



Council of the
European Union

Brussels, 2 June 2023
(OR. en)

10108/23
ADD 3

**Interinstitutional File:
2023/0169(COD)**

JUSTCIV 80
JAI 770
EJUSTICE 20
CODEC 1012
FREMP 173
IA 129

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	1 June 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2023) 154 final
Subject:	COMMISSION STAFF WORKING DOCUMENT Subsidiarity Grid Accompanying the document 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

Delegations will find attached document SWD(2023) 154 final.

Encl.: SWD(2023) 154 final



EUROPEAN
COMMISSION

Brussels, 31.5.2023
SWD(2023) 154 final

COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

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} - {SEC(2023) 208 final} - {SWD(2023) 155 final} -
{SWD(2023) 156 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?

1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?

This subsidiarity grid concerns *the proposal for the Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults* (hereinafter as: 'the Regulation Proposal'). The Proposal harmonises **private international law rules** to be applied among Member States to the **cross-border protection of adults** who, by reason of an impairment of insufficiency of their personal faculties, are not in a position to protect their interests (hereinafter as: 'adults')¹.

The Regulation Proposal will apply in civil matters to the protection of adults in cross-border situations and will provide rules in particular on:

- international jurisdiction on measures aimed at the protection of adults ('protection measures');
- law applicable to protection measures and to powers of representation granted by an adult to be exercised when that adult is not in a position to protect his or her interests ('powers of representation');
- recognition and enforcement in one Member State of protection measures taken in another Member State;
- acceptance in one Member State of authentic instruments drawn up or registered by competent authorities of another Member State;
- cross-border cooperation of competent authorities and Central Authorities and their communication, including through digital means;
- digital communication among competent authorities and natural and legal persons;
- forms simplifying the cross-border proceedings and dealings, including rules on the creation of a European Certificate of Representation to be used by (a) representative(s) of an adult to invoke his or her powers abroad; and
- interconnection of protection registers where information on protection measures taken and powers of representation registered or confirmed in a Member State are recorded.

The legal basis for the Regulation Proposal is **Article 81(2) of the Treaty on the Functioning of the European Union** ('TFEU'). In accordance with this Article, the Union can adopt, in the ordinary legislative procedure and based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases, **measures to develop judicial cooperation in civil matters having cross-border implications**. This includes, among others, measures aimed at ensuring: the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; the effective access to justice; or the elimination of obstacles to the proper functioning of civil proceedings.

1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?

In the case of the cross-border protection of vulnerable adults, the **Union's competence is shared**. In accordance with Article 4(2)(j) TFEU, shared competence applies in the area of freedom, security and justice. Measures to develop judicial cooperation in civil matters having cross-border implications under Article 81(2) TFEU, such as this Regulation Proposal, belong to this area.

This shared competence is to be distinguished from the Member States' exclusive competence to adopt measures of *substantive* civil law in the field of the protection of adults, such as the rules governing the conditions and consequences of a protection measure, as well as, where applicable, the rules governing the establishment, the extent, the validity and the termination of powers of representation ('substantive law in the field of the protection of adults'). In purely national cases, Member States are also exclusively competent to adopt *procedural rules*, such as rules how to seize a court, how to serve a decision etc.

¹ The insufficiency or impairment of the personal faculties of the adult can be permanent or temporary and, among others, of physical or psychosocial nature, or in connection with an age-related disease, such as Alzheimer's disease, or resulting from a health condition, such as coma.

2. Subsidiarity Principle: Why should the EU act?

2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2²:

- Has there been a wide consultation before proposing the act?
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

Yes. First, in conformity with Article 2 of Protocol No. 2, **the Commission conducted extensive consultations** in the preparation of the Regulation Proposal. These consultations were conducted together for this Regulation Proposal and for a parallel initiative concerning 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* (hereinafter as: ‘the Council Decision’)³.

The consultations on both proposals included: (i) open public consultation and call for evidence (in early 2022); (ii) a meeting with stakeholders (September 2022); (iii) a meeting with experts from Member States’ authorities (October 2022); (iv) a consultation of the European Judicial Network in civil and commercial matters; and (v) a fact-finding mission by the European Network of Justice Inspection Services (RESIJ). The consultations showed a practical need and strong support by most stakeholders for Union measures in the area of the cross-border protection of adults.

Besides the consultation activities conducted by the Commission, **further consultations were undertaken by an external contractor** that prepared a study used in the preparation of the impact assessment. The contractor used the following consultation tools: (i) semi-structured interviews; (ii) case studies; and (iii) two focus groups used for example to quantify the costs and benefits associated with the Regulation Proposal and other policy options.

The feedback received in the consultation activities informed the preparation of the Regulation Proposal and the impact assessment accompanying it. A detailed summary of the outcome of the consultations is included in the impact assessment.

Second, in preparing the Regulation Proposal, the Commission assessed the subsidiarity of the measures to be adopted at Union level both in the explanatory memorandum of the Regulation Proposal and in the impact assessment (Section 3 of the impact assessment). The problems to be addressed by the Regulation Proposal were quantified in the impact assessment on the basis of the estimated number of ‘vulnerable adults’ in cross-border situations in the Union. The costs incurred by those adults, their families and representatives were also estimated.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Yes. Both the explanatory memorandum and the impact assessment accompanying the Regulation Proposal (in its Section 3) include justifications regarding the compliance of the Regulation Proposal with the subsidiarity principle.

The explanatory memorandum states that:

The policy objective of having an efficient and harmonised set of PIL rules applying to all Member States in cross-border cases of protection of adults can be better achieved through a Union initiative.

The existing problems faced by adults in cross-border situations have an inherent Union dimension because they are of cross-border nature and impact fundamental rights of adults and their right of free movement. The rules on international jurisdiction, applicable law and recognition apply in cross-border context and thus require the involvement of at least two States. The Member States conflicting or diverging PIL rules in the area of the protection of adults cause multiple issues in cross-border situations in the Union, such as discontinued protection of adults, non-recognition of foreign measures, additional judicial proceedings, or

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

³ The Council Decision, for its part, obliges Member States to join *the Convention of 13 January 2000 on the International Protection of Adults* providing private international law rules on the cross-border protection of adults to be applied with third States that are contracting Parties to the Convention.

lack of recognition of the wills and preferences expressed by an adult. Member States acting individually could not satisfactorily remove those problems.

Similarly, the modernisation and digitalisation of judicial cooperation requires the application of harmonised rules (for instance uniform forms streamlining the cross-border procedures), and the use of interoperable tools (forms, software, registers etc.), which can only be developed at the Union level.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

No.

There is a growing number of cross-border cases where adults require support with decision-making with or continued protection in matters such as managing their assets or real estate located in another Member State, relocating to another Member State or undergoing emergency or planned medical care in another Member State. In those cross-border situations, adults are confronted with the **complex and sometimes conflicting private international law rules⁴ of Member States**. This leads to situations where adults, their families and their representatives experience **significant legal uncertainty** as to what rules will apply to their case and as to the outcome of the procedures and formalities they need to carry out. To ensure that the adults' protection lasts across borders or that they have access to their rights abroad, they often have to go through **long and expensive proceedings**. In some instances, **the protection measures concerning adults or the powers entrusted in their representative are eventually not recognised**, either by foreign courts or by non-judicial actors like banks, medical staff or real estate agents.

Since these difficulties stem from the differences and divergences between Member States' private international law rules applicable to the protection of adults and from a lack of framework for effective cross-border cooperation, **the problems have an inherent cross-border dimension**. The rules on international jurisdiction, applicable law and recognition apply in cross-border context and thus require the involvement of at least two States. **The consequences of the problems also have a Union dimension** because the problems impact fundamental rights of adults in cross-border situations and may even dissuade adults from exercising their right of free movement within the Union.

Due to the cross-border nature of the problems, stemming in particular from the differences and divergences between Member States' private international law rules, Member States cannot solve them by an uncoordinated change in their national private international law rules. **Harmonisation of these rules across Member States would thus be required to solve the existing problems.**

An international convention, *the Convention of 13 January 2000 on the International Protection of Adults* ('the HCCH 2000 Protection of Adults Convention') exists and provides for certain private international law rules in the field of the cross-border protection of adults. Twelve Member States are currently contracting Parties to that Convention⁵. In addition to those 12 EU Member States, the Convention has three other Contracting Parties⁶. The Convention provides for rules on international jurisdiction, applicable law, recognition and enforcement of protective measures, as well as provisions on powers of representation. It also establishes mechanisms of cooperation between the authorities and Central Authorities of the countries which have ratified the Convention ('Contracting Parties'). This Convention is considered as an efficient and flexible private international law instrument that is fit for its purpose at global level.

Since the Convention provides for uniform private international law rules concerning the protection of adults, it could be argued that the **ratification of the HCCH 2000 Protection of Adults Convention by all Member States** could provide solutions to the problems experienced by adults in cross-border situations in the Union, should all Member States join the Convention. In addition, as mentioned above, the Regulation Proposal is accompanied by another proposal for a Council Decision obliging all Member States to join the Convention within a certain timeframe. It should be however noted in this regard that the HCCH 2000 Protection of Adults **Convention provides only for 'core' private international law rules aimed for the global**

⁴ Those rules determine for instance which court or other authority competent to take protection measures has jurisdiction, which law applies to a case, and how to recognise or give effect to a protection measure taken or powers of representation established abroad.

⁵ Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Malta, and Portugal are party to the HCCH 2000 Protection of Adults Convention.

⁶ Monaco, Switzerland, and the United Kingdom (in respect to Scotland).

application. This means that the rules included in the Convention: (i) do not (or not sufficiently) regulate all relevant aspects linked to the cross-border protection of adults; and (ii) do not reach the potential that the European Area of Justice and the principle of mutual trust among Member States inherently provide for a closer cooperation among Member States.

- First, the HCCH 2000 Protection of Adults Convention does not include many rules that are either commonplace in other areas of civil justice in the Union or are necessary in the Union of the 21st century. These include for instance provisions establishing basis for digital communication, rules on the circulation of authentic instruments among Member States; binding rules concerning the choice of jurisdiction made by an adult; rules on the provision of legal aid; rules establishing a uniform certificate available in all languages and in all contracting Parties that would prove one's representative powers abroad with a high level of legal certainty; or rules on the provision of information to competent authorities that a particular adult is under a protection measure in another Member State or has granted powers of representation to someone in another Member State. In addition, the Convention does not provide mechanisms for close cooperation among competent authorities that are commonplace for other Union's *acquis* in the civil justice area, such as the exchanges of information and regular bilateral meetings in the context of the European Judicial network in civil and commercial matters etc.
- Second, the Convention provides a minimum set of rules that can be applied internationally and on which an international consensus could be reached. These rules are thus, by design, intended to apply even among countries that have different legal systems in general and on the protection of adults in particular and that do not, like the Member States, have a developed high degree of judicial cooperation, high level of mutual trust, or uniform interpretation of the rules by the CJEU in line with the same fundamental rights standards. The Convention thus keeps in place stricter safeguards than those that are common in the Union in other areas of civil justice. As compared to the Convention, the Regulation Proposal would thus for instance (i) limit those grounds for refusal of the recognition of a protection measure that are not necessary in the Union; or (ii) do away with *exequatur* procedure; or (iii) establish closer cooperation.

These limitations of the HCCH 2000 Protection of Adults Convention were detailed in the impact assessment accompanying the Regulation Proposal⁷. While the Convention is an efficient tool at the global level, its limitations are especially noticeable in the Union where the increasing cross-border mobility of people and the growing number of adults who require support or protection in cross-border situations are a reality.

The Convention thus is not able to address all the problems currently faced by adults, their families and their representatives in cross-border situations in the Union. It follows that **the ratification of the Convention by all Member States would address some of the problems experienced by adults**, their families and representatives in the Union, **but some not at all or not completely**.

In contrast, a Union regulation, such as the one proposed, would take over the 'core' private international law rules contained in the Convention and would streamline them and modernise them. It would fill any existing gaps and also address future needs for the cross-border protection of adults. The regulation would apply only among Member States. Those Member States that are or become a party to the HCCH 2000 Protection of Adults Convention would apply this Convention vis-à-vis third States – other contracting Parties to the Convention.

Finally, it should be highlighted that **some of the measures** introduced by the Regulation Proposal, by their very nature, **cannot be adopted by individual Member States**. These rules, such as the European Certificate of Representation that will have uniform evidentiary effects concerning the powers that a representative of an adult has throughout the Union, can only be introduced through a directly applicable legislation at the Union level. Similarly, interoperable digital solutions (such as the interconnection of national registers or the digital communication means for cross-border proceedings) cannot be developed by a Member State acting on its own.

In conclusion, **the problems in the evolving area of the cross-border protection of adults cannot be solved by individual Member States acting on their own. They also cannot be, in their varied nature**

⁷ See in particular Annexes 6 and 7 of the impact assessment.

and comprehensively, solved by the mere ratification of the HCCH 2000 Protection of Adults Convention by all Member States.

- (a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

Yes. The problems at the heart of the Regulation Proposal concern exclusively cross-border situations.

In the absence of statistics, the impact assessment estimated that there are currently between 145 000 and 780 000 adults in cross-border situations in the Union. This number is growing steadily in time. Each of those adults or their representatives may experience difficulties and incur avoidable costs related to the cross-border nature of their situation. It was estimated that the streamlining of the current patchwork of diverging national rules concerning the cross-border protection of adults in the Union would bring about significant cost savings not only for the adults, their families and representatives, but also for Member States' competent authorities. These cost savings were quantified in the impact assessment report, both for the preferred policy option, *i.e.* where the Union adopts both the Regulation Proposal and the Council Decision ('preferred policy option'), as well as for the other options where the Union adopts only one of them.

- (b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁸ or significantly damage the interests of other Member States?

Yes. The absence of an action at the Union level would conflict with core objectives of the Treaty. This is because the current status quo leads to problems where the rights of adults, including their fundamental rights, are hampered. Those problems may affect in particular adult's access to justice, right to property, right to be heard, autonomy and self-determination, dignity, equality and the right to free movement.

As explained above, Member States acting on their own cannot tackle the causes of the problems. The absence of a Union action would thus fail to prevent the problems and their consequences, in particular to uphold the fundamental rights of adults in cross-border situations. It would thus hinder the achievement of the objectives and values upheld by the Treaty, in particular by Article 3 of the Treaty on the European Union⁹ and the Charter of Fundamental Rights of the European Union.

- (c) To what extent do Member States have the ability or possibility to enact appropriate measures?

As explained above, Member States acting individually could not satisfactorily remove the problems experienced by adults, their families and representatives in cross-border situations in the Union. To that effect, uniform private international law rules applicable throughout the Union, coupled with additional measures improving the cooperation among competent authorities of different Member States and streamlining the cross-border procedures, would be appropriate.

Member States can (and under the Council Decision would be obliged to) join the HCCH 2000 Protection of Adults Convention. As detailed above, this instrument would, however, fall short of effectively tackling all the problems experienced by the adult in cross-border situations in the Union. Furthermore, without a Union action, the adoption of measures that are common in other areas of the Union *acquis* (that facilitate cross-border proceedings and thus further protect the rights of parties to those proceedings) would not be possible.

- (d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

The current problems stem from (i) conflicting and complex rules on applicable law, (ii) conflicting rules on jurisdiction, (iii) conflicting or complex rules on recognition of foreign measures and powers of representation, (iv) unnecessary or complex enforcement proceedings, (v) absent or limited cooperation among national competent authorities, (vi) lack of accessible information on foreign law; and (vii) lack of

⁸ https://europa.eu/european-union/about-eu/eu-in-brief_en

⁹ See in particular the following objective in Article 3 Treaty on the European Union: *[The Union] It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.*

training and information. In addition, a number of external factors influencing the problems were identified and described in the impact assessment.

In general, the problems stemming from those causes should be most pronounced in relation to those Member States that are not contracting Parties to the HCCH 2000 Protection of Adults Convention, since they currently do not have harmonised private international law rules with any other Member States and cannot use the cooperation mechanisms under the Convention to solve cross-border cases. However, this is not the only factor influencing the existence or prevalence of problems in situations involving cross-border protection of adults. Notably, the problems may be (more) marked between Member States with a higher population of vulnerable adults with links to other Member States. In addition, the problem is also more noticeable between Member States with the same language or in border regions of some Member States.

In addition, those Member States that are contracting Parties to the HCCH 2000 Protection of Adults Convention have a uniform set of private international law rules vis-à-vis those other 11 Member States that are also contracting Parties. However, the problems remain in relation to those Member States that are not contracting Parties to the Convention (and even vis-à-vis the other contracting Parties to the Convention in instances where the Convention does not include sufficient rules).

Therefore, to a varying extent, the problems affect or may affect all Member States. In particular, it should be noted that with the ageing population and the increasing number of people with disabilities of all ages and with the increasing mobility of the Union's population, the problems will continue to increase in the future throughout the Union.

(e) Is the problem widespread across the EU or limited to a few Member States?

See the answer to 2.3(d).

(f) Are Member States overstretched in achieving the objectives of the planned measure?

No. First, the Regulation Proposal would not affect the substantive law in the field of the protection of adults or procedural rules currently applied by each Member State to the protection of adults in domestic situations.

Second, the private international law rules included in the Regulation Proposal partially reflect the rules already existing in Member States' private international law rules. This applies especially for Member States that already are contracting Parties to the HCCH 2000 Protection of Adults Convention, since the Regulation Proposal builds on the rules contained in the Convention. In addition, even a number of Member States that are not parties to the Convention already now apply similar rules. Member States would not have to change those rules, which will still apply to third States that are not contracting Parties to the HCCH 2000 Protection of Adults Convention. Some of them may choose to harmonize their national private international law rules with those of the Convention, but this is not imperative.

As regards the other rules included in the Regulation Proposal, they are either based on the rules already included in other Union instruments on private international law (such as the creation or running of Central Authorities, rules on the circulation of authentic instruments, multilingual standard forms, and certificates with uniform legal effects throughout the Union, or cooperation via the European Judicial Network in civil and commercial matters, interconnection of national registers) or on those measures that are currently in the process of being prepared and implemented across the board for all other EU *acquis* in the civil-law area (such as the digitalisation of communication concerning cross-border civil procedures).

Third, as regards costs, the Regulation Proposal would only lead to moderate adjustment costs for Member States. These would include, for instance, costs arising from the need to train judges and other authorities on the new rules, to set up Central Authorities, or to implement digital communication tools¹⁰. Minor recurrent costs would also be incurred (for example, costs for the issuance of European Certificates of Representation, costs of running Central Authorities, or for the continuous training of Member State authorities applying the regulation). These costs would however be offset by the savings on procedural costs made by adults, their

¹⁰ These costs would be however largely mitigated by the fact that equivalent tools are to be implemented in all other area of cross-border civil justice under the (proposal for a) *Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*.

families and their representatives and by the Member States and their competent authorities. Additional adjustment costs will also arise for the interconnection of national registers concerning protection measures and (confirmed) powers of representation. This would entail making existing registers interoperable for the interconnection, but in some Member States also creating national registers of measures and confirmed powers of representation¹¹ or digitalising them. While all other costs linked to the Regulation Proposal will not be significant, the IT-related costs for the interconnection of registers are comparatively higher, even though comparable to other systems of interconnection already established at the Union level¹².

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

The general need for having uniform private international law rules on the cross-border protection of adults and mechanisms for cooperation among Member States in this area was confirmed repeatedly by various actors¹³. This need was supported unanimously during the consultations conducted over several years.

Most Member States, in particular those that are already contracting Parties to the HCCH 2000 Protection of Adults Convention, supported that all Member States should join the Convention¹⁴. In addition, the Commission consulted Member States on the various measures that could complement the Convention at a meeting with Member States governmental experts in October 2022. Member States representatives expressed their general support for the possible measures to be included in the Regulation Proposal, in particular a European Certificate of Representation.

Besides the consultations of Member States, the Commission received feedback from legal practitioners dealing with the protection of adults in the Union, including civil servants, notaries, lawyers and judges. Legal practitioners (similarly to most of the civil society) were in favour of Union rules on the cross-border protection of adults.

It can thus be concluded that overall, most stakeholders welcome a Union legislation in this field.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

Yes. The Regulation Proposal aims to tackle difficulties experienced by adults in cross-border situations by providing common rules in the area of cross border protection of adults. **The objectives of the Regulation Proposal are to: (i) protect the fundamental rights of the adults; (ii) improve the effectiveness and speed of cross-border proceedings concerning the protection of adults, and (iii) to strengthen legal certainty and predictability in cross-border dealings.**

These objectives would be best achieved through the adoption of uniform private international rules and rules on cross-border cooperation in the form of a Union legislation applicable among Member States (combined with the ratification of the HCCH 2000 Protection of Adults Convention by all Member States). The adoption and uniform application of these rules throughout the Union cannot be achieved by Member States acting individually but can be achieved by the Union legislation. The mere ratification of the HCCH 2000 Protection of Adults Convention does not go far enough to tackle the problems of adults in cross-border situations and thus does not meet the objectives fully.

¹¹ Where national law provides for powers of representation in respect of which a competent authority can confirm that the representative vested with these powers can exercise them (since the adult is, by reason of an impairment or insufficiency of his or her personal faculties, not in a position to protect his or her interests).

¹² See for instance the IRI (Interconnection of Insolvency Registers).

¹³ Ratification by all Member States of the HCCH 2000 Protection of Adults Convention (or accession thereto) is a long-standing objective of the Union. Since 2008, the HCCH 2000 Protection of Adults Convention has been explicitly endorsed by the Council of the European Union, the European Parliament, and the European Commission. The European Parliament has actively supported not only the ratification of the Convention by all Member States but also a possible Union legislative initiative in the field of protection of adults to complement the Convention.

¹⁴ See for instance the 2021 Council conclusions where all Member States called for the ratification of the Convention: [pdf \(europa.eu\)](#).

Therefore, **for reasons of scope and effects, the objectives of the proposal would be best achieved at Union level in accordance with the principle of subsidiarity.**

(a) Are there clear benefits from EU level action?

Yes. The adoption of uniform rules on the cross-border protection of adults in the Union can be best achieved by a Union legislation.

First, there are clear benefits from the Union's legislative action as compared to an uncoordinated (legislative) action by Member States. As explained above, it is considered that such action by Member States would not tackle the existing problems in the area of the protection of adults. In that regard, an EU level action that would tackle the problems would have clear benefits, in particular for the adults, their families and representatives, as well as for Member States' competent authorities and the overall legal certainty and predictability in cross-border dealings in the Union.

The Union legislation would safeguard the rights of adults in cross-border context, in particular their equal access to justice, right to property, right to be heard, autonomy and self-determination, dignity, equality and the right to free movement. It would thus have a positive impact on the **protection of the fundamental rights of vulnerable adults** in cross-border situations. It would also have other positive legal impacts, such as by avoiding the instances where an adult or their representative need to go to court or avoiding legal uncertainty and improving the provision of information on the law that applies to the cases involving adults. It would also have a positive **social impact** as it would benefit vulnerable adults' wellbeing, health, inclusion and equality. Through the adoption of common Union rules, the cross-border procedures would be **simplified, speeded up and digitalised**. This would result in significant savings in cross-border situations in terms of costs, time and burden for both adults, their families and representatives, and for Member States' public authorities.

Second, there are **clear benefits from Union's legislative action in comparison to an international legal framework** (the HCCH 2000 Protection of Adults Convention). Given the existence of the European Area of Justice in the Union established on the principles of the high level of mutual trust and cooperation among Member States, as well as the shared fundamental rights framework (including the Charter and the UNCRPD¹⁵), the Union legislation is best suited for creating rules that are comprehensive, streamlined and modernised enough to tackle the problems faced by adults in cross-border situations in the Union. The Union legislation can thus build on the existing international law rules in the area included in the Convention, improve them and add measures that are needed and appropriate in the Union context. *(For details on those additional measures, see question 2.3 above or the impact assessment)*. In addition, the uniform Union rules would be supported by a uniform interpretation by the Court of Justice and therefore their consistent application under the control of the Court.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The current problems in the cross-border protection of adults have a significant adverse impact on the fundamental rights and other rights of those adults. In view of this, the quantitative size of the problem in terms of the absolute number of adults affected by the problems should not be considered as the prime or only indicator of the seriousness of the problem, or as the basis to assess the need for the Union to take action to address the problem.

Even considering the above, the adoption of the Regulation Proposal would result in **cost reductions for both adults, their families and representatives and for Member States' competent authorities**. These costs reductions were quantified, based on a number of assumptions, in the impact assessment.

Member States would likely to benefit from **economies of scale in implementing the Regulation Proposal together with the Council Decision** obliging them to join the HCCH 2000 Protection of Adults Convention. With these two complementary proposals, a coherent legal framework would be established both with respect to other EU Member States and to third States. Other economies of scale can be expected for the implementation of the digital tools (the digital communication and the interconnection of registers), since those measures have been adopted also in other areas of the Union's (civil) justice *acquis*.

¹⁵ United Nations Convention on the Rights of Persons with Disabilities.

Given its nature, the proposal would not have a direct impact on the functioning of the internal market, but it would have a **positive impact on the free movement of adults** within the Union as they would not be deterred from exercising their right to free movement and **on the cross-border capital flows** as the adult's rights to property and its smooth management would be protected even in cross-border situations.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

The introduction at Union level of uniform rules on private international law rules and rules on cooperation in the area of cross-border protection of adults would avoid the current problems that are faced, especially by those adults, their families and representatives but also by Member States competent authorities and the general public. This would provide greater legal certainty, reduce the length and costs of proceedings, ensure a better recognition of protection measures and powers of representation, remove gaps and inconsistencies in the protection of adults and thereby ensure that their fundamental rights are not at risk in cross-border situations.

This would be in line with the values, rights and objectives set by the Treaties.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Yes. First, the Union action enable achieving objectives and tackling the problems that the Member States cannot achieve on their own. Most importantly, one clear benefit of the Union's intervention would be the better protection of vulnerable adults in cross-border situations in the Union. This has already been elaborated above.

Second, the measures adopted under the Regulation Proposal would be standard ones, in the sense that their equivalents exist already in other areas of the Union civil-law *acquis*. Third, the Union's action would not affect the Member States' competence to regulate matters of substantive law in the field of the protection of adults or their procedural laws in this field. Fourth, given the nature of the Union intervention, the division of competences between the Member States and local and regional authorities would not be affected by the intervention.

In view of the above, **the benefits of action at Union level outweigh the loss of competence** of the Member States as regards the private international law rules and rules on cooperation in the area of cross-border protection of adults.

(e) Will there be improved legal clarity for those having to implement the legislation?

Yes.

First, the uniform rules would reduce the current legal patchwork of different and diverging national rules on the protection of adults in cross-border situations. It will thus improve the overall legal clarity, as well as predictability. This includes for instance that the measures taken or powers of representation registered or confirmed by competent authorities in one Member State would be given effect in other Member States and their content could thus be relied upon.

The legislation will improve legal certainty for vulnerable adults (current and future), their families and representatives, as well as for Member States' competent authorities and for legal practitioners having to deal with matters concerning the protection of adults. However, more broadly, the legal certainty will improve for everyone. This is because everyone might want to establish powers of representation for the situation when one cannot protect his or her interests and would want to ensure that these powers are respected in other States. In addition, under the Regulation Proposal, everyone dealing with an adult's representative entrusted with certain powers abroad would have improved legal certainty that the representative may act on behalf of the adult (or in the interest of the adult) in specific matters, thanks to, in particular, the European Certificate of Representation.

Second, the measures to be introduced by the Regulation Proposal, such as the information available in all official Union languages on the e-Justice Portal, the use of multilingual standardised forms, and the

establishment of Central Authorities that can provide assistance or information in this area, modern and direct communication tools among (competent) authorities, and practice guides and other tools to be developed by the European Judicial Network in civil and commercial matters would greatly facilitate legal clarity and predictability in the field of cross-border protection of adults.

Third, the Union rules could be further clarified by a uniform interpretation by the Court of Justice ensuring their uniform application throughout the Union.

Finally, **improving legal certainty and predictability in cross-border dealings in the area of protection of adults is in fact one of the objectives of the Union initiative.**

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

Yes. Both the explanatory memorandum and the impact assessment include an appraisal of the compliance of the proposal with the principle of proportionality. As the explanatory memorandum summarises:

The objectives of this proposal are to protect the fundamental rights of the adults, improve the effectiveness and speed of cross-border proceedings concerning the protection of adults, and to strengthen legal certainty and predictability in cross-border dealings. To that effect, the proposal harmonises the Member States' rules on international jurisdiction, applicable law, recognition and enforcement of protection measures and acceptance of authentic instruments. It also sets out rules giving effect to powers of representation in all Member States. Finally, it establishes tools to improve and expedite the cooperation between Member States in this area.

The proposal does not go beyond what is necessary to achieve its objectives.

For instance, it does not interfere with national rules governing the support provided to adults with diminished capacities; it only applies to conflict of jurisdiction, conflict of laws or recognition of foreign measures or documents in cross-border situations.

In addition, the European Certificate of Representation established in this proposal is optional and will not replace equivalent national documents providing evidence of representation.

The proposal requires Member States to establish a register of measures and of powers of representation and to interconnect it with other Member States registers, in order to ensure that the protection of adults is continuous in cross-border cases, and that their fundamental right to self-determination is respected when they move within the Union. However, the set of data to be registered and shared through the interconnection of registers under this proposal is extremely limited with a view to providing information on the existing protection of an adult. Moreover, Member States will remain responsible for designating their national authorities which can access the interconnected system of registers.

The proposal therefore respects the principle of proportionality.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

Please see the summary in question 3.1

- (a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes. **The Regulation Proposal only contains common rules to the extent necessary to achieve the policy objectives and to the extent that Member States cannot achieve satisfactorily on their own.**

The Regulation Proposal does not interfere with national substantive law in the field of the protection of

adults, nor national procedural law. The initiative is thus limited to those aspects that Member States cannot achieve satisfactorily on their own, especially private international law aspects and rules on the cooperation between competent authorities of different Member States.

The use of the standard EU tools, such as the e-Justice Portal, the European Certificate of Representation, multilingual standardised forms or digital communication tools in those cross-border proceedings would greatly improve legal clarity and efficiency of the cross-border proceedings. These measures can only be introduced through a Union legislation and not by Member States individually.

- (b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

Yes. The adoption of uniform rules on international jurisdiction, and recognition of protection measures, acceptance of authentic instruments, and applicable law on protection measures and powers of representation in cross-border situations can only be achieved through a uniform set of rules applying in the Union.

(As to the choice of a Regulation for relations among Member States instead of the HCCH 2000 Protection of Adults Convention, see the explanations above.)

At the Union level, directly applicable legislation would be necessary to ensure their uniform application and interpretation. Only a Regulation ensures a fully consistent interpretation and application of the rules in the Union and ensures full reciprocity in the cooperation (in contrast with e.g. a Directive). In addition, other measures, such as the European Certificate of Representation, the digitalisation of cross-border communication and the ease of language barriers can only be established by a Regulation. Therefore, in line with previous Union instruments on private international law and to achieve the objectives of the Union action, **the only possible legal instrument is a Regulation**.

- (c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

Yes. First, the Union action is **already limited to private international law rules** in relation to the protection of adults in cross-border situations and cooperation among Member States in that area, and does not regulate the substantive law in the field of the protection of adults or national procedural laws. In addition, the Regulation Proposal would not substantively¹⁶ change the jurisdiction and recognition rules and rules on applicable law included in the HCCH 2000 Protection of Adults Convention since those rules are already applied by competent authorities of Member States that are contracting Parties to the Convention.

Second, using a less ambitious instrument (e.g. a soft law or a directive) would not meet the objectives of the intervention (or would not be legally possible for the envisaged measures) and using less comprehensive rules (such as those under the HCCH 2000 Protection of Adults Convention) would not meet the objectives completely. As a result, the situations where adults' rights and fundamental rights are violated and they incur unnecessary costs in cross-border situations would be perpetuated. In addition, it was confirmed, including through the consultations, that **a staged approach** (such as introducing first the Convention and then, after time, a regulation) **would not be a desirable solution** since adjustment costs would then be incurred twice by Member States and legal professionals. The consideration of those adjustment needs is important in the area of civil justice in general since the rules are to be applied by many legal professionals and courts. It is even more important in the area of the protection of adults, dealing with vulnerable people.

Third, the **measures proposed by the Regulation Proposal do not go further than necessary**. For instance, the European Certificate of Representation established under the Regulation Proposal is optional and will not replace equivalent national documents providing evidence of representation. Similarly, the digital communication of natural or legal persons with competent authorities of Member States is not compulsory for those persons, the Regulation Proposal just provides for a legal basis and IT tools necessary for such a

¹⁶ Beyond specific clarifications and additions aimed at streamlining those rules for the Union's context.

communication. Those persons may (but do not have to) use these tools. In addition, the system of interconnection is limited to interconnecting a minimum set of compulsory data that are necessary to access the information whether or not a protection measure was taken or powers of representation were registered or confirmed concerning a particular adult and whether they are applicable/in force. Moreover, Member States will remain responsible for designating their national authorities which can access the interconnected system of registers. The Regulation Proposal would also not limit the functioning of the existing or future national registers, beyond the obligation that the minimum set of data is included therein.

Finally, given the lack of evidence of practical problems met by adults in cases involving the law applicable or *ex lege* representation¹⁷, which were mainly mentioned by the academia, the **Regulation Proposal does not include additional provisions** on applicable law in that respect.

- (d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The Regulation Proposal would not create any new costs for adults, their families or representatives and would significantly lower their existing costs. This in fact belongs to one of the main objectives of the Regulation Proposal.

As regards Member States, besides usual **minor adjustment costs** applicable for the adjustment to a new legislation and for the necessary training of competent authorities, the impact assessment also envisages small costs for the extension of legal aid to some specific cases or for the establishment and running of Central Authorities. **These costs would be small and outweighed by the benefits brought about by the Regulation Proposal.** This is because the labour and procedural costs of processing cases for public authorities and courts would be reduced thanks to the uniform predictable rules in the Regulation Proposal.

As regards the costs for the **digital measures under the Regulation Proposal**, **the costs would be shared between Member States and the Union.** The Regulation Proposal includes provisions **on digital communication** between national/legal persons and Member States' competent authorities through the European electronic access point and among Member States' competent authorities in the context of the decentralised IT system. This will entail some costs for the Member States and for the Union, but the impact will not be significant, because the necessary IT infrastructure would be developed for the purposes of other Union *acquis* that will be digitalised under the Proposal for the Digitalisation of Justice in the meantime. The costs borne by Member States for the **interconnection of national registers** of protection measures and powers of representation (**and their set-up in Member States where they do not exist yet**) would be higher than those for other digital solutions. **The costs of establishing, interconnecting, maintenance, and future development of the system interconnecting national registers would be financed from the general budget of the Union.** The overall costs for interconnecting and running the system of interconnection (both for Member States and the Union) would be **comparable to the costs for other systems of interconnection of registers already existing at the Union level** (*see the assessment of the costs in the impact assessment*). **The costs will be proportionate to the objective** of ensuring the protection of adults in cross-border situations and the respect for their wills and preferences. In concrete terms, the measure would be proportionate to ensuring that the competent authorities have, in cross-border situations, access to information whether or not a person is under a protection measure in another Member State or whether the person has granted powers of representation in another Member State. The information to be accessed through the system of interconnection would thus be limited to the information strictly necessary for that purpose.

The costs of the Regulation Proposal would thus commensurate with the objectives to be achieved.

For detailed estimation of the costs, see impact assessment, in particular its Annex 3 and 4.

- (e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

¹⁷ In some Member States, the protection of an adult by a spouse or by other relative is provided by law. In those cases, the spouse or the relative is automatically vested with the power to represent the adult in the event that the latter is not in a position to protect his or her interest.

There are no significant special circumstances applying in individual Member States, other than the difference between Member States that are contracting Parties to the HCCH 2000 Protection of Adults Convention and those that are not. This difference has been taken into account in the impact assessment.

This is without prejudice to the fact that Denmark will not take part in the adoption of the Regulation Proposal as it does not take part in the measures adopted under Article 81 TFEU¹⁸, and without prejudice to Protocol No 21, whereby Ireland can notify whether it wishes to take part in the adoption and application of the new regulation.

¹⁸ Protocol No 22 on the Position of Denmark, annexed to the Treaties.