Hague Convention

⁴² *Ibid.*, para 10

⁴³ European Commission, Answer - Protection of vulnerable adults - E-003844/2017, 30 August 2017

⁴⁴ HCCH, Vulnerable Adults – An Important Step Forward, [<https://www.hcch.net/en/news-archive/details/?varevent=654>] Accessed 25.02.2019

⁴⁵ Ruck Keene, A., *The Cross-border Protection of Adults: Hague 35*, in: Frimston, R., Ruck Keene, A., Van Overdijk, C., D Ward, A. (eds.), *The International Protection of Adults*, Oxford University Press, Oxford, 2015, p. 78

⁴⁶ HCCH, Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, [<https://www.hcch.net/en/instruments/conventions/full-text>]

2000. For example, the concept of measures directed to the protection of person and property (of a child), the importance of making decisions in the best interests (of a child) as the basis of measures to be adopted by the authorities of the state which is not the state of habitual residence, and finally, the importance of cooperation manifested by setting up Central Authorities.⁴⁷

The Preamble to the Hague Convention 2000 is very short; it consists of only four sentences. The fourth sentence states that “the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations”. The concept of “the interests of the adult” is mentioned repeatedly in the text of the Hague Convention 2000. It should be distinguished from the concept of “the best interests of the child”⁴⁸ given in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: the Hague Convention 1996).⁴⁹ The literature suggests that these are two different concepts and that the aim of this preamble is to ensure that there is a balance between the autonomy of the adult’s will and the protection of his or her interests, which is different from the concept of the best interests of the child.⁵⁰

3.1. Scope of Application

The Hague Convention 2000 shall apply to situations in which there is an international element, for example, when property of an adult is located in another state. Other terms of application in the geographic context have not been set.⁵¹ The Hague Convention 2000 follows the trends and accordingly, represents *loi*

t/?cid=39] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, [<https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>] Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>] Accessed 28.02.2019

⁴⁷ Ruck Keene, *op. cit.*, note 45, p. 79

⁴⁸ On the best interest of the child see: Župan, M., *The Best Interest of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?*, in: Liefgaard, T., Sloth-Nielsen, J. (eds), *The United Nations Convention on the Right of the Child. Taking Stock after 25 Years and Looking Ahead*, Brill - Nijhoff, Leiden - Boston, 2017, pp. 213-230

⁴⁹ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>] Accessed 28.02.2019

⁵⁰ Ruck Keene, *op. cit.*, note 45., p. 99

⁵¹ Von Hein, *op. cit.*, note 10, p. 23

uniforme; its rules on the applicable law also apply in cases where they refer to the law of a non-contracting state.

The Hague Convention 2000 applies to persons who have reached the age of 18 years.⁵² This limit overlaps with the age limit of the Hague Convention 1996, which is applied to children until they reach the age of 18 years.⁵³ Such limit should help us avoid difficulties in delimiting the application of the two conventions in relation to the personal field of application. In addition, the Hague Convention 2000 shall also apply to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.⁵⁴ Thus, the authorities competent under the Hague Convention 1996 that adopt a measure in relation to a child with disability will be able to envisage that these measures would continue to remain effective beyond the child's majority.⁵⁵ The effectiveness of these two instruments depends indeed on the ratification of the conventions themselves, and the continuity will only be maintained in those situations in which both states are parties to both conventions.⁵⁶ At EU level, this complementarity will only be achieved by all EU Member States ratifying the Hague Convention 2000, as all Member States are contracting parties to the Hague Convention 1996.⁵⁷

The Hague Convention 2000 gives a definition of adults, determining how it applies to the protection of adults who are not in a position to protect their interests by reason of an impairment or insufficiency of their personal faculties. An accompanying Explanatory Report gives the interpretation of the terms "an impairment or insufficiency of one's personal faculties". It is stated that the Hague Convention 2000 does not apply to the protection of adult victims of violence, such as abused women. In such cases, at EU level, the protection can be achieved in accordance with the provisions of the Protection Measures Regulation.⁵⁸ Likewise, the Hague Convention 2000 shall not apply to persons with only physical disabilities, which is justified by the fact that a physical disability that is not accompanied by a mental disability does not bring persons into a situation in which they are unable to make

⁵² Hague Convention 2000, *op. cit.*, note 13, Art. 2(1)

⁵³ Hague Convention 1996, *op. cit.*, note 49, Art. 2

⁵⁴ Hague Convention 2000, *op. cit.*, note 13, Art. 2(2)

⁵⁵ Lagarde, P., Explanatory Report on the 2000 Hague Protection of Adults Convention, [<https://www.hcch.net/en/publications-and-studies/details4/?pid=2951&dtid=3>] Accessed 25.02.2019, para 15.

⁵⁶ Curry-Sumner, *op. cit.*, note 11, p. 48

⁵⁷ With effect from 1 January 2016 in Italy, the Convention on Measures for the Protection of Children is effective in all EU Member States

⁵⁸ See: Dutta, A., *Cross-border protection measures in the European Union*, *Journal of Private International Law*, Vol. 12, No. 1, 2016, pp. 169-184

decisions and protect their interests.⁵⁹ On the other hand, such a position can be considered restrictive. Namely, a physical disability itself can justify the adoption of a protection measure if a person agrees that such measures should be taken.⁶⁰

The Hague Convention 2000 provides for a list of measures to be imposed in relation to an adult. The list is not exhaustive. The scope of application of these measure encompasses a wide range of measures and deal in particular with: a) the determination of incapacity and the institution of a protective regime; b) the placing of the adult under the protection of a judicial or administrative authority; c) guardianship, curatorship and analogous institutions; d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult; e) the placement of the adult in an establishment or other place where protection can be provided; f) the administration, conservation or disposal of the adult's property; g) the authorization of a specific intervention for the protection of the person or property of the adult.⁶¹ The Explanatory Report states that it is possible that some of the measures listed above are not known in some legal systems. However, the provision in the Hague Convention 2000 does not make them available to all Contracting States, but only applicable only if they are provided for by the law applicable by the Convention.⁶²

The Hague Convention 2000 also provides for certain issues outside its scope of application. Unlike a list of possible measures, this list is exhaustive. This means that any measure directed at the protection of an adult or his or her property not excluded by the Hague Convention 2000 is covered by its scope of application.⁶³ Certain issues are excluded from the scope of application of the Hague Convention 2000 because they have already been regulated by other Hague Conventions or because the application of the Hague Convention 2000 thereto would not be appropriate: a) maintenance obligations; b) marriage; c) property regimes in respect of marriage; d) trusts or succession; e) social security; and f) health. Other restrictions concern public law, and in those cases, the aim of the Hague Convention 2000 was not to impose limits on the states in terms of their jurisdiction in matters of key interest: ⁶⁴ g) measures taken in respect of a person as a result of penal offences; h) asylum and immigration; and i) public safety. If in the context of any of the above questions the issue of adult representation is raised, the Hague

⁵⁹ Clive, E., *The New Hague Convention on the Protection of Adults*, Yearbook of Private International Law, Vol. 2, 2000, p. 5

⁶⁰ Von Hein, *op. cit.*, note 10, p. 24

⁶¹ Hague Convention 2000, *op. cit.*, note 13, Art. 3

⁶² Lagarde, *op. cit.*, note 55, para 18

⁶³ *Ibid.*, para 29

⁶⁴ *Ibid.*, para 32

Convention 2000 shall apply.⁶⁵ For example, an appointed representative may accept or renounce a succession on behalf of an adult, while the succession proceeding itself will be excluded from the scope of application of this Convention.⁶⁶

3.2. Jurisdiction

The Hague Convention 2000 contains a set of rules for determining jurisdiction in situations falling within its scope of application. The judicial authorities of the state of habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.⁶⁷ The Contracting State in the territory where these adults are present as a result of their displacement has the jurisdiction for adults who are refugees and persons who, due to disturbances occurring in their countries, are internationally displaced. The same also applies to adults whose habitual residence cannot be established.⁶⁸ Concurrent or subsidiary jurisdiction appears in the form of nationality as a jurisdiction criterion.⁶⁹

The Hague Convention 2000 provides for the possibility of a consensual transfer of jurisdiction from a Contracting State of habitual residence or the authorities of the state in whose territory refugees, displaced persons or persons whose habitual residence cannot be established are present to the authorities of certain other Contracting States, where this is in the interest of the adult. Jurisdiction may be transferred upon request from the authorities of either the Contracting State of habitual residence or another Contracting State. The request may relate to all or some aspects of such protection.⁷⁰ Finally, the Hague Convention 2000 stipulates that Contracting State where property of the adult is located has jurisdiction to take measures of protection concerning that property.⁷¹

3.2.1. *Habitual Residence vs. Nationality*

The traditional approach, which prevails in most national jurisdictions, is that the authority of a state of which the adult is a national shall have jurisdiction to take measures for the protection of that person. The application of the law of the state of which the adult is a national, when this adult is habitually resident in another

⁶⁵ Hague Convention 2000, *op. cit.*, note 13, Art. 4(2)

⁶⁶ Von Hein, *op. cit.*, note 10, p. 24

⁶⁷ Hague Convention 2000, *op. cit.*, note 13, Art. 5

⁶⁸ *Ibid.*, Art. 6

⁶⁹ *Ibid.*, Art. 7

⁷⁰ *Ibid.*, Art. 8

⁷¹ *Ibid.*, Art. 9

state, may cause difficulties. This often leads to delays in proceedings, higher costs, difficulties arising from the relationship between substantive and procedural law, and ultimately to a high level of legal insecurity. The Hague Convention 2000 chooses the principle of habitual residence as the primary jurisdiction criterion. This makes it equal to other conventions of the HCCH and European instruments of private international law.⁷²

The Hague Convention 2000 stipulates that the authorities of the state of habitual residence of the adult shall have jurisdiction to take measures directed to the protection of the adult's person or property. 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, without the conditions foreseen for the *perpetuation fori*.⁷³

Subsidiary jurisdiction appears in the form of a nationality criterion.⁷⁴ It is provided for cases where the authorities of the state of which the adult is a national consider that they are in a better position to assess the interests of the adult. This jurisdiction criterion is quite limited. The authorities of the state of which the adult is a national are obliged to notify the authorities of the state of habitual residence of the adult. Circumstances may be envisaged under which this jurisdiction of the state of which the adult is a national shall not be exercised. These are cases in which the authorities having jurisdiction in accordance with general rules of jurisdiction, the rules of jurisdiction of the authorities of the state where the person is present or the rules of the transfer of jurisdiction, take all measures required by the situation, decide that no measures should be taken or when proceedings are pending before them. The measures taken by the state of which the adult is a national are time-limited, they shall cease to apply as soon as the aforementioned authorities having jurisdiction take a measure or decide that no measure shall be taken. This rule of jurisdiction does not apply to adults who are refugees and those who are internationally displaced due to disturbances occurring in the state of which the adult is a national. The reason for that is obvious. The aim of the Hague Convention 2000 is to avoid that the authorities of the state the adult has been forced to leave make decisions referring to the protection of adults.⁷⁵

Although there is no turmoil in this arrangement, some difficulties may arise when applying the provisions. The first is related to the definition of the term "habitual

⁷² Von Hein, *op. cit.*, note 10, p. 22

⁷³ Hague Convention 2000, *op. cit.*, note 13, Articles 5 and 6

⁷⁴ *Ibid.*, Art. 7

⁷⁵ Lagarde, *op. cit.*, note 55, para 58

residence of an adult”.⁷⁶ As is common, the Hague Convention 2000 does not define the term, which is a factual term.⁷⁷ The obvious need for further clarification of the concept of “habitual residence” is clearly expressed in the cases referring to the protection of children’s rights, where in a large number of cases national courts have requested clarification of the term “habitual residence” from the Court of Justice of the European Union (hereinafter: CJEU).⁷⁸ It is to be expected that difficulties in practice will be shown in relation to the concept of “habitual residence of an adult”, particularly when considering the fact that for an adult adaptation to a family environment can hardly be a relevant fact.⁷⁹ The concept of “habitual residence” is attractive because it does not represent a rigid legal concept, but a flexible factual concept that can satisfy every situation.⁸⁰ Providing any quantitative or qualitative definition of this concept in any convention would be to cast doubt on the interpretation of this expression in numerous other conventions it is used in.⁸¹ Nevertheless, the lack of a commonly accepted definition of the term can indeed cause legal uncertainty. The concept of “habitual residence of an adult” could certainly be subject to the interpretation of the EU if a special instrument for the international protection of adults were adopted at EU level. This implies the interpretation by the CJEU in relation to the reference for a preliminary ruling, or the taking of a good solution adopted in the Succession Regulation, where in the recital of the Regulation the legislator introduced those indicators which might be helpful when determining the habitual residence of the deceased.⁸² The solution from the Succession Regulation has resulted with a consensus; it retains the flexibility of the concept, and the indicators given in the recital ensure a uniform interpretation of this concept.⁸³

Another difficulty is the fact referring to a small number of states that are contracting parties to the Hague Convention 2000. As currently only 10 EU Member States are applying the Hague Convention 2000, the national private internation-

⁷⁶ Kruger, T., *Habitual Residence: The Factors that Courts Consider*, in: Beaumont, P., Danov M., Trimings, K., Yüksel, B. (eds.), *Cross-Border Litigation in the Europe*, Hart Publishing, Oxford and Portland, Oregon, 2017, pp. 741-755

⁷⁷ Lagarde, *op. cit.*, note 55, para 49

⁷⁸ Case C-523/07 *A* [2009] ECLI:EU:C:2009:225; Case C-497/10 PPU *Mercredi* [2010] ECLI:EU:C:2010:829; Case C-376/14 PPU *C* [2014] ECLI:EU:C:2014:2268; Case C-499/15 *W and V* [2017] ECLI:EU:C:2017:118; Case C-111/17 PPU *OL* [2017] ECLI:EU:C:2017:436; Case C-512/17 *HR* [2018] ECLI:EU:C:2018:513; Case C-393/18 PPU *UD* [2018] ECLI:EU:C:2018:835

⁷⁹ Ruck Keene, *op. cit.*, note 45, p. 112

⁸⁰ Curry-Sumner, *op. cit.*, note 11, p. 63

⁸¹ Lagarde, *op. cit.*, note 55, para 49

⁸² See: Succession Regulation, *op. cit.*, note 33, Rec 23-25

⁸³ Curry-Sumner, *op. cit.*, note 11, p. 63

al law rules are applied in the remaining 18 Member States. Member States which are Contracting States to the Hague Convention 2000 will primarily establish jurisdiction in relation to habitual residence of adults, whereas national law will be applied in other states, which may be based on different grounds of jurisdiction. As a result, both courts can establish their jurisdiction, which will ultimately lead to conflicting decisions.⁸⁴ The accession of the EU to the Hague Convention 2000 would eliminate this problem.

3.2.2. *Jurisdiction in Cases of Urgency and Temporary Protection Measures*

The rule of jurisdiction in cases of urgency stipulates that in cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.⁸⁵ This rule is concurrent and its application is justified only because of the existence of an emergency situation. The Explanatory Report states that a situation of urgency arises where the situation might bring about irreparable harm to the adult or his or her property if remedial action were only sought through primary jurisdiction. It is also stated in the Report that this ground of jurisdiction must not be used as general justification for the jurisdiction of the authorities of the state where the adult is present, especially in medical matters, giving an example of termination of pregnancy of a young incapacitated woman.⁸⁶ An acceptable example given in the Report is the situation in which it is necessary to ensure the representation of an adult who is away from his or her habitual residence and who must undergo an urgent surgical operation. These measures are limited to the period of time in which the authorities responsible for acting on other grounds of jurisdiction take measures required by the situation, i.e., in case an adult is habitually resident in a non-Contracting State, this means as soon as measures taken by the authorities of the third state are recognized in the Contracting State in question.⁸⁷

The rule of jurisdiction for taking temporary protection measures is not related to cases of urgency. Exceptional concurrent jurisdiction is conferred on Contracting States where the adult is present to take measures concerning the protection of his or her person. These measures are temporary in nature and their territorial effect is limited. Unlike Article 12 of the Hague Convention 1996, in which jurisdiction is conferred for the purpose of taking measures of provisional character for

⁸⁴ *Ibid.*, p. 62

⁸⁵ Hague Convention 2000, *op. cit.* note 13, Art. 10

⁸⁶ Lagarde, *op. cit.*, note 53, para 63

⁸⁷ Hague Convention 2000, *op. cit.*, note 13, Art. 10(3)

the protection of the person and property of the child, this Hague Convention 2000 limits the scope of jurisdiction only to the protection of the person of the adult, not his or her property. The Explanatory Report indicates that it is obvious that this rule applies to medical treatment. These would be the cases of placement or hospitalization, which by their nature are not urgent.⁸⁸ In contrast to urgent protection measures, these measures will cease to have effect whenever it has been established by the primary competent authorities that it is not necessary to take any measure.

The system of urgent and temporary measures does not indicate possible difficulties in the implementation. It contributes to the protection of adults and as such, it would be of benefit to the EU, where a similar concept was partially recognized as beneficial for the protection of the child and his or her property within the meaning of Article 20 of the Brussels *Ibis* Regulation.⁸⁹ Without the existence of provisions to regulate urgent and temporary protection measures in the international protection of adults, at EU level, Member States will determine the jurisdiction to take urgent and temporary measures pursuant to their national rules. The level of protection of adults in the respective state will certainly depend on whether national law provides for the possibility of adopting such measures on the grounds of presence or whether the jurisdiction to adopt such measures is limited only to nationals of that state.

3.3. Applicable Law

3.3.1. General Rules of Applicable Law

The Hague Convention 2000 determines that in exercising its jurisdiction the Contracting State applies its law. This rule applies irrespective of the criterion on which jurisdiction is based and, like the Hague Convention 1996, it is justified by the fact that the application of national law makes it easier for the authorities as they apply the law they know best and since ultimately the protection measures themselves shall primarily be enforced in the state that determine them.⁹⁰ Exceptionally, in so far as the protection of the person or the property of the adult

⁸⁸ Lagarde, *op. cit.*, note 55, para 84

⁸⁹ See: Drventić, M., *New Trends in European Family Procedural Law*, in: Duić, D., Petrašević, T. (eds.), *Procedural Aspects of EU Law*, Sveučilište J. J. Strossmayera u Osijeku, Pravni fakultet Osijek, Osijek, 2017, p. 433. and Župan, M.; Ledić, S.; Drventić, M., *Provisional Measures and Child Abduction Proceedings*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, Vol. 35, No. 1, 2019, pp. 9-32

⁹⁰ Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, in: Rešetar, B. (ed.), *Pravna zaštita prava na (zajedničku) roditeljsku skrb*, Pravni fakultet Osijek, Osijek, 2012, p. 212

requires, the court may exceptionally apply or take into account the law of another state with which there exists a substantial connection.⁹¹ The purpose of this provision is not to strengthen the connection but to apply the rights of another state in order to protect the interests of a person or his or her property.⁹² In addition, the Hague Convention 2000 lays down the law applicable to the implementation of the measure in another Contracting State. Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.⁹³

The rules of this Convention's applicable law shall apply even if the law referred to by them is the law of a non-Contracting State.⁹⁴ In addition, the Hague Convention 2000 excludes *renvoi*, stipulating that in terms of the rules of applicable law, the term "law" means the law in force in a State other than its choice of law rules.⁹⁵

3.3.2. *Mandate in Case of Incapacity*

The Hague Convention 2000 provides for the situation in which the adult himself or herself organizes in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. An adult does that by conferring powers of representation on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act. This situation is characterized by the fact that the powers of representation cannot begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests. This measure is quite common in certain states, particularly in North America, and it is known in some European states.⁹⁶ As part of strengthening the rights of persons with disabilities, the Council of Europe promotes the regulation of a mandate in case of incapacity.⁹⁷ By adopting various resolutions and recommendations, the Council of Europe endeavors to transpose

⁹¹ Hague Convention 2000, *op. cit.* note 13, Art 13(2)

⁹² Ruck Keene, *op. cit.*, note 45, p. 125

⁹³ Hague Convention 2000, *op. cit.* note 13, Art. 14

⁹⁴ *Ibid.*, Art. 18

⁹⁵ *Ibid.*, Art. 19

⁹⁶ E.g. England and Wales, Ireland, Belgium, Denmark, Finland, Germany, Netherlands. See more: *Part III Existing Law in Various Jurisdictions*, in: Frimston, R.; Ruck Keene, A.; Van Overdijk, C.; D Ward, A. (eds.), *The International Protection of Adults*, Oxford University Press, Oxford, 2015.

⁹⁷ Council of Europe, Principles concerning continuing powers of attorney and advance directives for incapacity, Recommendation CM/Rec(2009)11 and explanatory memorandum. [<https://rm.coe.int/168070965f>] Accessed 18.02.2019

into national law the principles on which legal regulations governing this situation should be based.⁹⁸

The mandate in case of incapacity is completely different from the ordinary mandate which a fully capable adult confers on a person to take care of his or her interests. Such mandate takes effect immediately and in most legal systems ends with the onset of the adult's incapacity or by the determination of his or her incapacity to protect his or her interests. This situation is regulated within the framework of private international law by the Hague Convention of 14 March 1978 on the Law Applicable to Agency.⁹⁹

On the basis of the Hague Convention 2000, the mandate in case of incapacity is governed by the law of the State of the adult's habitual residence at the time of the agreement or the unilateral act.¹⁰⁰ This law is applicable to the existence, extent, modification and extinction of powers of representation. The manner of exercise of such powers of representation is governed by the law of the state these powers are exercised in.¹⁰¹

The link between the law of the state the adult is habitually resident in and the existence, extent and extinction of powers conferred by him or her is retained only if the adult has not designated himself or herself another law to govern the aforementioned. An adult may, for this purpose, choose the law of: a) a state of which the adult is a national; b) the state of a former habitual residence of the adult; c) a state in which property of the adult is located, with respect to that property. Such limitation in the choice of the applicable law represents the balance between the principle of personal autonomy and the idea that this situation falls into a category in which not all decisions should be entirely left to persons.¹⁰² However, such arrangement does not prevent the law of a non-Contracting State to be chosen as the applicable law. A positive aspect of this provision is manifested in the fact that nothing prevents a person from designating more applicable laws for the mandate in case of incapacity, which is efficient in cases where a person has property in several states. Finally, if an adult wishes to choose the law of the state which does not recognize the mandate in case of incapacity, such authorization shall be null and void.¹⁰³

⁹⁸ Hrstić, D., *Anticipirano odlučivanje pacijenata*, Zagrebačka pravna revija, Vol. 5, 2016, p.12

⁹⁹ HCCH, Convention of 14 March 1978 on the Law Applicable to Agency, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=89>] Accessed 01.03.2019

¹⁰⁰ Hague Convention 2000, *op. cit.*, note 13, Art 15(1)

¹⁰¹ *Ibid.*, Art 15(3)

¹⁰² Curry-Sumner, *op. cit.*, note 11, p. 64

¹⁰³ Ruck Keene, *op. cit.*, note 45, p. 159

While the fact referring to the right to the choice of applicable law does not entail too many issues related to the application in practice, questions arise from the application of a provision regulating the law applicable to the manner of exercising the powers conferred on the authorized person in case of incapacity, determining the law of the state in which the powers of representation are exercised as the law applicable thereto. This provision results in a situation in which, under the law applicable to the mandate in case of incapacity, the authorized person is entitled to the right to manage the property of a person without any restriction, whereas under the law of the state in which the measure is executed, the authorized person shall have additional authorization for property management. In such a case, the authorized person will need to obtain such authorization in a manner prescribed by the law of the state where execution takes place.¹⁰⁴

3.4. Recognition and Enforcement

The Hague Convention 2000 stipulates that the measures taken by the authorities of a Contracting State shall be recognized by operation of law in all other Contracting States.¹⁰⁵ Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person relying on the measure does not take any step towards enforcement. The party against whom the measure is invoked is the one who must allege a ground for non-recognition provided for by the Hague Convention 2000.¹⁰⁶

There are five reasons why recognition may be refused: a) if the measure was taken by the authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the Hague Convention 2000; 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 recognition is contrary to public policy of the requested state, or conflicts with a provision of the law of that state which is mandatory, whichever law would otherwise be applicable; d) if that measure is incompatible with a later measure taken in a non-Contracting State that would have had jurisdiction on the basis of jurisdiction provided for by the Hague Convention 2000, where this later measure fulfils the requirements for recognition in the requested State; and e) if

¹⁰⁴ Clive, *op. cit.*, note 59, p. 12

¹⁰⁵ Hague Convention 2000, *op. cit.*, note 13, Art. 22(1)

¹⁰⁶ Lagarde, *op. cit.* note 55, para 116

the procedure referring to the placement of the adult in an establishment or other place where protection can be provided has not been complied with.¹⁰⁷

It is clear from the provision on enforcement that the provision applies only to measures taken by a Contracting State whose recognition is sought in another Contracting State. At present, the application of this provision is geographically limited in the EU, as there are only 10 Member States which are contracting parties to the Hague Convention 2000. The Hague Convention 2000 is virtually non-applicable in respect of mutual recognition and enforcement of measures between Member States. The lack of a legal framework to ensure mutual recognition and enforcement of protection measures in relation to adults, in particular with respect to the recognition of foreign powers of representation, is currently one of the biggest disadvantages of the EU system.¹⁰⁸ The free movement of such measures in the EU will certainly contribute if the EU ratifies the Hague Convention 2000. If Member States are left to ratify the Hague Convention 2000 independently, the procedure will, as in the Hague Convention 1996, take a very long time. The situation would be most effectively solved by a new instrument at EU level. The new instrument is in favor of the fact that, at the EU level, an equivalent to the ground for non-recognition because the measure was not taken by an authority whose jurisdiction was not based on one of the grounds envisaged by the Hague Convention 2000, has been removed from the recent regulations.¹⁰⁹ It is not only that this reason is not included in the list of possible reasons for rejection, but there is the existing EU standard on prohibition of review of jurisdiction of the court of origin.¹¹⁰ It is clear that such arrangement with respect to the progress of European private international law is outdated and needs to be updated in line with European trends that aim at building mutual trust between Member States.

With regard to the enforcement of measures, the Hague Convention 2000 provides for a procedure for the declaration of enforceability, stating that measures taken in one Contracting State and enforceable there shall, upon request by an interested party, be declared enforceable and registered for the purpose of enforcement in another Member State. In so doing, Contracting States shall apply a simple and rapid procedure, while the declaration of enforceability or registration may be refused only for one of the reasons for which their recognition may be refused.¹¹¹ In this case, there is also a question the declaration of enforceability

¹⁰⁷ Hague Convention 2000, *op. cit.*, note 13, Art. 22(2)

¹⁰⁸ Curry-Sumner, *op. cit.*, note 11, p. 66

¹⁰⁹ Brussels IIbis Regulation, Art. 22 and 23; Maintenance Regulation, Art. 24, Succession Regulation, Art. 40, Brussels I Regulation Recast, Art. 41(1)

¹¹⁰ Brussels IIbis Regulation, Art. 24, Brussels I Regulation Recast, Art. 41(3)

¹¹¹ Hague Convention 2000, *op. cit.*, note 13, Art. 25

within the framework of European private international law. Shortcomings of this concept have already been recognized at EU level.¹¹² The need for the declaration of enforceability has become increasingly excluded from European legislation.¹¹³

4. CONCLUSION

Vulnerable adults who are unable to protect their interests need to be specifically protected by a special legal framework. At EU level, there is still no special legal framework for adequate protection of vulnerable adults in cross-border situations. Each Member State has its own legal framework, which provides for different legal instruments for the protection of vulnerable adults. Such an arrangement causes unpredictability when it comes to cross-border cases. Ratification of the Hague Convention 2000 by the EU can be a solution to the existing legal unpredictability in this area. A further step is the adoption of a special legal instrument at EU level, in the form of a regulation, for which the legal basis is found in Article 81 TFEU on judicial cooperation in civil matters. The EU-level regulation is a more effective and comprehensive solution, which has the potential to fill the gaps in the provisions of the Hague Convention 2000. Guided by the principle of mutual trust of Member States, specific provisions contained in the Hague Convention 2000 have reached more modern forms within the framework of the European private international law.

Despite the well-grounded reasons and the existence of the basis within the EU primary legislation, the introduction of private international law rules for the international protection of adults in the EU remains only in the form of recommendations. As early as in 2008, the Parliament adopted a Resolution, which requires the Commission to adopt a legislative proposal that will facilitate the free movement of Europe-wide protection measures relating to vulnerable adults. In its subsequent Initiative and Added Value Assessment, the Parliament justified the reasons for the need to adopt a special regulation, which did not differ greatly from those contained in the existing legal framework for the protection of families and children at EU level. Not even after the second Parliament Resolution of 2017 did the Commission express their will to adopt the proposal. Such stance limits the rights of the vulnerable adults to the freedom of movement. It suggests that

¹¹² Arenas García R., *Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea*, Yearbook of Private International Law, 2010, p. 362

¹¹³ Maintenance Regulation regarding decisions given in a Member State bound by the 2007 Hague Protocol, Art. 17(2); Brussels IIbis Regulation regarding decisions on the right to access, Art. 41(1), and a decision on the return of a child, Art. 42., Brussels I Regulation Recast, Art. 39, Protection Measures Regulation, Art. 4

EU legislator considers that the mobility of vulnerable adults does not affect the freedom of movement of workers, at least not to the extent to which it is linked to the mobility of families and children. Thus the current state of play of vulnerable adults protection in the EU is contrary to the recommendation of the Committee on the Rights of Persons with Disabilities which warns the EU that the persons with disabilities and their families must enjoy the right to freedom of movement at the same level as other persons do.

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