

Towards an EU Regulation on the International Protection of Adults

On 31 May 2023, the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (in the following: EU Adult Protection Regulation - EUAPR). This proposal is a response to significant demographic and social changes in the EU: Many Member States face enormous challenges posed by an increasingly aging population. Due to considerable improvements in medical care in recent decades, people grow much older than they used to, and this lengthening of the average lifespan in turn leads to an increase in age-related illnesses such as Alzheimer's disease. This demographic change creates problems for private international law, because the mobility of natural persons has increased within the EU where borders may, in principle, be crossed without restrictions. Many people who have left their state of origin in search for work elsewhere in their youth or middle age do not return to their home state after retirement, but rather spend the last part of their lives where they have established a new habitual residence. Besides, more and more people decide to leave their home state once they have reached the age of retirement. Such processes of migration at a late stage in life may have different reasons: Some old-age movers may want to avoid a heavy taxation of their estates that would put a burden on their heirs, some may wish to circumvent other restrictions of domestic inheritance laws (e.g. the right to a compulsory portion), others may simply wish to spend the remaining parts of their lives in milder climates, e.g. the Mediterranean, or look for a place to stay where the cost of living is lower, e.g. in some parts of Eastern Europe. When these persons begin to suffer from an impairment or an insufficiency of their personal faculties which no longer allows them to protect their interests themselves, however, intricate conflict of laws problems may arise: The authorities or courts of which state shall have jurisdiction to take protective measures concerning vulnerable adults or their property? Which law is to be applied to such measures? Under which conditions may protective measures taken in one state be recognised and enforced in other states?

The EUAPR is meant to solve these problems. It is in many parts based on

proposals made by two working groups set up by the European Law Institute and the European Association of Private International Law, respectively. The Regulation will partially supersede and complement the Hague Convention on the International Protection of Adults (in the following: Hague Adult Protection Convention - HAPC), a derogation which is permitted by Art. 49(2) and (3) HAPC. The Hague Convention was concluded on 13 January 2000 and entered into force on 1 January 2009 between France, Germany and the United Kingdom (restricted to Scotland, however). Today, the Convention is in force as well in Switzerland, Finland, Estonia, the Czech Republic, Austria, Monaco, Latvia, Portugal, Cyprus, Belgium, Greece, and Malta. The Netherlands, Ireland, Italy, Luxembourg, and Poland have signed the Convention, but have not ratified it yet. In the Netherlands, however, the Convention is already applied by the courts as a part of Dutch autonomous law (see Hoge Raad 2 February 2018, ECLI:NL:HR:2018:147). Thus, more than 23 years after the HAPC was concluded, the status of ratifications is rather unsatisfactory, as only 12 EU Member States have ratified the Convention so far. In order to speed up this process, the Regulation shall be accompanied by a Council Decision authorising Member States to become or remain parties, in the interest of the EU, to the HAPC.

For a long time, it was controversial whether the EUAPR could be based on the EU's general competence in PIL matters (Art. 81(2) TFEU) or whether such a measure ought to be classified as concerning family law within the meaning of Art. 81(3) TFEU. On the one hand, adult protection is traditionally codified in the family law sections of many Member States' civil codes (e.g. in Germany), and people will frequently benefit from the protection of family members (see COM(2023) 280 final, p. 4). On the other hand, a guardian, curator or a person endowed with a power of representation does not necessarily have to be a relative of the vulnerable adult. Following the example set by the EU Succession Regulation, the Commission eschews the cumbersome special procedure envisioned for family law matters and bases its proposal on Art. 81(2) TFEU instead.

As far as the spatial scope of the EUAPR is concerned, Art. 59 EUAPR contains detailed rules on the relation between the Regulation and the HAPC. The basic factor that triggers the application of the EUAPR is the vulnerable adult's habitual residence in the territory of a Member State (Art. 59(1)(a) EUAPR). There are some exceptions to this rule, however, in order to ensure a smooth coordination

with the Contracting States of the HAPC which are not Member States of the EUAPR (see Art. 59(1)(b) and (2) EUAPR). The substantive scope of the EUAPR is broadly similar to that of the HAPC, although it should be noted that Art. 2(2) EUAPR speaks of “matters” to which the Regulation shall apply, whereas Art. 3 HAPC uses the narrower term “measures”. This may allow the inclusion of ex-lege powers of representation which are not directly covered by the HAPC. The Regulation’s personal scope is defined in Art. 3(1), which states that, for the purposes of the EUAPR, an adult is a person who has reached the age of 18 years. Although the Regulation is largely a response to problems created by an aging population, it must be borne in mind that its scope is not restricted to elderly people, but encompasses all adults above the age of 18, and, if the exceptional condition of Art. 2(2) EUAPR is met, even younger people.

With regard to the rules on jurisdiction, the Regulation largely refers to the HAPC, with one significant divergence, though. The Convention does not permit a direct prorogation of jurisdiction, because it was feared that an uncontrolled freedom of prorogating the authorities of another state could be abused to the detriment of the adult concerned. Art. 8(2)(d) HAPC merely gives the authorities of a Contracting State having jurisdiction under Art. 5 or 6 HAPC the possibility of requesting the authorities of another Contracting State designated by the adult concerned to take protective measures. Contrary to this restrictive approach, Art. 6(1) EUAPR provides that the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met:

- the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest;
- the exercise of jurisdiction is in the interest of the adult;
- the authorities of a Member State having jurisdiction under Art. 5 to 8 HAPC have not exercised their jurisdiction.

The following paragraphs 2 to 3 of Art. 6 EUAPR concern formal requirements and the integration of the adult’s choice of court into the HAPC’s jurisdictional framework. The possibility of choosing the competent authorities is a welcome addition to the choice-of-law provision on powers of representation in Art. 15 HAPC.

In order to determine the applicable law, Art. 8 EUAPR refers to Chapter III of the

HAPC. As in the HAPC, there are no specific conflicts rules for ex-lege powers of representation. Moreover, advance medical directives that are not combined with a power of representation (Art. 15 HAPC) are neither covered by the HAPC nor the EUAPR. Since the authorities exercising their jurisdiction under the HAPC usually apply their own law pursuant to Art. 13(1) HAPC, the spatial scope of the Convention's jurisdictional rules also indirectly determines the reach of its conflicts rules. This will lead to a new round of the debate that we are familiar with in the context of the relationship between the Hague Child Protection Convention and the Brussels IIb Regulation, i.e. whether the intended parallelism only works if at least a hypothetical jurisdiction under the respective Convention's rules can be established, or whether it suffices that jurisdiction is established according to a provision that is only found in the respective Regulation. Within the framework of the EUAPR, this problem will arise with regard to a choice of court pursuant to Art. 6 EUAPR, an option that is not provided for by the HAPC. Applying Art. 13(1) HAPC in this context as well seems to be the preferable solution, which leads to an indirect choice of law by the vulnerable adult even in cases where no voluntary power of representation is established under Art. 15 HAPC.

The recognition of measures taken in other Member States is governed by Art. 9 and 10 EUAPR. Notwithstanding mutual trust - and, in this particular area of law, with good reason - , the Regulation still contains a public policy clause (Art. 10(b) EUAPR). For the purpose of enforcement, Art. 11 EUAPR abolishes the declaration of enforceability (exequatur) that is still required under Art. 25 HAPC, thus allowing for simplified enforcement procedures within the EU.

A major innovation is found in Chapter VII. The Regulation will introduce a European Certificate of Representation (Art. 34 EUAPR) which will supersede the certificate under Art. 38 HAPC. The Certificate shall be issued for use by representatives, who, in another Member State, need to invoke their powers to represent a vulnerable adult (Art. 35(1) EUAPR). The Certificate may be used to demonstrate that the representative is authorised, on the basis of a measure or confirmed power of representation, to represent the adult in various matters defined in Art. 35(2) EUAPR.

Apart from those substantive achievements, the Regulation contains necessary rules on rather procedural and technical subjects, such as the cooperation between the competent authorities (Chapter VI EUAPR), the establishment and

interconnection of protection registers (Chapter VIII EUAPR), digital communication (Chapter IX EUAPR), and data protection (Chapter X EUAPR). These rules will also lead to a major modernisation compared with the older rules of the HAPC.

In sum, the proposal of the EUAPR will considerably strengthen the international protection of vulnerable adults within the EU.