

EUROPEAN PARLIAMENT

2004



2009

Session document

A6-0460/2008

24.11.2008

REPORT

with recommendations to the Commission on cross-border implications of the legal protection of adults
(2008/2123(INI))

Committee on Legal Affairs

Rapporteur: Antonio López-Istúriz White

(Initiative – Rule 39 of the Rules of Procedure)

CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED	7
EXPLANATORY STATEMENT	8
OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS	11
RESULT OF FINAL VOTE IN COMMITTEE	15

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI))

The European Parliament,

- having regard to Article 192, second paragraph, of the EC Treaty,
 - having regard to the Hague Convention of 13 January 2000 on the international protection of adults,
 - having regard to the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006,
 - having regard to the proposal for a Council decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (COM(2008)0530),
 - having regard to the Communication from the Commission to the Council and the European Parliament of 10 May 2005 entitled ‘The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice’ (COM(2005) 0184),
 - having regard to Rules 39 and 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0460/2008),
- A. whereas in its aforesaid Communication on the Hague Programme, the Commission singled out, as one of its priorities, the need to guarantee an effective European area of civil justice, not least as regards the recognition and enforcement of judicial decisions,
- B. whereas work and consultations have been conducted in that context on decisions concerning family property issues, successions and wills, with a view to drawing up new legislative proposals,
- C. whereas there is also a need to promote the recognition and enforcement of legal or administrative decisions regarding persons who are the subject of protection measures,
- D. whereas care must be paid to the often delicate and vulnerable circumstances of persons who are the subject of protection measures and requests for cooperation, information or recognition and enforcement need to be handled swiftly,
- E. whereas situations have developed in which the implementation of legal protection concerns two or more Member States,
- F. whereas situations have also developed in which cases involving legal protection concern

two or more Member States and concern Member States and non-EU States, in particular because of traditional migration flows (former colonies, the United States and Canada),

- G. whereas problems have arisen because of the increasing movement between Member States where there is a net outflow of retired people, including vulnerable adults, and those Member States where there is a net inflow of retired individuals,
- H. whereas the need for and the principles governing the legal protection of vulnerable adults were agreed by all EU Member States in the Council of Europe's Recommendation No. R (99) 4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults, adopted on 23 February 1999,
- I. whereas the legal protection of vulnerable adults must be a pillar of the right of free movement of persons,
- J. whereas disparities currently exist between the laws of the Member States in the field of protection measures,
- K. whereas the provisions of the UN Convention on the Rights of Persons with Disabilities need to be borne in mind,
- L. whereas the provisions of the Hague Convention can help to achieve the goal of establishing an area of justice, freedom and security by facilitating the recognition and enforcement of decisions granting a protection measure, determination of the law to be applied and cooperation between the central authorities,
- M. whereas specific and appropriate measures for cooperation between the Member States should be implemented, which could draw on the instruments under that Convention,
- N. whereas single Community forms could be introduced to promote information on protection decisions and the circulation, recognition and enforcement of those decisions,
- O. whereas a single Community form could be created at European Union level in the case of incapacity mandates, in order to ensure their effectiveness in all the Member States,
- P. whereas mechanisms could be introduced for the easy recognition, registration and use of lasting powers of attorney throughout the European Union,
 - 1. Welcomes the commitment of the French Presidency regarding the situation of vulnerable adults and their cross-border legal protection; congratulates those Member States which have signed and ratified the Hague Convention and encourages those Member States which have not yet signed or ratified it to do so;
 - 2. Requests the Commission, as soon as sufficient experience of the operation of the Hague Convention has been acquired, to submit to Parliament, on the basis of Article 65 of the EC Treaty, a legislative proposal on strengthening cooperation between Member States and improving the recognition and enforcement of decisions on the protection of adults and incapacity mandates and lasting powers of attorney, following the detailed recommendations set out below;

3. Calls on the Commission to monitor experience with the application of the Hague Convention and its implementation in the Member States, and to submit to Parliament and the Council in due course a report summarising the problems and best practices in its practical application and containing, if necessary, proposals for Community provisions supplementing or specifying the manner in which the Convention is to be applied;
4. Calls on the Commission to assess the option of the accession of the Community to the Hague Convention; suggests that this could be an area of enhanced cooperation between Member States;
5. Calls on all Member States which have not yet signed or ratified it to accede to the UN Convention on the Rights of Persons with Disabilities, inasmuch as this would serve to enhance the protection of vulnerable adults within the EU;
6. Requests that the Commission finance a study to compare Member States' legislation on vulnerable adults and protection measures with a view to ascertaining where legal issues could arise and what measures would be needed at EU or Member State level to resolve any such issues; considers that the study should also address the issue of institutionalised adults with intellectual disabilities as regards their guardianship and their ability to exercise their legal rights; calls on the Commission to organise a series of conferences for legal professionals directly involved in such cases and to take into account in future legislation the results of the study and the views of professionals;
7. Calls on Member States to ensure that protective measures are proportionate to the state of the vulnerable adults in question, so that individual EU citizens are not denied a legal right when they still have the ability to exercise that right;
8. Calls on Member States to take measures to protect vulnerable adults from becoming victims of identity theft or fraud or other telephone or cyber-crimes, including legal measures to enhance the protection of and/or limit access to a vulnerable adult's personal data;
9. Supports the creation of secure mechanisms, subject to robust rules for the protection of personal data and rules on the limitation of access, for the sharing of best practices and other information regarding protective measures currently in force between Member States, including the possibility of Member States' judicial systems sharing information as to the protection status of a vulnerable adult;
10. Reminds the Commission and Member States that not all vulnerable adults are so because of advanced maturity and asks that steps be taken to strengthen the legal protection and rights not only of elderly vulnerable adults but also of those adults who are vulnerable because of severe physical and/or mental disabilities, and to take their needs into account too when taking future social measures to ensure those legal rights;
11. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
12. Considers that the requested proposal will not have any financial implications;

13. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission, the Council and the governments and parliaments of the Member States.

**ANNEX TO THE MOTION FOR A RESOLUTION:
DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL
REQUESTED**

A. PRINCIPLES AND AIMS OF THE PROPOSAL

1. To promote the recognition and enforcement of legal or administrative decisions regarding persons who are the subject of protection measures.
2. Provisions to help achieve the goal of establishing an area of justice, freedom and security by facilitating the recognition and enforcement of decisions granting a protection measure, determination of the law to be applied and cooperation between the central authorities.
3. Specific and appropriate measures for cooperation between the Member States should be implemented, drawing on the instruments available under the Hague Convention.
4. Single Community forms to promote information on protection decisions and the circulation, recognition and enforcement of those decisions.
5. Single Community form created at European Union level in the case of incapacity mandates, in order to ensure their effectiveness in all the Member States.

B. ACTION TO PROPOSE

1. Requests the Commission, as soon as sufficient experience of the operation of the Hague Convention has been acquired, to submit to Parliament, on the basis of Article 65 of the EC Treaty, a legislative proposal on strengthening cooperation between Member States and improving the recognition and enforcement of decisions on the protection of adults, incapacity mandates and lasting powers of attorney.

EXPLANATORY STATEMENT

I. Background points

The European Union is having to cope with a sharp increase in the overall age of the populations of the Member States, which is linked with the major increase in life expectancy. This means that by 2050, people over the age of 60 should constitute 37% of the population of Europe, with 10% of them being 80 and over. This demographic shift has major economic, social, health and budgetary impacts and is the subject of numerous European-level studies¹.

This means that tailored and targeted mechanisms for the protection of individuals will have to be introduced in order to guarantee, as is the Member States' wish, equal rights and responsibilities for people in all walks of life, and respect for everyone as individuals, including the elderly, and their right to privacy. The possibility must also be ensured of the very elderly being able to continue to look after their own property and manage their everyday affairs².

Special laws are in place in the Member States to ensure the protection of individuals and their property. Several major reforms entered into force in the 1990s. This was the case: in Germany on 1 January 1992, with the Act of 12 September 1990 on the reform of guardianship and curatorship of adults, which established a single assistance system and modernised the protection mechanisms; in Spain on 18 November 2003, with the Act establishing protection of the property of incapacitated persons; in Italy on 9 January 2004, with the law reforming the guardianship and curatorship systems and introducing less rigid protection measures; and in the United Kingdom, in April 2007, with the Act of 7 April 2005. In France, the Act of 5 March 2007 reforming the law governing the legal protection of adults is due to enter into force on 1 January 2009.

These legislative reforms are aimed, in particular, at ensuring greater individualisation of the measures ordered, so that the individuals protected can continue to exercise certain rights, and at the advance implementation of any protection arrangements. Such is the case, for example, with the *lasting power of Attorney* in English law, which is a voluntary private agreement made on one's own or with the assistance of a lawyer, or the *Vollmacht* in German law, which can be made on one's own, or by notarial deed if the disposal of property is involved. The future protection mandate in French law also allows an individual to provide for their protection in advance, and to confer authority on a person of their choice by private agreement, or by notarial deed when the disposal of property is envisaged.

It has to be possible for these protection regimes to be easily recognised and enforced, in

¹ Information and statistics published by the European Commission, DG Health and Consumer Protection, in the field of ageing and health:

http://ec.europa.eu/health/ph_information/indicators/docs/healthy_ageing_en.pdf

² Declaration of principles of the Council of the European Union and the Ministers for Social Affairs, meeting within the Council of 6 December 1993 to mark the end of the European Year of the Elderly and of Solidarity between Generations (1993) (OJ C 343, 21.12.1993, pp 1 to 3.).

cross-border situations within the European Union, when the person protected has to travel or is taken into care or residence in a Member State other than the one in which they habitually reside, or when their property is split between more than one Member State. The fact that major disparities exist between protection regimes from one State to the next, while the mobility of persons covered by protection measures is on the increase, makes this all the more important.

Indeed, situations in which persons enjoying protection are present in a State other than that of their habitual residence, or are hospitalised in a State other than that in which their property is to be found, are becoming increasingly common. This is partly due to easier access to healthcare systems between the Member States.

The legal protection regimes must therefore have continued legal effect, not least to ensure the continuity of decisions taken at a judicial or administrative level, or by the person him/herself. Such is the case with incapacity mandates or future protection mandates, which it must be possible to apply throughout the European Union.

II. Introduction of appropriate measures for cooperation between the Member States

1. Content

The Hague Convention of 13 January 2000 provides the European Union with potential instruments for cooperation between the Member States aimed at ensuring the recognition and enforcement of protection measures ordered in the Member States.

The European Community's accession to the Hague Conference on International Private Law on 3 April 2007 should lead to ratification by the Community of conventions which have yet to be ratified by all the Member States.

To date, the Hague Convention of 13 January 2000 on the international protection of adults has only been signed by 9 Member States (Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Poland and the United Kingdom) and Switzerland, and has only been ratified by Germany, France and the United Kingdom (for Scotland). For all that, this instrument of private international law has the capacity to enable, at European Union level, determination of the competent authorities and of the law applicable, and to ensure the recognition and enforcement of protection measures ordered in the Member States.

The Community's ratification of that Convention would provide it with an appropriate instrument in this area that reflected the recent legislative developments in the Member States in the field of the legal protection of adults, and guarantee continued close cooperation with the Hague Conference. At present, judicial cooperation is in fact limited, at a time when instruments such as these are becoming a necessity owing to the demographic, social and health changes triggered by the ageing of the European Union's population.

Nevertheless, certain directly-operational mechanisms specific to the European Union could be introduced immediately to foster close cooperation among Member States.

Harmonised Community forms should hence be created to promote the circulation and

recognition of measures or decisions taken, and to help arrange or manage protection. In the same way, a mechanism could be established for the forwarding of dossiers, thereby ensuring that this is done efficiently, not least in emergencies, such as when an individual covered by a protection measure has to be hospitalised while temporarily resident outside his or her Member State of habitual residence.

The creation of a single form for incapacity mandates would also be very useful and would constitute a harmonised Community vehicle for the circulation, recognition and enforcement of those mandates. This would mean that individuals who had granted powers of representation to a third party through an agreement or unilateral deed could live or reside in a Member State other than their Member State of origin, without foregoing the benefits of that mandate.

Annex: Summary of the Hague Convention of 13 January 2000

1. The Hague Convention of 13 January 2000 bestows, on the judicial and administrative authorities of the habitual State of residence of an individual, jurisdiction to take measures to protect that person or their property, while also ensuring, in a flexible manner, the jurisdiction of the authorities in other States, including the one in which the person is present – as in the case of persons hospitalised or taken into care in a State other than that of their habitual residence. The authorities of the competent State apply its law, unless it appears necessary to apply the law of another State with which the situation has a more substantial connection, as is particularly the case in property matters (Article 13) or ‘mobility conflict’ scenarios.
2. Inclusion of incapacity mandates within the framework of the Convention is a major innovation, and targets situations in which individuals have, by agreement or unilateral deed, granted powers of representation to a third party. Changes in the laws of the Member States in this field, and the implementation of numerous mechanisms of this type, should in fact lead to the circulation of mandates and guarantee their effect in all EU countries.
3. The Hague Convention of 13 January 2000 also enshrines the principle of automatic recognition of measures taken by the authorities of a Contracting State.
4. The Convention also frames cooperation measures, including the appointment of a central authority, in each State, in order to ensure cooperation and the exchange of information as to the laws of, and services available in, the Contracting States. Amongst other things, these authorities may, should the circumstances of an adult so require, and where a protection measure is being contemplated, request information from any competent authority of another State. The competent authorities can also encourage the use of mediation to achieve agreed solutions for the protection of an adult’s person or property.

11.11.2008

OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

for the Committee on Legal Affairs

on cross-border implications of the legal protection of adults
(2008/2123(INI))

Rapporteur: Urszula Gacek

(Initiative - Rule 39 of the Rules of Procedure)

SUGGESTIONS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. whereas a move from substitute decision-making by legal guardians to supported decision-making by vulnerable adults themselves can, in some cases, help to prevent the dehumanisation of vulnerable adults and prevent conflict, and ensure respect for the dignity of vulnerable adults,
- B. whereas situations have developed in which cases involving legal protection concern two or more Member States and concern Member States and non-EU States, in particular because of traditional migration flows (former colonies, the United States and Canada),
- C. whereas problems have arisen because of the increasing movement between Member States where there is a net outflow of retired people, including vulnerable adults, and those Member States where there is a net inflow of retired individuals,
- D. whereas the need for and the principles governing the legal protection of vulnerable adults were agreed by all EU Member States in the Council of Europe's Recommendation No. R (99) 4 of the Committee of Ministers to Member States on Principles concerning the Legal Protection of Incapable Adults, adopted on 23 February 1999,

- E. whereas the legal protection of vulnerable adults must be a pillar of the right of free movement of persons,
1. Welcomes the commitment of the French Presidency regarding the situation of vulnerable adults and their cross-border legal protection; congratulates those Member States who have signed and ratified the Hague Convention of 13 January 2000 on the International Protection of Adults, and encourages those Member States which have not yet signed or ratified it, to do so;
 2. Calls on the Commission to monitor the implementation of the Hague Convention in the Member States and to report to Parliament and the Council on problems and best practices in its practical application;
 3. Calls on the Commission to assess the option of the accession of the Community to the Hague Convention; suggests that this could be an area of enhanced cooperation between Member States;
 4. Calls on all Member States which have not yet signed or ratified it, to accede to the 2006 UN Convention on the Rights of Persons with Disabilities, which would only enhance the protection of vulnerable adults within the EU;
 5. Calls on the Commission to propose legislation on the mutual recognition of Member States' statuses of disability and legal protection measures which limit, or transfer to another, a vulnerable adult's decision-making powers, and supports the introduction of clear rules on jurisdiction in order to prevent conflicts of interest or other legal issues caused by questions of guardianship of vulnerable adults by family members who live in more than one Member State;
 6. Requests that the Commission finances a study to compare Member States' legislation on vulnerable adults and protection measures to confirm where legal issues could occur, and what measures would be needed at the EU or Member States level to solve any such issues; the study should also address the issue of institutionalised adults with intellectual disabilities as regards their guardianship and the possibility for them to exercise their legal rights; calls on the Commission to organise a series of conferences for legal professionals directly involved in such cases and to take into account the results of the study and the opinion of professionals in future legislation;
 7. Calls on Member States and the Commission to further investigate national and cross-border legal measures to allow for greater "supported decision-making" by vulnerable adults in the place of legal incapacity or the surrendering of decision-making rights to a guardian; calls for "supported decision-making" to be used for as long as possible and as the first and foremost option in most cases; calls for greater focus to be given to empowering the elderly and other vulnerable adults;
 8. Calls on Member States to ensure that protective measures are proportionate to the state of the vulnerable adults so that individual EU citizens are not denied a legal right when they still have the ability to exercise that right;
 9. Calls on Member States to take measures to protect vulnerable adults from becoming

victims of identity theft or fraud or other telephone or cyber-crimes, including legal measures to enhance the protection of and/or limit access to a vulnerable adult's personal data;

10. Supports the creation of secure mechanisms, subject to robust rules for the protection of personal data and rules on the limitation of access, for the sharing of best practices and other information regarding protective measures currently in force between Member States, including the possibility of sharing information as to the protection status of a vulnerable adult between Member States' judicial systems;
11. Reminds the Commission and Member States that not all vulnerable adults are so because of advanced maturity and asks that steps be taken not only to strengthen the legal protection and rights of elderly vulnerable adults, but also those adults who are vulnerable because of severe physical and/or mental disabilities, and to take into account their needs as well when taking future social measures to ensure these legal rights;
12. Calls on the Council and the Commission to work to clarify other issues related to the free movement of all elderly EU citizens in the Union, including national laws providing for “alimony” payments by adult children to their parents who have financial difficulties, questions of the rights of access to and use of property which has been transferred from an elderly adult to an adult child for reasons of retirement, and other issues which could weaken an elderly person's ability to defend their fundamental rights against the will of their adult child or other relation.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	4.11.2008
Result of final vote	+: 12 -: 0 0: 0
Members present for the final vote	Mihael Brejc, Maddalena Calia, Giusto Catania, Jean-Marie Cavada, Agustín Díaz de Mera García Consuegra, Urszula Gacek, Inger Segelström, Csaba Sógor, Vladimir Urutchev, Manfred Weber
Substitute(s) present for the final vote	Adamos Adamou, Luca Romagnoli

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	17.11.2008
Result of final vote	+: 19 -: 0 0: 0
Members present for the final vote	Carlo Casini, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Neena Gill, Othmar Karas, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Manuel Medina Ortega, Aloyzas Sakalas, Diana Wallis, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitute(s) present for the final vote	Jean-Paul Gauzès, József Szájer, Jacques Toubon, Ieke van den Burg