



C/2024/1581

5.3.2024

Opinion of the European Economic and Social Committee on the ‘Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults’

(COM(2023) 280 final — 2023/0169 (COD))

and on the ‘Proposal for a Council decision authorising Member States to become or remain parties, in the interest of the European Union, to the Convention of 13 January 2000 on the International Protection of Adults’

(COM(2023) 281 final)

(C/2024/1581)

Rapporteur: **Pietro Vittorio BARBIERI**

Referral	European Commission, 18.7.2023
Legal basis	Article 81(2) of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	21.11.2023
Outcome of vote (for/against/abstentions)	78/0/1
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Outcome of vote (for/against/abstentions)	192/0/2

1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) welcomes the proposal for a regulation on the international protection of adults ⁽¹⁾. It considers that the absence of such legislation restricts the right of citizens to move freely under particular conditions. However, reference should be made to the UN Convention on the Rights of Persons with Disabilities (CRPD) ⁽²⁾ rather than to the Hague Convention ⁽³⁾, including with regard to the contextual definitions.

1.2. The EESC believes that such legislation could have positive effects in terms of harmonising laws on the protection of persons with disabilities and vulnerable persons, in a context in which the civil law of each country is highly uneven.

1.3. The EESC considers the instruments identified in the proposal — namely the European Certificate of Representation, the establishment of registers and monitoring — to be appropriate. It proposes that monitoring start 3 years (instead of 10) after the adoption of the proposal, and that the necessary transmission of documents start from the first year following the proposal's implementation.

1.4. The EESC also considers it important to state that, where the adoption of a legal measure against a person with a disability or a vulnerable person clearly violates human rights and international law, a Member State should not recognise such a measure. The EESC calls for this provision to be strengthened with a clear and explicit reference to an obligation, thereby converting a power into an obligation.

⁽¹⁾ COM(2023) 280 final.

⁽²⁾ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

⁽³⁾ Convention of 13 January 2000 on the International Protection of Adults (HCCH 2000 Protection of Adults Convention), The Hague Conference on Private International Law (HCCH).

1.5. The EESC calls for a substantial revision of the text based on the legal principle of regulatory hierarchy, according to which the CRPD, in particular Articles 12 and 19 thereof, is the primary legal principle of reference. The same documents cited in the accompanying report to the regulation (footnotes 14 and 15, p. 5) propose a statement by the UN Special Rapporteur on the rights of persons with disabilities which clearly states: 'States that join the Hague Convention should be clear that their primary obligation is to phase out guardianship (under the CRPD), and should not fall back on the Hague Convention as an excuse or pretext to preserve it'.

1.6. In particular, the EESC calls for the following definition to be amended: 'vulnerable adults' (on page 4 of the proposal), to 'adults with disabilities and vulnerabilities'.

1.7. The EESC rejects the first paragraphs of Articles 2 and 35 on the grounds that they contravene the CRPD, and suggests replacing 'adults who ... are not in a position to protect their interests' with 'adults who ... require support in taking decisions'.

1.8. The EESC rejects Article 2(3)(e) on the grounds that it contravenes the CRPD, and proposes replacing it with 'the designation and functions of any person or entity entrusted with powers of representation'.

1.9. The EESC proposes that the introduction of Article 10 be replaced with the following: 'In order to protect human rights, the rule of law and the Treaties of the European Union, a measure taken in another Member State cannot be recognised'.

1.10. The EESC rejects Article 21 in its entirety as it clearly contradicts the CRPD, and calls for it to be removed.

1.11. The EESC proposes the following addition to Article 58: 'Member States, as parties to the United Nations Convention on the Rights of Persons with Disabilities, should interpret and implement this Regulation in line with the Convention'.

1.12. The EESC calls for Article 66(1) to be amended to read: '3 years after the entry into force' instead of '10 years after the entry into force', and proposes that Article 66(2) be amended to read '1 year after the entry into force' instead of '3 years after the entry into force'.

1.13. The EESC argues that support measures adopted in accordance with the legislation of one EU country must be recognised in another EU country when the authority involved in the legal act is entitled to do so under the applicable rules of the Member State in which the measures were established, without prejudice to the annotations or legalisations needed for the document to circulate in the EU.

2. General comments

2.1. To date, the EU's objectives in the area of the protection of adults have been hindered by the various private international law rules established by the individual Member States. This lack of approximation is a barrier to the full enjoyment of people's civil and social rights.

2.2. At least three problems can be traced back to the patchwork of Member States' private international law: positive conflicts of jurisdiction (in which two or more Member States consider that they are competent with regard to one particular person); the absence of circulation of protection measures (a protection measure recognised in one Member State might not be guaranteed in another); and difficulties establishing a dialogue between the authority of the state in which the adult is currently located and the authority of the state in which that person would like to live.

2.3. One of the proposals highlights the importance of the HCCH 2000 Protection of Adults Convention and calls on the Council of the European Union to authorise the Member States to ratify the Convention, if they have not yet done so, or to remain parties to it if they have already ratified it. The second proposal suggests the adoption of a regulation of the European Parliament and of the Council in order to ensure that the Member States work together more smoothly, with a view to achieving even greater cooperation than is called for by the HCCH 2000 Protection of Adults Convention.

2.4. The legal basis for both proposals is Article 81(2) and Article 218(6)(a) of the Treaty on the Functioning of the European Union. These stipulate that the EU has the power to adopt measures intended to approximate private international law. The Union is therefore given authority to establish the limits of Member States' civil jurisdiction and to facilitate the recognition of decisions taken by one Member State in other Member States.

3. Specific comments

3.1. With this opinion, the EESC endorses the two European Commission proposals presented on 31 May 2023 ⁽⁴⁾, which seek to bolster the protection of adults in cross-border situations; the private international law rules that apply in the individual Member States frequently clash in such situations, thereby undermining a host of acquired rights.

3.2. The EESC salutes the attempt made in both these proposals to approximate the rules that apply under private international law.

3.3. The EESC is pleased that the Commission is underscoring the importance of the United Nations Convention on the Rights of Persons with Disabilities. In March 2021, the Commission adopted the Strategy for the Rights of Persons with Disabilities 2021-2030 ⁽⁵⁾. This strategy builds on the European Disability Strategy 2010-2020, and will continue working towards empowering people with disabilities, ensuring that they enjoy their civil and social rights.

3.4. However, the EESC calls on the Commission to focus greater efforts on upholding the CRPD, particularly Articles 12 and 19 thereof, which safeguard people's legal capacity and ability to make their own choices and guarantee their complete autonomy and full integration into and participation in society.

3.5. The EESC considers that the proposal for a regulation is in line with the HCCH 2000 Protection of Adults Convention in terms of principles and content and because there would be no legal conflict between the two texts. Indeed, Article 49 of the HCCH 2000 Protection of Adults Convention allows for the possibility of waivers to the Convention by one or more states. Such a waiver is authorised solely with regard to the protection of a person habitually resident in one of the states in question. Moreover, these agreements do not render the Hague Convention ineffective.

3.6. The HCCH 2000 Protection of Adults Convention is in force in many EU countries and already applies in a number of third countries. The EESC calls on those Member States which have not yet ratified the Convention to do so.

3.7. The EESC calls for the subsidiarity principle to be upheld. Legal barriers arising in cross-border cases of the protection of adults require legislative action by the European Union. On their own, the Member States are not able to remove barriers such as discontinued protection, non-recognition of foreign measures and most importantly the lack of recognition of the will and preferences expressed by an adult. The proposed regulation seeks to approximate this area, doing away with conflicts and divergent meanings in Member States' private international law rules.

3.8. With regard to the grounds for refusal of recognition set out in Article 10 of the proposal for a regulation, the EESC calls for it to be clearly stated that a measure taken by another Member State should not be recognised, in the cases specified in that Article, as otherwise it would violate human rights, the rule of law and the Treaties of the European Union.

3.9. Support measures adopted in accordance with the legislation of one EU country must be recognised in another EU country when the authority involved in the legal act is entitled to do so under the applicable rules of the Member State in which the measures were established, without prejudice to the annotations or legalisations needed for the document to circulate in the EU.

3.10. The approximation of private international law as regards the protection of adults should better safeguard adults' civil and social rights. The regulation should ensure the circulation of powers of representation in all Member States and uphold adults' will and preferences. The EESC trusts that the application of the proposed regulation, in full compliance with the United Nations' CRPD, will not breach the proportionality principle laid down in Article 12 of the CRPD.

3.11. The EESC endorses the adoption of the European Certificate of Representation (Article 34), as it will make it simpler for legal representatives to provide proof of their role in another Member State. Compared to the certificate stipulated by the HCCH 2000 Protection of Adults Convention, this new certificate is broader and covers practical aspects such as the conditions under which it is issued, amended, corrected, revoked or suspended, as well as setting out the appeals procedure.

3.12. The EESC endorses the creation of registers for recording information on measures for the protection of people and powers of representation. These registers will be part of a decentralised and free of charge European system in which information on powers of representation will be pooled electronically. The EESC calls for the registers to be made accessible so that they can be used effectively.

⁽⁴⁾ COM(2023) 280 final; COM(2023) 281 final.

⁽⁵⁾ COM(2021) 101 final.

3.13. During the hearing on 13 September 2023, some concerns were raised by experts and the European representative organisations involved. In particular, it was overall agreed that there exists an imbalance between Article 12 of the CRPD and the Hague Convention. In point 3 of the explanatory memorandum to the proposal, it is clear that the choice favours implementing the Hague Convention. In the current text it seems to be the single reference document, whereas in legal terms the CRPD has a higher value.

3.14. The first issue concerns the target audience of the proposal. There are two types of afflictions: persons with disabilities on the one hand, and those with behavioural and substance addictions on the other. In both cases, the competent judicial authority must obviously refer to an appropriate clinical assessment.

3.15. These assessments are based on guidelines from the World Health Organisation, in particular the ICD-10 (International Statistical Classification of Diseases and Related Health Issues) and the ICF (International Classification of Functioning, Disability and Health). The first identifies the nature of the disease. The second relates to functioning and performance.

3.16. For mental health cases, the ICF is accompanied by the more specific Diagnostic and Statistical Manual of Mental Disorders (DSM), which is accepted by the relevant international scientific community. As a result, it can be concluded that the ICF definition can be taken as a reference point for both permanent and temporary disability conditions.

3.17. The EESC cannot therefore uphold the description of adults who 'by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests'. This wording is quite different from that of Article 12 of the CRPD. The EESC considers that also, and particularly when it is difficult to determine the personal faculties of an adult, their needs, will and preferences must always be deemed paramount, binding and absolute. The competent authorities of each Member State must also undertake first to convey the needs, will and preferences expressed by an adult and only then to take account of the mechanisms for representation, control, management and disposition and any other decision taken on behalf of the person in question.

3.18. The report accompanying the proposal (page 4) uses the term 'vulnerable adults'. The EESC rejects this term for two reasons: most importantly, using the wide-ranging concept of vulnerability would entail factoring in cases which are not relevant to the protection of adults. The adjective 'vulnerable' is also discriminatory, in that it makes disability part of a person's identity. The adjective modifies the person, creating a status which is not specific to a given time period and which is taken out of context. The EESC therefore proposes replacing this wording with the term 'adults with disabilities and vulnerabilities'.

3.19. Article 2(1) stipulates that the regulation shall apply 'in civil matters to the protection in cross-border situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests'. The EESC rejects this wording as it clearly contradicts Article 12 of the UN Convention on the Rights of Persons with Disabilities, which instead stipulates that all people with disabilities, irrespective of the type and degree of the disability, have the inalienable right to enjoy legal capacity on an equal basis with others. This overcomes the dichotomy between those who are capable and those who are not. It proposes a concept of progressive capacity which can be tailored to the needs of the person in question and therefore guarantees that everyone has the greatest possible control of their own affairs.

3.20. Article 2(3) of the regulation covers, without distinction, various roles and bodies such as guardianship, curatorship, representation, assistance and administration. Each of these roles has specific features and purposes. The EESC considers that each of these roles should be accepted or rejected depending on whether it is in line with Article 12 of the CRPD, which guarantees the will and preferences of the person in question.

3.21. Every adult must be free to make choices regarding every aspect of their life, without interference. The principle of 'best interests', often used to limit legal capacity and to delegate decision-making power to a third party (particularly for people with cognitive or psychosocial disabilities), must be replaced by 'supported decision-making'.

3.22. Through this principle, an adult who, for any reason, has difficulty making decisions, has the right to any support they may need to be in the best position possible to make decisions freely. Supported decision-making therefore also entails the right to refuse decisions made on their behalf by someone else. Support must therefore be guaranteed, but it is crucial to ensure that there is no undue interference in the person's own decision-making and that their will and preferences are upheld, including the right to take risks and make mistakes⁽⁶⁾. It must be ensured that the person's will and their decision-making and self-determination powers are safeguarded.

3.23. The EESC rejects the following points in the proposal for a regulation: Article 2(3)(e), Article 21 and Article 35(2)(h), since they contravene Article 19 of the CRPD, which is the reference point for persons with disabilities living independently and being included in society. Article 21 of the regulation provides for the possibility to place adults in institutions. However, as stated in Article 19 of the CRPD, in deference to the principle of equality, steps must be taken to guarantee that a person can choose their own place of residence and has access to a raft of home services, including the support needed to enable them to live in the community and so prevent isolation, dependence on the family and segregation.

3.24. Article 58 of the proposal for a regulation considers the possibility of international conventions signed by the Member States. In this regard, the EESC calls for this article to be amended to state that the Member States must interpret and apply the regulation in line with the United Nations Convention on the Rights of Persons with Disabilities.

3.25. Regarding Article 66 of the proposal for a regulation, the EESC calls for the maximum limit for the monitoring and evaluation of the regulation to be reduced from 10 years to 3, and for the transmission of data (as provided for in paragraph 2) to start from the year following its entry into force.

Brussels, 13 December 2023.

*The President
of the European Economic and Social Committee*
Oliver RÖPKE

⁽⁶⁾ General Comment No 1, UN Committee, 2014.