

# CCBE position paper on the European Commission proposed Regulation on the protection of vulnerable adults

21/03/2024

## EXECUTIVE SUMMARY

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 46 countries, and through them, more than 1 million European lawyers.

The CCBE greatly appreciates the efforts of the European Commission in striving to ensure better protection of vulnerable adults and that it signals to EU Member States the importance of this. The CCBE, however, has noted several concerns with the current proposed Regulation which should be addressed, particularly with regard to jurisdiction and the necessity that the choice of law prevails.

## 1. Introductory remarks

The CCBE would like to firstly warmly welcome the European Commission for its work on the preparation of a proposal for a Council Decision and a proposal for a Regulation on the protection of vulnerable adults (hereinafter referred to as 'proposed Regulation'). The CCBE considers this a highly important matter and has been closing following the work of the European Commission with respect to the protection of vulnerable adults, having also [responded](#) to the public consultation launched in 2022 in preparation for this proposal, as well as worked on procedural safeguards for vulnerable adults who are suspects or accused persons in criminal proceedings (see for example the CCBE [response](#) to the European Commission Recommendations on this matter in 2014).

With around 20 million vulnerable adults in the European Union (EU) and a growing ageing population, it is vital that better protection is afforded to them than currently is the case. The CCBE would like to also stress that this is not just a political issue, this is a matter of the interests of vulnerable adults which should be the main motivation behind the Regulation, and it is appreciated that the European Commission is encouraging Member States to address this pertinent matter.

It should also be noted that this proposed Regulation would be the first European Union (EU) Regulation in which a Hague Convention has been fully incorporated directly in it. Thereby, the European Commission is sending a clear signal regarding the importance of the protection of vulnerable adults and their interests, without forcing the Member States that have not signed the [Hague Convention on the International Protection of Adults](#) (hereinafter referred to as 'HCCH 2000

Protection of Adults Convention’) to accede to it, but nevertheless strongly encouraging them to do so.

In addition, the CCBE wishes to flag that while the motivation and approach of the proposed Regulation is admirable, the practicality/feasibility and implementation of the proposed Regulation will need further work, especially with regard to the European Certificate of Representation under Chapter VII and the registers under Chapter VIII. In terms of practicality, the CCBE further would like to stress the usefulness of attaching the HCCH 2000 Protection of Adults Convention to the Regulation.

## **2. Observations on the provisions of the proposed Regulation**

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### **2.1. Chapter I – Scope and definitions**

#### **2.1.1. Article 1**

With regard to Article 1(g) on the digitalisation of the communications and Article 1(h) on the creation of a European Certificate of Representation, the CCBE would like to flag the sensitivity and possible issues which may arise in terms of data protection. In relation to these issues, the CCBE wishes to express agreement with the remarks and recommendations made by the European Data Protection Supervisor in its [Opinion](#) on the proposed Regulation. The CCBE notes also that the e-CODEX mechanism should guarantee data security.

#### **2.1.2. Article 4**

The CCBE considers that the article is not written in a clear manner and considers that the article itself is not necessary to be included in the Regulation.

In addition, the CCBE would like to generally highlight in relation to the use of the Latin phrase “mutatis mutanda” instead of English text, that the EU should strive to make the Regulation as understandable as possible, especially by vulnerable adults which this Regulation is for, and to limit any misinterpretations.

### **2.2. Chapter II – Jurisdiction**

#### **2.2.1. Article 5**

The CCBE had extensive discussions on this article and would like to highlight concerns about situations where a vulnerable adult is removed without their volition. Examples of this include situations in which a family member takes a vulnerable adult from somewhere where they were very well protected to another country where they are less protected as they wish to take their money, for example. In the discussions, several practitioners noted more frequent cases like this and wanted to flag that this is a very real danger that should be addressed. Moreover, it can also lead to a risk of forum shopping.

With such a risk in mind, the CCBE would like to propose adding in the recitals of the Regulation a provision regarding the need for intention in relation to the change of habitual residence or a reference to the change of actual residence of the vulnerable adult without consent as it may be helpful for the courts. Accordingly, a possible wording which could be included in the recitals is as follows:

*"In assessing its jurisdiction, the court of the habitual residence of the vulnerable adult should assess the effectiveness of that residence, in particular by verifying the adult's intention to settle and live in that State, especially in the event of a recent change of habitual residence. The judge should ensure that the vulnerable adult consents to reside in the State in question".*

Moreover, the CCBE questioned whether it would be useful or necessary to allow a period of 3 or 6 months for residence to be deemed to have become habitual, while also noting that it may be a burden for somebody who has voluntarily moved to have to go back if something happens within that time period.

Furthermore, the CCBE also raised during its exchanges the issues relating to the determination that an adult is vulnerable, as the appreciation and understanding of vulnerability varies from country to country.

### 2.2.2. Article 6

The CCBE would like to express serious concern in relation to this article and wishes to strongly stress the pertinence that the choice of jurisdiction must be the priority and prevail, which under the current wording of Article 6, it does not.

In addition, the CCBE would like to highlight some concerns raised during the exchanges on this article, including the suggestion that it must be for somebody else to prove that an adult's choice might not be in their interest. Furthermore, the danger of the concept of what is in their "interest" was also mentioned, as well as that adults with capacity at the time can make decisions which are not in their own interests, and it should be respected. In view of the points raised, it is considered that Article 6(1)(b) should certainly be removed as it is not in line with the [United Nations Convention on the Rights of Persons with Disabilities](#), which the EU has ratified, and is highly inappropriate considering that this leads to there not being an actual choice in the end. However, if Article 6(1)(b) is retained, the CCBE proposes to limit its application to cases where its choice would lead to unreasonable consequences for the adult.

Moreover, in regard to Article 6(1)(c), taking into consideration that the choice of jurisdiction should be the priority, it is proposed to add at the end of the sentence "[...] have not exercised their jurisdiction **before the choice of court has been made**". The CCBE is aware that it may be a considerable change; however, it wishes to reiterate that it seems inappropriate to mention that there is a choice of jurisdiction when in reality there is not, and a false perception is given.

Given these remarks, the CCBE proposes the following amendment to Article 6(1):

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| <p>1. Notwithstanding Article 5, 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:</p> <p>(a) the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest;</p> |
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~~(b) the exercise of jurisdiction is in the interest of the adult;~~

(e) (b) the authorities of a Member State having jurisdiction under Articles 5 to 8 of the HCCH 2000 Protection of Adults Convention have not exercised their jurisdiction, **before the choice of court has been made.**

### 2.2.3. Article 7

The CCBE would like to note that Article 7 seems to be repeating Article 6(1)(c). Therefore, in view of the above-mentioned comments in regard to Article 6, the CCBE wishes to flag that this article does not work if the choice of jurisdiction is a priority as proposed above. The CCBE would like to once more reiterate that if the aim of the proposed Regulation is to encourage autonomy, and this would be contrary to that.

## 2.3. Chapter III – Applicable law

### 2.3.1. Article 8

The CCBE would like to remark that the article does not state which law applies by operation of law if no court decision has been made, and wonders if ex lege representation situations, which are not covered by the 2000 HCCH Protection of Adults Convention, have been taken into consideration when the proposed Regulation was drafted.

## 2.4. Chapter IV – Recognition and enforcement of measures

### 2.4.1. Articles 21 and 22

The CCBE would like to flag possible issues with the translations of “shall” in the proposed Regulation (and “must” under Article 33 of the HCCH 2000 Protection of Adults Convention) in languages other than English and French. It was noted that the German translation of the word “shall” under Articles 21 and 22 of the proposed Regulation is written in a way that the provisions can be perceived as not mandatory, and this should be reviewed in other translations as well as to not be contrary to the HCCH 2000 Protection of Adults Convention.

## 2.5. Chapters VIII on the establishment and interconnection of protection registers, IX on digital communication, and X on data protection

The CCBE wishes to flag the comments made under point 2.1.1. above on Article 1 of the proposed Regulation.

### **3. Concluding remarks**

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The CCBE wishes to thank the European Commission once again for their efforts in preparing a proposed Regulation, as well as a proposed Council Decision, on this pertinent matter. It is hoped that these observations are considered useful, and the CCBE remains at your disposal should you have any questions or if further comments on particular provisions would be of assistance.