European Association of Private International Law (EAPIL)

POSITION PAPER

in response to the European Commission's public consultation on an

EU-wide protection for vulnerable adults

26 March 2022

The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has more than 360 members, mostly academics and practitioners, based in more than 60 countries.

By this position paper, EAPIL intends to take part in the discussion launched by the European Commission's public consultation on an EU-wide protection for vulnerable adults.

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The paper was approved by the Scientific Council of the Association on 26 March 2022 and will be submitted to the Association's General Assembly for endorsement in accordance with the Association's Statute.

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A. Need for action at the Union's level

1. The European Union and its Member States are parties to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). As stated in Article 12(2), "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". Pursuant to Article 12(3), the Union and its Member States must "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" on an equal basis with others". As clarified in Article 12(4), the measures that relate to the exercise of legal capacity must "provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law". The said safeguards must ensure, *inter alia*, that "measures relating to the exercise of legal capacity respect the rights, will and preferences of the person" and "are free of conflict of interest and undue influence".

2. The availability of the above measures is crucial to ensuring the dignity, social inclusion, self-determination and non-discrimination of the persons aged 18 or more who are not in a position to protect their interest due to an impairment or insufficiency of their personal faculties.

3. Private international law rules, especially where they are internationally uniform in nature, have an important role to play in this area. They may ensure the thorough realisation of the fundamental rights of those concerned by providing for the international portability of measures aimed at supporting the exercise of legal capacity, by preventing the risk of positive and negative conflicts of jurisdiction, by making sure that powers of representation granted in one State may be relied upon in another (and adapted or terminated by the competent authorities, whenever the interest of the adult so requires), and by fostering dialogue and cooperation among the authorities of the States concerned.

4. Harmonised private international law rules concerning the protection of adults are also important to legal security, legal certainty and market efficiency. They do so by bringing clarity as regards the conditions subject to which, in cross-border situations, the transactions made by, or on behalf of, an adult may be challenged for reasons relating to an impairment or insufficiency of the personal faculties of the adult, or for reasons relating to the powers granted to those representing or assisting the adult in question.

5. The European Union has the opportunity to exploit the potential of private international law by harmonising the relevant rules on jurisdiction, applicable law, the recognition and enforcement of measures of protection and cooperation between States' authorities, based on its competence in the field of judicial cooperation in civil matters. In so doing, the Union must comply with the UNCRPD, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, and must act in accordance with its own Strategy for the rights of persons with disabilities 2021-2030 (COM/2021/110).

6. In determining the scope and content of possible action in this area, the Union should make sure that the effective operation and the prospect of worldwide success of the Hague Convention of 13 January 2000 on the International Protection of Adults (hereinafter, the Hague Adults Convention) are preserved. The Convention – which is in force for several Member States (and would in principle enjoy priority, in those States, over subsequent EU legislation) – provides a set of balanced solutions, has proved to work well in practice and is an obvious reference for States outside Europe interested in joining a harmonised regime in this field, rather that fragmenting the law in a delicate area where people need protection and clarity.

B. Suggested approach and legal bases: external action combined with legislation

7. In light of the concern expressed above, it is believed that the Union should follow a two-fold approach. It should make use of its external action to ensure that all Member States ratify, or accede to, the Hague Adults Convention (the Union cannot become itself a party to the Convention, for this is only open to States); and it should enact such legislation as may enhance the operation of the Convention in the relations between Member States.

8. The legal basis for the suggested action is Article 81 TFEU, on judicial cooperation in civil matters, combined with Article 216 TFEU as regards external action.

B.1 *The "family law" issue*

9. It is undisputed that Article 81 TFEU vests the Union with competence to enact measures relating to the international protection of adults. Rather, one may wonder whether the protection of adults should be deemed to fall within the scope of "family law", as this (autonomous) concept is understood for the purposes of Article 81(3) TFEU.

10. Admittedly, the legal traditions of some Member States regard the protection of vulnerable adults as falling within the broad category of family law. The protection of adults largely rests on concepts that are also found in several areas of family law. Actually, the adults concerned often receive support in the framework of long-term family relationships; the support provided underlies an ethic of care that is also common to family relations; and the scope and manner of operation of an adult's protection reflect a delicate balance between self-determination of the individual and public interest, which is also a general pattern of family law.

11. That said, the protection of adults is not concerned *as such* with family relationships. The aim of the rules on adults' protection is to ensure the dignity, social inclusion and self-determination of the adults concerned, while avoiding the risk of discrimination. The latter rules often refer to family ties, but they do not shape those ties, nor are they shaped by those ties. Additionally, situations obviously arise where support is given by an adult in the exercise of his or her legal capacity in a manner that is totally unrelated to the adult's family relationships, e.g., because no such relationships exist in the circumstances, or because the adult themselves, or the authority in charge of their protection, considers that family members should not be involved. The latter situations raise the same issues and underlie the same concerns as the situations that arise where support is provided by, or in the framework of, the adult's family.

12. The existing legislation based on based Article 81 TFEU supports the idea of classifying the protection of adults as a field outside the scope of "family law". Regulation (EU) No 650/2012 on matters of succession was not deemed to relate to family law, because, despite the obvious relevance of family ties to the transfer of a person's assets upon death, the institutions considered that it was essentially concerned with property and financial interests. Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters was also not considered to deal with family law, in spite of the fact that the protection measures to which the Regulation applies are often granted to prevent domestic violence and to counter risks that arise in household or family environment. With the adoption of Regulation No 606/2013, the Union, as stated in Recital 3, aimed to secure that the protection afforded to a natural person in one Member State is maintained and continued in any other Member State to which that person travels or moves, as a means to ensure that the legitimate exercise by citizens of the

Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3(2) TEU and Article 21 TFEU, does not result in a loss of that protection.

13. The above remarks apply, *mutatis mutandis*, to such measures as the Union may adopt in the field of adults' protection. The latter measures would aim to secure that the support provided to the adult concerned under the law of one State is maintained and continued in any other (Member) State to which the adult moves or travels. To the extent to which support is provided in connection with the property and financial interests of the adult, the focus would be on the adult's ability to self-determine as regards such property and financial interests, not on the ties that could exist between the adult concerned and the members of his or her family, if any, involved in the support.

14. While the protection of adults should not be considered to fall as such within the purview of Article 81(3) TFEU, one may wonder where, exactly, the dividing line should be drawn between the protection of adults and family law in specific contexts. One such context is *ex lege* powers of representation, that is, powers granted by operation of law to a person with whom the adult concerned has special ties (the adult's spouse, registered partner, children, etc.) to take decisions on behalf of the adult whenever the protection of the adult's interest so requires, provided that protection is not otherwise ensured under a judicial or administrative measure or under a mandate granted by the adult themselves. The point is dealt with more specifically below in this paper.

B.2 *External competence*

15. As observed above, the European Union cannot itself become a party to the Hague Adults Convention, since this is only open to sovereign States, not to international organisations. When it acceded to the Hague Conference on Private International Law, the European Community, as it was then, declared that it would "examine whether it is in its interest to join existing Hague Conventions in respect of which there is Community competence", adding that, where this interest exists, it would "make every effort to overcome the difficulties resulting from the absence of a clause providing for the accession of a Regional Economic Integration Organisation to those Conventions".

16. As regards the Hague Convention on Measures for the Protection of Children of 19 October 1996, which was likewise open only to sovereign States, the Union authorised (and in fact requested) the Member States that had not already done so, to ratify the Convention "in the interest of the Union".

17. The Union may follow the same path for the Hague Adults Convention only if it is shown that it has external competence in respect of the latter Convention, as it had for the 1996 Convention.

18. Admittedly, it is not immediately clear whether such external competence exists. So far, the external side of the Union's private international law has been built on the provision whereby the Union has the power to conclude such international agreements as are "likely to affect common rules [i.e. existing Union's legislation] or alter their scope". The Hague Adults Convention would not meet that condition, given that none of the existing EU legislative measures relating to judicial cooperation in civil matters deals with the protection of adults.

19. Still, Article 216(1) TFEU provides for a list of *alternative* conditions that an international agreement must fulfil to fall within the external competence of the Union. Other conditions may accordingly be considered in this context.

20. Article 216(1) TFEU stipulates that the Union may conclude an international agreement, *inter alia*, where such conclusion "is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties".

21. This part of Article 216 TFEU echoes the case law of the Court of Justice of the European Union. In Opinion 1/76, the Court recalled that the external competence of the Community, as it was then, "may flow implicitly" from the provisions of the Treaties, in the sense 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 described scenario does not only cover cases in which internal power has already been used in order to adopt measures within the attainment of common policies: "[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 […] necessary for the attainment of one of the objectives of the community".

22. Two conditions must be fulfilled for the Union to have the power to conclude an international agreement on this basis. The agreement must come within the purview of the policies of the Union, and its conclusion must appear to be necessary to achieve one or more of the objectives referred to in the Treaties. The Hague Adults Convention clearly meets the former requirement, since it deals with issues within the scope of Article 81 TFEU. It is more difficult to determine whether the latter condition would also be complied with.

23. It is more difficult to say how the criterion of "necessity" ought to be understood. In his conclusions regarding case C-600/14, *COTIF I*, AG Szpunar expressed the view that the criterion should be "interpreted broadly" (para 101). He argued that, "[i]n that regard, the political institutions with competence have a wide margin of discretion", and suggested that the criterion of necessity "could even be regarded as a simple declaratory confirmation of the principles of subsidiarity and proportionality". In its subsequent ruling, the Court did not explicitly disagree with the latter findings.

24. Arguably, the assessment of whether the conclusion of the Hague Adults Convention would be "necessary" to achieve the objectives set out in the Treaties comes in two steps.

25. The *first* step consists in identifying the objectives, among those referred to in the Treaties, that the Hague 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, 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.

26. 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 are debatable.

27. One key element, it is contended, 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.

28. The 2017 ruling of the Court of Justice in *COTIF I* provides an interesting illustration of this notion. The judgment concerned 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.

29. Opinion 2/15, of 16 May 2017, is also interesting in this respect. It 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 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".

30. Admittedly, it is not obvious that one can rely on Opinion 2/15 and *COTIF I* for the purposes of assessing the existence of external competence in a field such as judicial cooperation in civil matters. Both Opinion 2/15 and *COTIF I* concern policy fields, namely capital movements and transport, the objectives of which are explicitly described in the Treaties in terms of third-country relations: Article 63 TFEU speaks of "restrictions on the movement of capital … between Member States and third countries", while Article 91(1)(a) TFEU refers to "international transport to or from the territory of a Member State or passing across the territory of one or more Member States". Article 81 TFEU, it is true, does not use the same language. The latter provision, however, has been consistently understood as involving a reference both to intra-EU situations and situations involving a third country. This is attested, *inter alia*, by the *erga omnes* effect of the Union's conflict-of-law rules (see, e.g., Article 2 of Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations) and by the provisions on *lis pendens* and related actions involving a third country as are found in Articles 33 and 34 of Regulation (EU) No 1215/2012.

31. Reliance on Opinion 2/15 and *COTIF I* is accordingly appropriate also in the area of judicial cooperation in civil matters.

32. Now, the protection of adults is precisely an area of law where a clear distinction between intra-EU and extra-EU situations would hardly make sense

33. 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. Additionally, since an adult may be in a situation of vulnerability for several years, if not decades, situations may 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.

34. All this seems to suggest that the conclusion of the Hague Adults Convention would make sure that the above scenarios are dealt with under one and the same set of basic rules, no matter whether (and the extent to which) the situation is connected, or becomes connected, to a third country.

35. All in all, given the peculiarities of the protection of adults, the objectives of the Treaties mentioned above – the protection of the fundamental rights of those concerned, the free movement of citizens, the fight against social exclusion and discrimination, etc. – would not be thoroughly fulfilled if a unitary basic framework were lacking.

36. Actually, a number of practical problems could arise in cases involving a 'highly-mobile' vulnerable adult if the Hague Adults Convention were in force for some, but not all, Member States.

37. The following case provides an illustration of the above assertion. Suppose that Chloé, a citizen of the Union, benefits from a measure of protection issued in Switzerland, where she has settled. She has a brother in France and a sister in Italy, whom she regularly visits. She owns assets in both France and Italy. France is a contracting State of the Hague Adults Convention, like Switzerland. Italy is not.

38. The described situation is such that:
    (i) The measure of protection given in Switzerland is recognised in France under the Convention, whereas its recognition could in principle be denied in Italy, since Italy has not ratified the Convention and its domestic rules regarding recognition differ from those in the Convention.
    (ii) The Convention would prevent the risk of negative and positive conflicts of jurisdiction to the extent to which they arise in France and Switzerland, while it would be of no avail in the relationship between Italy and Switzerland, and in the relationship between Italy and France.
    (iii) French authorities would follow the same conflict-of-laws rules as the Swiss authorities (the rules in the Convention), and eventually consider that the substance of the protection is governed by one and the same law, whereas Italian authorities would stick to the Italian conflict-of-laws rules, and may well conclude that a different law applies to the matter.

39. The above scenario is likely to make it difficult for Chloé to actually get the support she may need in the exercise of legal capacity, as she moves from Switzerland to France and Italy. It is

also likely to undermine legal security and legal certainty for all those concerned, including her brother and sister, and those in charge of providing support.

40. The only way to address these difficulties is to make sure that all Member States are ultimately a party to the Hague Convention, while promoting the broadest possible ratification of the Convention by third countries.

41. The Union should ultimately consider that it has external competence to conclude the Hague Adults Convention, and, accordingly, that it may request the Member States that have not yet done so to ratify, or accede to, the Convention, "in the interest of the Union".

C. Legislation aimed at enhancing the Hague Convention

42. The European Union, as suggested above, should not content itself with ensuring that the Hague Adults Convention enters into force for all Member States. It should also pass legislation aimed to enhance the operation of the Convention in the relations between Member States, without interfering with the operation of the Convention in the broader international context or undermining its prospects of success in the global arena.

43. All this would ultimately result in a basic regime of a universal character (the Hague Convention), coupled by a special regime that would improve the latter at a regional level.

44. For the purposes of this position paper, only two such improvements will be considered, namely: the enactment of legislation that would enable the adult concerned, at a time when they are still in a position to self-determine, to choose the court with jurisdiction over their protection, and the enactment of legislation regarding the law applicable to *ex lege* powers of representation.

45. The former innovation would be of significant practical importance. The latter is concerned with an aspect that has only rarely been discussed in literature, so far. Other improvements have been suggested by scholars and practitioners. The present paper should not be understood as either endorsing or rejecting such other suggestions.

C.1 *Choice of court by the adult concerned*

a. The current state of affairs

46. The Hague Adults Convention provides for the jurisdiction of various courts (or other authorities), but no explicit choice by the adult at a moment that they are still capable of making such a choice. The question arises whether a future instrument of the Union should introduce a possibility for the adult to make such a choice of court and, if yes, the modalities, safeguards and limitations for such a choice. This question is relevant in light of the special weight accorded by the UNCRPD and other sources to the autonomy of persons with disabilities.

47. The main jurisdiction rule in the Hague Adults Convention refers to the court of the adult's habitual residence (Article 5). This is a sensible rule, which allows the court closest to the life of the adult to make arrangements that fit into the social structure and services of the place where the adult lives. This is in line with jurisdictional bases in non-commercial law instruments of the EU, such as Regulation (EU) 2019/1111 on matrimonial matters and matters of parental responsibility and Regulation (EU) No 4/2009 on maintenance obligations, as well as with connecting factors appointing applicable law in instruments such as Regulation (EU) No

1259/2010 on the law applicable to divorce and legal separation or the Hague Maintenance Protocol of 2007, to which the Union is a party.

48. The Hague Adults Convention's jurisdiction rules have some flexibility. *First*, the court of the adult's nationality may in some instances issue measures of protection if it considers that it is in a better position to assess the interests of the adult (Article 7). *Second*, a court of the place where property is located can take measures with regard to such property (Article 9). *Third*, a court with jurisdiction may transfer the case to another court (Article 8). This may be done the court's own motion or upon an application of another court. The Convention contains a list of courts to where a case can be transferred through this provision (Article 8(2)). This list refers to the State of the adult's nationality, the previous habitual residence, a State where property is located, a State whose authorities the Adult chose to take measures of protection, the State of the protecting person's habitual residence, and the State where the Adult is present. It is interesting to note that an adult is thus implicitly permitted to choose the authorities that could take measures of protection, while the Convention does not treat this as a direct choice of court but only as a consideration for the transfer of the case. This is because the drafters wished to make the choice subject to the control of the authorities in the State of the adult's habitual residence due to the adult's vulnerability.

49. Moreover, the Hague Adults Convention allows the adult a limited possibility to choose the law applicable to powers of representation (Article 15(2)). The permitted choices relate to the adult's nationality, a former habitual residence and a State where property is located.

50. These three modes of flexibility for jurisdiction and the limited possibility for choice of law provide a starting point for considering whether choices of court should be permitted and if such choice should be available but restricted, which courts should be available.

b. Striking a fair balance between self-determination and protection

51. Various EU instruments, also in the non-commercial field, contain elements of party autonomy. In light of the Union's commitment to equal rights and self-determination by the disabled, it would make sense to allow adults to choose a court to issue protective measures over their person and/or their property as well. The difficulty is the precarious balance between autonomy and protection that is omnipresent when legislating in the field of vulnerable adults.

52. Other EU instruments in non-commercial matters have consistently taken the approach that persons in a potentially weak position, such as spouses, maintenance creditors, children, persons drafting wills, should be protected, including when they make choices. This can be done by a limitation of the available courts that they are permitted to choose. The available courts are generally courts that are considered to have some connection to the person(s). One might question whether such abstract protection is really useful: on the one hand, the fact that the court is in some way close to the person might ensure that the court is better placed to take account of the interests and issue measures tailored to their location and their needs. On the other hand, the abstract approach takes no account of the measures available to the court; it is unrelated to the law that that court can apply.

53. EU law often also seeks to provide protection on a concrete level by introducing a check by an authority. This check entails making sure that the person was not unduly influenced and made a free and informed choice. Note that concrete protection might be granted by stringent rules

on formal validity, such as requiring a notarial document (in Member States where this option is available) or a document drafted by a lawyer confirming that they advised the client. The check can be done by a notary or lawyer at the point in time that the choice is made or a court at the point that the choice is being used. A check could also be required at both these points in time. This and similar checks should in any way be shaped in a manner that they can be integrated to already existing safeguards provided by the legal systems of Member States, having regard to their diversity.

54. A specific difficulty with regard to the choice by adults, different from all the fields in which the EU has legislated up until now, is that the adult is fully capable when making the choice of court (e.g., as part of a power of representation) but often no longer has full legal capacity at the time the choice is to be used, i.e., when the matter is brought to the chosen court.

55. The question arises whether the abstract and/or concrete protections explained above are suited to address this difficulty. Starting with protection on the abstract level: a limitation of the available choices might exclude the possibility of choosing an unrelated court. However, this is no guarantee that the most efficient court is chosen, neither that the consent to the choice was real, free, uninfluenced and informed. Moreover, the point in time at which the choice was made and the point at which it is used might lie very far apart. If using abstract protection, the available choices should therefore take into account both these points in time. The attachments allowed should be sufficiently broad. They should include, among others, nationality or habitual residence at the time of the choice or of the proceedings, location of relevant property, the habitual residence of the person designated to take care of the adult.

56. Turning to concrete protection concerning the granting of powers of representation, the Hague Adults Convention sets only the requirement that the choice must be in writing and no requirement exists that a specific authority be involved. The existence of the power of attorney is determined by the applicable law, i.e., the law of the adult's habitual residence or the chosen law. It might be useful to insert more protection at this level, in order to ensure that at the time of drafting, the adult really made a free and informed choice.

57. The question arises whether a choice of court should always related to the granting of powers of representation. Such a power of representation is the obvious place to insert a choice of court for latter matters, but it is also conceivable that an adult does not specifically appoint a representative but expresses the desire that a particular court should treat the matter concerning their protection if that ever becomes necessary. Such choices should be permissible. As explained above, the Hague Adults Convention only indirectly allows such choices and subjects them to the control of the court of the State of the adult's habitual residence. Within the EU, where the principle of mutual trust is embedded, the chosen court can be trusted to perform the control: it should not be required that the court of the adult's habitual residence performs the control.

58. The choice of court will have an influence on the applicable law, since the general rule on applicable law is that the court applies its own law (Article 13).

59. Consideration should be given to the nature of the choice of court. Is there a presumption that the choice is exclusive unless otherwise indicated, or is the choice to be regarded as the addition of a court with jurisdiction? The proposal is that there should be no presumption of exclusivity. The choice should provide an extra available forum without removing the forum

of the habitual residence (the availability of which is generally in the interest of the adult), unless the adult has made explicit that the choice is to be to the exclusion of that forum.

60. If a future EU instrument introduces the possibility to choose a court, the instrument should pay attention to the complex question of disconnection, as addressed in Article 49 of the Convention. States outside the EU that are bound by the Hague Adults Convention (at the moment only Monaco, Switzerland and the UK, but only as far as Scotland is concerned) will not recognise the choice of court when applying the Convention. If an Adult for instance has their habitual residence in Switzerland but chooses a court in Austria, the Swiss courts will not refrain from taking jurisdiction, unless under the transfer provision. The disconnection should therefore be such that the EU instrument will only apply if both the habitual residence of the Adult and the chosen court is in the EU at the moment of the proceedings.

c. The possible options

61. In light of the above discussion, three options could be considered for possible EU legislation regarding choice of court by the adult concerned:

(i) The EU could enact legislation that would confer jurisdiction on the courts of a Member State chosen by the adult, subject to appropriate safeguards aimed to ensure the genuineness of consent (such as a requirement that the adult in question was provided information regarding the implications of a choice, or the absence thereof, prior to making the choice itself), provided that the adult has a specific connection with the Member State in question (e.g., had their habitual residence there previously, or it is the place of the habitual residence of a person with attributed or *ex lege* powers of representation). If a rule to this effect were in place, the court chosen by the adult would *immediately* have jurisdiction to rule on the protection of the adult, rather than as a result of a transfer pursuant to Article 8(2)(d) of the Convention.

(ii) The EU could enact legislation that would confer jurisdiction on the courts of the Member State whose law was chosen by the adult, pursuant to Article 15 of the Hague Adults Convention, to govern powers of representation, subject to appropriate safeguards, as above. This option is different from the previous one in that a choice by the adult would confer jurisdiction (instead of merely permitting a transfer) only where the choice would be "aligned" with a previous or simultaneous choice of law.

(iii) The EU could enact legislation that, without introducing any jurisdiction-conferring rule, would require the courts of a Member State to transfer the case, pursuant to Article 8(2)(d) of the Convention, on to the court of another Member State, chosen by the Adult, whenever certain conditions are met (e.g., whenever it is established that the adult choose the law of the latter Member State in accordance with Article 15 of the Convention). This option is different from the two preceding options in that it would not derogate, properly speaking, from the Convention: a rule to this effect would merely affect the operation of Article 8(2)(d) of the Hague Adults Convention by clarifying the circumstances in which a transfer ought to take place in accordance with that provision.

62. The three options illustrated above may be described as follows:

(i) The first option is the most far-reaching; it would promote the self-determination of the adult, but it would have a significant impact on the Hague Adults Convention. Admittedly, this may result in positive conflicts of jurisdiction between Member States and third countries (bound by the Convention). In addition, the measures of protection given

by the chosen court would not be recognised under the Convention in a third country bound by the Convention. A carefully drafted disconnection rule becomes very important: the EU instrument should only apply if both the habitual residence of the Adult and the chosen court is in the EU at the moment of the proceedings.

(ii) The second option is more moderate, but would still depart from the Convention.

(iii) The third option is more conservative and cautious. It would preserve the operation of the Convention and simply make a transfer under Article 8(2)(d) of the Convention easier, and more rapid. If a rule were adopted based on this approach, self-determination by the adult would still be improved, compared with the Convention, albeit less prominently than under the first and the second options. Rather, since the impact on the Convention would be limited, or non-existent, the disadvantages associated with the previous options would disappear.

63. Further discussion appears to be necessary to arrive at a thorough assessment of the implications of further promoting autonomy in this area as regards jurisdiction.

C.2 *Ex lege powers of representation*

64. The legal orders of several States include provisions whereby powers of representation arise by operation of law whenever a person suffers from a severe impairment of their abilities, so that the partner, or a family member, of the latter person may take decisions (e.g., as regards health treatment) on behalf of them. Similar provisions are found, for instance, in the Swiss Civil Code, the Austrian Civil Code, and the German Civil Code (pursuant to the newly enacted § 1358, which will become applicable on 1 January 2023).

65. Determining the law applicable to *ex lege* powers of representation raises some intricate problems. Article 3 of the Hague Adults Convention, on the one hand, positively spells out the kind of protective measures that may be taken under the Convention, such as guardianship, curatorship or analogous institutions, the hospitalisation of an adult, the administration of an adult's property, etc. Article 4 of the Convention, on the other hand, contains a negative list of issues to which the Convention is inapplicable, such as maintenance, property regimes in respect of marriage, succession, social security, criminal offences or measures directed solely at public safety. The general effects of marriage, however, were deliberately not excluded from the scope of the Convention, because the pertinent rules may aim at the protection of an ailing partner.

66. In his Explanatory Report of the Convention, Paul Lagarde explains: "[A]ny restriction on the capacity of an adult or even on the free disposal of his or her rights can only be the result of a measure of protection. One will not find, therefore, in the Convention a provision equivalent to those which, in the 1996 Convention [on Measures for the Protection of Children], determine the law applicable to the attribution or to the extinction of parental responsibility by operation of law. The Commission rejected a proposal by the Finnish and Swedish delegations to apply to the *ex lege* representation of the adult the law of his or her habitual residence. … So this question is not regulated by the Convention, even though it falls within its scope as a consequence of the marriage …".

67. However, the Convention does not provide for any conflicts rule applicable to a power of representation arising by operation of law. Article 13 of the Convention does not cover *ex lege*

powers of representation because this provision only refers to measures taken by "the authorities of the Contracting States". For its part, Article 15 only covers "powers of representation granted by an adult, either under an agreement or by a unilateral act", but not powers of representation arising by operation of law. Since the drafters of the Adults Protection Convention deliberately rejected a provision similar to Article 16 of the Hague Convention on Measures for the Protection of Children, there is, apparently, no unintended gap in the Adults Convention. One can hardly assert, in these circumstances, that the Convention should be understood as requiring that such a gap be filled by means of analogy (at the same time, nothing in the Convention seems to prevent a Contracting State from providing internally that the gap should be filled in a manner that promotes consistency with the Convention). Rather, it remains possible for a court to take an existing power of representation into account pursuant to Article 13(2) of the Adults Convention.

68. The private international law of the European Union does not cover *ex lege* powers arising in the field of adults' protection. The only exception, it has been suggested, arises where the law applicable to matrimonial property regimes and the property consequences of registered partnerships is determined in accordance with Regulation (EU) 2016/1103 and 1104, respectively: the same law, so the contention goes, should also determine such *ex lege* powers of representation as exist in relation to the couple's property.

69. In any case, determining the law applicable to *ex lege* powers of representation in the context of medical treatment, however, is a question that is left to domestic choice of law rules. In this regard, the national approaches differ considerably. In Switzerland, the law applicable to the general effects of marriage also determines whether a marriage gives rise to an *ex lege* power of representation in cases of illness. The same approach has been preferred in Germany before the reform of 2021. From 1 January 2023, a new special rule on *ex lege* powers of representation will apply. Article 15 of the Introductory Act to the Civil Code provides as follows: "In matters concerning medical treatment that is carried out in Germany, Section 1358 of the Civil Code applies irrespective of a foreign law applicable under other choice-of-law rules".

70. This solution is also extended to registered partnerships (Article 17b(2) of the Introductory Act to the Civil Code, as amended). Article 15 EGBGB elevates the German provision on *ex lege* powers (§ 1358 of the Civil Code) to an overriding mandatory provision (*Eingriffsnorm*). The German government justified this approach as follows: "In the interest of individuals, spouses and the health service, the proposed rule shall ensure that, in difficult and unforeseeable situations involving a conflict of laws, important medical decisions may be taken expeditiously and implemented immediately. Against this background, Article 15 of the Introductory Act to the Civil Code draft provides that § 1358 of the Civil Code applies in matters concerning medical treatment that is carried out in Germany irrespective of a foreign law applicable under other choice-of-law rules. […] This overriding mandatory provision is justified by its outstanding significance for the life and health of the persons concerned in acute emergencies as well as with regard to the proper functioning of the health service in such situations. Thus, doctors and the hospital staff are relieved from the necessity of having to determine which law might be applicable to a power of representation, and from having to ascertain and to interpret a foreign law. Instead, they may directly apply German law. This is also in the best interest of the spouses because it helps them to cope with a difficult and challenging situation, e.g., in cases of severe illness or an accident".

71. Although this reasoning has some strong points, the approach underlying Article 15 of the Introductory Act to the Civil Code has some drawbacks as well. First, it leaves open the question how the law applicable to *ex lege* powers of representation must be determined if the medical treatment is carried out not in Germany, but abroad (e.g., Switzerland or Austria). In this case, a German court would have to fall back on the general conflicts rule on guardianship, protective care and curatorship (Article 24(1) of the Introductory Act to the Civil Code, as amended), which refers to the habitual residence of the adult who is to be protected. Secondly, Article 15 of the Introductory Act to the Civil Code fails to determine the law in all cases in which *ex lege* powers may not arise between spouses or registered partners, but between persons connected by a different type of (family) relationship. In Austria, for example, *ex lege* powers of representation (*gesetzliche Erwachsenenvertretung*) may be conferred on parents, grand-parents, adult children and grand-children, siblings, nieces and nephews, spouses or registered partners and a person who has lived together with the adult for at least three years in a common household (§ 269(1) and (2) of the Austrian Civil Code). Article 378 of the Swiss Civil Code contains a similarly wide catalogue. In this regard, a mandatory provision that only covers spouses and registered partners leaves many gaps in practice. Again, German courts would have to fall back on the habitual-residence-rule in Article 24(1) of the Introductory Act.

72. In Austria, determining the law applicable to *ex lege* powers of representation in the context of adults' protection is controversial. Most writers have proposed to apply, at least by analogy, the general rule for protective measures taken by courts, which is the nationality of the adult (§ 15 of the Law on Private International Law). Others have suggested to invoke the principle of the closest connection (§ 1 of the same Law) in order to apply the law of the habitual residence of the protected adult. This is also the solution that is now proposed in a recent reform draft for a new § 15(2) of the Law.

73. A few lessons may be drawn from the preceding analysis. The lack of clarity as to the determination of the law applicable to *ex lege* powers of representation may be an impediment to persons in need of medical services in cross-border situations. Legal uncertainty is also a considerable burden on doctors and hospital staff who may have to take quick decisions in cases of an emergency. The German legislature has tried to alleviate such concerns by introducing an overriding mandatory provision (Article 15 of the Introductory Act to the Civil Code).

74. The European Union should address the issue of the law governing *ex lege* powers of representation, and should do so in a manner that would ensure consistency with the rules provided in the Hague Convention as regards neighbouring or connected situations. Courts and other authorities may need to determine the law applicable to *ex lege* representation where the question is also raised of the existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, the latter questions being within the scope of the Convention.

75. The Union, it is contended, has competence to legislate on the above issue, based on Article 81 TFEU. The fact that *ex lege* powers of representation normally rest on the existence of family ties between the adult concerned and their representative does not necessarily indicate that the matter falls within the scope of Article 81(3). The fundamental concern underlying *ex lege* representation is the protection of the adult in question. The remarks made above (para. 11) may arguably be relied upon to advocate that *ex lege* representation should not be treated as belonging to "family law" for the purposes of the latter provision.

76. At the European Union level, a solution would arguably consist in enacting a uniform conflict-of-laws rule whereby *ex lege* powers of representation, regardless of the nature of the ties they reflect (whether marital, parental, etc.), are governed by the law of the State of habitual residence of the person whose protection is at issue, without prejudice to such mandatory provisions as are in force in the State in which the adult is to be protected, if and insofar as they are meant to apply whatever the otherwise applicable law. For the purposes of the above rule, habitual residence ought to be determined with reference to the time at which the powers of representation are being exercised.

77. The suggested provision would be consistent with the assumption whereby the habitual residence of the adult generally represents a suitable connecting factor in matters relating to protection. It would also be aligned with the provision in Article 20 of the Hague Adults Convention, according to which the conflict-of-laws rules in the Convention do not prevent the application of "those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable".

78. The resulting picture would arguably be advantageous for both the adults concerned and such medical staff as may be required to take urgent decisions in connection to the adults in question. As a rule, the adult concerned (and their partner) would in fact be able to rely on the provisions on *ex lege* powers of representation in force in his or her country of habitual residence, no matter the Member State where such powers are exercised in the circumstances. At the same time, whenever the need arises, in particular, to take urgent decisions regarding the health of the adult in question, the doctors in a Member State would be permitted to rely on the provisions on *ex lege* representation in force in their own State, insofar as the legislation of the latter State considers that the application of those provisions is mandatory whatever law would otherwise be applicable.

79. The suggested compromise would prove workable, it is contended, if information were provided to the general public and those in medical facilities regarding the content of the rules on *ex lege* powers of representation in the different Member States (and, ideally, a selection of third countries). Based on this information (in the form of country profiles, or similar, to be hosted in the e-Justice portal or analogous databases), the interested persons would be able to determine in advance the implications of a change of habitual residence from one State to another as regards *ex lege* representation. State authorities would likewise be able to determine (in situations other than urgent ones) whether, in respect of which matters and subject to which limitations, *ex lege* powers of representation may be claimed in the State to which they belong in the interest of persons whose habitual residence is in another (Member) State.

D. Conclusions

77. The European Association of Private International:

a. stresses the importance of private international law to the realisation of the fundamental rights of persons aged 18 and more who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculty;

b. considers that there is an urgent need of measures of judicial cooperation in civil matters aimed to support, in cross-border situations, the exercise of legal capacity by the adults concerned;

c. recalls that the above measures must accord with the United Nations Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, and must be consistent with the Union's own Strategy for the rights of persons with disabilities 2021-2030;

d. underlines that, in taking the above measures, the Union should preserve the operation and the prospect of success of the Hague Convention of 13 January 2000 on the International Protection of Adults; to this end, the Union should combine external action and legislation, meaning that the Convention should provide the basic legal framework in this field, common to all Member States, but legislation should be enacted by the Union to strengthen cooperation between Member States and improve the operation of the Convention in their relations;

e. notes that the legal basis for the above measures, both internally and externally, would be Article 81 TFEU, while considering that the protection of adults would fall within the general rule of Article 81(2) and not in the scope of "family law" within the meaning of Article 81(3);

f. considers that the Union has external competence, based on Article 216 TFEU to authorise the Member States that have not yet done so to ratify, or accede to, the Hague Adults Convention "in the interest of the Union", on the ground that the conclusion of the Convention would be "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties";

g. observes that the legislation of the Union aimed to improve the Convention regionally should relate to choice of court by the adult concerned and the law applicable to *ex lege* powers of representation, without prejudice to further possible improvements;

h. encourages the institutions of the Union, as regards choice of court, to further promote self-determination by the adult concerned as regards jurisdiction; different options may be considered for this purpose, as suggested in this position paper;

i. considers that the Union should enact a rule whereby *ex lege* powers of representation are governed by the law of the (Member) State where the adult concerned has their habitual residence at the time when those powers are relied upon, without prejudice to the application of the provisions on *ex lege* powers of representation as may be in force in the Member State where the powers are invoked, whenever the provisions themselves are meant to apply regardless of the law specified by conflict-of-laws rules.