

_ Adopted Position Paper, 12 September 2024

The European Commission's Legislative Package on the Protection of Adults

The Notaries of Europe (CNUE) note an increasing number of citizens that may reside in several countries throughout their life. When they do, these citizens may at some point find themselves in a situation where they are no longer capable of taking care of their own interests. The notary, acting as a public official, is the trusted party that can help, be it at the moment a citizen becomes incapacitated or in preparation for the future.

On 31 May 2023, the European Commission published its legislative package on the protection of adults. It consists of two proposals: one for a Council decision authorising Member States to become or remain parties to the Hague Convention on the Protection of Adults; the other for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (hereinafter 'the Regulation').

While the European Commission has called for the ratification of the Hague Convention for quite some years, many Member States have not ratified this Convention, leading to major legal uncertainty. Therefore, the CNUE supports the Commission's proposal for the Council decision on the ratification of the Hague Convention. It welcomes the idea of an international framework for the protection of adults followed by all Member States.

The CNUE also welcomes the European Commission's proposal for the Regulation, as it relates to an issue of high importance for all citizens across Europe. It is essential that the Regulation is effective in practice and respectful of the substantive law of the Member States. In that spirit, the CNUE would like to point out the following aspects for consideration:

1. Definitions

To avoid misinterpretation, the concepts of authority, competent authority, and measures should be clarified.

a. Authority and Competent Authority

Art. 3(6) defines "authority" as any judicial or administrative authority of a Member State with competence to take measures directed to the protection of an adult's person or property. The concept of "competent authority", as defined in Art. 3(9), means a public authority of a Member State with responsibilities in matters of protection of adults. The latter term is intended to be broader, as it includes, according to Recital 18, authorities taking measures, but also authorities which draw up authentic instruments, notably notaries. This terminology might lead to misunderstanding and, therefore, should be clarified and brought in line with the terminology used in other EU private international law Regulations.

b. Competent Authority and Notaries

Given their importance in the protection of adults, notaries should be explicitly mentioned in the Regulation. This is also in line with other secondary law. In that spirit, the following amendment of Recital 18 is suggested:

*(18) For the purposes of this Regulation, and in line with the terminology used in the HCCH 2000 Protection of Adults Convention, the concept of ‘authority’ should be interpreted as referring to the judicial or administrative authorities taking measures directed to the protection of the adult. More broadly, a ‘competent authority’ should be interpreted as referring to a public authority of a Member State with responsibilities in matters of protection of adults. This includes authorities taking measures and authorities **such as notaries** drawing up authentic instruments and ~~authorities~~ issuing attestations, forms or the European Certificate of Representation. It further includes other authorities, or entities acting in an official capacity in matters related to the protection of adults, such as those that are responsible for the supervision or implementation of measures.*

c. Measures and Confirmation

According to the structure of the Regulation, neither a confirmation of a power of representation nor its registration, even if done by a (judicial or administrative) authority, makes it a “measure”, as defined in Art. 3(2). To avoid misunderstanding, this should be explicitly stated. Therefore, we suggest the following amendment to Recital 44:

(44) To ensure a continuous protection of adults in cross-border situations in the Union, competent authorities and Central Authorities should have access to relevant information on the existence of measures taken by other authorities, including those measures that have been taken in another Member State. In addition, it is crucial for safeguarding of the right to autonomy and freedom to make one's own choices that the will expressed by an adult in powers of representation is respected, even in cases where those powers of representation have been granted by the adult in another Member State or confirmed by competent authorities of another Member State. In order to improve the provision of information to relevant competent authorities and Central Authorities and to prevent parallel proceedings or failure to take account of powers of representation, Member States should be required to set up and maintain one or more registers recording data related to the protection of adults. Protection registers should record mandatory information concerning measures taken by their

*authorities and, where their national law provides for a confirmation by a competent authority of powers of representation, mandatory information concerning those confirmed powers of representation. **It should be noted that a power of representation does not qualify as measure merely because it is registered or confirmed.** To ensure interoperability and availability of information related to the protection of adults in the Union, those Member States that have established, prior to the adoption of this Regulation, registers of protection measures, of confirmed powers of representation, or other types of powers of representation which are registered under their national law, should make the same mandatory information available in those registers.*

2. The Scope of Application and Public Registers

Regulation aims at the protection of adults. Other areas do not fall under the scope of the Regulation. In that sense, the following two clarifications concerning national registers and national form requirements are recommended:

a. Requirments of National Registers

Art. 2(4) enumerates certain areas to which the Regulation does not apply. However, unlike other international private law regulations (e.g. on successions or on matrimonial property regimes), it does not exclude requirements set forth in national registers. In line with the *acquis communautaire*, it should also be made explicit in this Regulation that requirements of national registers remain unaffected. The following article 2.4 lit. (j) could be added:

4. *This regulation does not apply to: [...]*
- (j) Any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.**

b. National Form Requirements

The Regulation does not affect national form requirements. Independent from whether the power of representation is confirmed or registered, these form requirements still need to be respected keeping in mind the equivalence of function. Even though this already follows from the current scope of application, we suggest to make this point explicit, as other secondary EU legislative acts also do so. Therefore, the following paragraph 2(6) should be added:

- 6. This Regulation is without prejudice to national form requirements.**

3. Issuance of the European Certificate of Representation

Art. 36 is concerned with the issuance of the European Certificate of Representation. In its current form, the term “issuing authority” (Art. 36[2]) may lead to confusion as it is intended to be broader than the term “authority” as defined in Art. 3(6). To bring Art 36(2) in line with the definitions in Art. 3 and Recital 18, we propose to use the passive voice:

2. *The Certificate shall be issued in the Member State by: [...]*

4. Interconnection of Registers

The Notaries of Europe welcome the interconnection of protection registers. Currently, it is difficult in cross-border cases to receive information on whether a power of representation or a protection measure already exists. This information is crucial for judges and other officials when evaluating whether a protection measure is necessary or not. However, to make the interconnection of protection register as beneficial as possible, the following points should be taken into consideration.

a. Establishment of Protection Registers

Art. 3(12) correctly defines the protection register as a register where measures directed to the protection of an adult or confirmed powers of representation have been registered. To avoid misunderstandings and in the spirit of coherence, “or” should be replaced by “and” in Art. 45(2) lit. (a) and lit. (b), which would read as follows:

2. *The information recorded in the registers referred to in paragraph (1) shall include the following (‘mandatory information’):*
- (a) *an indication that a measure has been taken or, where applicable, that powers of representation have been granted **and** confirmed;*
 - (b) *the date of the first measure as well as the date of the subsequent measures taken, or, where applicable, the date when the powers of representation were granted by an adult **and** were confirmed by a competent authority;*

b. Condition of Access to Information

Art. 48 of the Proposal provides that Member States shall ensure that the information referred to in Article 47(2) is available to those competent authorities or Central Authorities of a Member State which: (a) have access to the mandatory information under their national law; (b) have a legitimate interest in accessing this information. In line with EU data protection principles, both requirements are cumulative. This also follows from Recital 58, which makes clear that legitimate interest is always required. To avoid misunderstanding and to make the

cumulative nature explicit, the word ‘and’ should be added in Article 48(2). The following wording is suggested:

2. *The information available through the system of interconnection shall only be available to those competent authorities or Central Authorities of a Member State which:*
 - (a) *have access to the mandatory information under their national law; **and***
 - (b) *have a legitimate interest in accessing this information.*

5. Digital Communication

Art. 51(2) prescribes qualified electronic signatures and seals for the communication between competent authorities or Central Authorities pursuant to Art. 49. In contrast, Art. 51(3) lowers the standard of legal certainty for communication through the European electronic access point according to Art. 50. Indeed, according to Art. 51(3), advanced electronic signatures and seals are also considered valid for use. This significantly lowers the standard of protection without any need. In addition, allowing advanced electronic signatures and seals also risks to create disparity of electronic tools in use and thereby threaten the EU-wide uniformization of protection standards. Finally, admitting only qualified electronic signatures simplifies the legal framework and thereby reduces complexity. Therefore, Art. 51(3) should be deleted and Art. 51(2) reframed as follows:

- (2) *Where a document transmitted as part of the electronic communication under Article 49(1) **or Article 50** requires or features a seal or handwritten signature, qualified electronic seals or qualified electronic signatures as defined in Regulation (EU) No 910/2014 may be used instead.*

About the CNUE

The Council of Notariats of the European Union (CNUE) is the official body representing the notarial profession in the European institutions. It brings together the notariats of the 22 Member States that know this institution: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In these 22 Member States, the notaries serve more than 400 million EU citizens. The Notariats of North Macedonia, Montenegro, Serbia, Turkey and Ukraine are observer members. The CNUE represents more than 45 000 notaries and 200 000 employees.