

# WORKSHOP

Cross-border protection of vulnerable adults

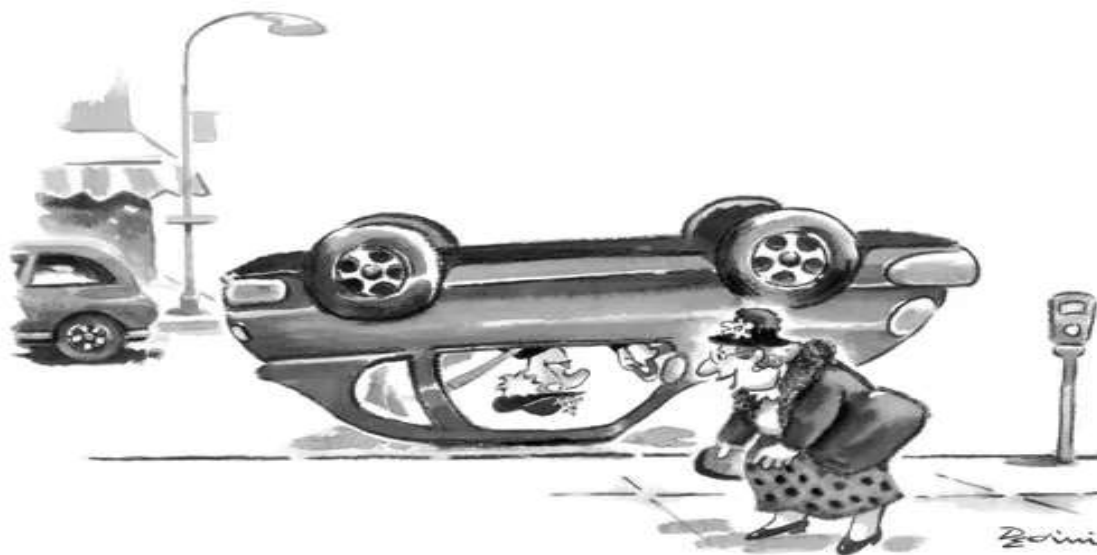
- Current situation –

Stockholm – 24 May 2023



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- ➔ 2030 - 1 in 6 people in the world will be aged 60 years or over
- ➔ 2050 - 37% of the population of Europe will be over 60, of which 10% of being 80 or over



*"Marie, are you still driving?"*



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- ➔ United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), adopted on 13/12/2006
- ➔ Protection of vulnerable persons - a human-rights concern
- ➔ Disabled person - a holder of rights and no longer only as a recipient of care. The traditional concept of “incapacitation” with deprivation of legal capacity and the appointment of tutors by courts, has been replaced by new forms of protection.
- ➔ Supported decision-making instead of substitute decision-making.
- ➔ Self-determination - fundamental in regard to human rights and dignity - advance planning of health care and patrimonial or financial issues choosing the way and the person responsible to deal with them in case of limitation or disability



The concept of **vulnerable adult** is, however, not yet defined in any international or European legal instrument

The Hague Convention on The International Protection of Adults from 13 January 2000 refers to:

*“adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests”*

### Example 1

George, **Romanian** national, dies in **Spain** where he had habitual residence and some immovable assets.

His son and only heir, John, living in **Portugal**, and with both Romanian and Portuguese citizenship, suffers from mental disorder, and is subject to a protective regime in Portugal.

The protective measures issued by the Portuguese court need to be recognised in Spain to decide whether he is able to accept the inheritance (or who might be able to authorise it) and the following sale of the properties.

## Example 2

David, **Swedish** national, living in **Greece**, owns family properties in Sweden and wishes his daughter Sarah to deal, manage and dispose of them, as he is now becoming too old to be able to do it.

David provides Sarah with a **lasting power of attorney** drafted in Greece to be exercised in the event of any incapacitating illness.

David had a stroke and needs to sell his properties to support his care. Is the lasting power of attorney issued in Greece recognised and can it be used in Sweden?

➔ **ex-post measures (non-voluntary measures)** - determined after the incapacitation. Recognised cross borders through judicial proceeding - judicial cooperation tools

➔ **ex-ante measures (or voluntary measures)** - drafted and enacted prior to the vulnerable person being unable to determine his own will. (private mandates, power or representation, lasting powers of attorney, anticipatory measures and living wills)

➔ **general powers of attorney** - the mandate expires upon supervening incapacity of the granter



## European initiative

- improve Europeans' four freedoms
- develop and **provide standard forms with respect to lasting powers of attorney**, whether referring to general powers of attorney or to advance directives

The **European Certificate of Powers of Representation**



## European initiative\*

### Prevent:

- Lengthy and costly judicial proceedings of ex post measures taken in one Member State to be enforced in another;
- Conflicting and complex rules of private international law

### Ensure:

- Legal certainty and predictability when establishing powers of representation;
- Respect for the adult dignity and personal autonomy shaped in the instrument granted to be exercised when he is not in a position to protect his own interests.

\* Marie Vautravers, presentation



- ➔ No specific regulation\* (other than the general legislation on powers of attorney) - Belgium, Denmark, Finland and The Netherlands
- ➔ Continuing powers of attorney rules – Germany, Austria, Finland, France and Spain
- ➔ Civil Code provisions on mandate – Portugal, Estonia and Czech Republic

\*report from The European Parliamentary Research Service



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## **ELRA COLLABORATION**

### **QUESTIONNAIRE**

- 1. Does any of the Registrar's duties require him to assess the legal capacity of individuals?**
- 2. Do National Registries often have cases with an international element?**
- 3. Would the Registries use a tool to access foreign registers?**

(answers from 18 Member States)



## 1. Does any of the Registrar's duties require him to assess the legal capacity of individuals?

Registrar's role in relation to people's disabilities is mainly related to its publicity or to assessing if they have been correctly represented in the transaction document presented.

- In Bulgaria, Ireland, Italy (Libro Fondiario), Latvia, Lithuania, Sweden and the Netherlands, the assess of the legal capacity is mainly an obligation of the notary or other legal entities with conveyancing competences;
- In Spain, Portugal or Malta, the registrar checks and verifies that the capacity judgement made by the Notary is duly reflected in the deed;

- In Estonia the Registrar may ask additional information or documents if he has a doubt about the legal capacity of the person;
- In Belgium the registry requires the powers of representation to be justified by law, by a proxy or by a court decision;
- In Finland the Registry Services must check, from the Finnish Population Information System, if the parties in the transaction are under guardianship; and
- In Lithuania, the capacity is checked only when accepting a request at the Customer Service Unit; the same happens in Portugal, a country where the Registrar also has conveyancing functions (similar to the notary), being, therefore, also bounded, in those cases to the verification of the capacity.

- In Austria, Italy (Libro Fondiario), and in The Netherlands in some circumstances, the limitation of legal capacity is annotated in the Landbook.
- In Spain judicial decisions on the capacity of persons are referred to the property registers to be reflected in a special book. Moreover, when a registry receives these decisions it must inform the college of registrars, who has a centralized index with all these limitations and relates it when registration publicity is given anywhere in Spain.
- In Portugal, Spain and Italy limitations on the individual capacity are registered in the Civil Registry.

## 2. Do National Registries often have cases with an international element?

- Not frequent - Belgium, Estonia, Ireland, Italy (Libro Fondiario), Latvia, Lithuania, Malta, Poland and Sweden.
- Frequent - Austria, Bulgaria, Cyprus, Finland, Portugal (where many foreigners are buying immovable properties), Slovakia, Spain and The Netherlands (mostly as regards succession and insolvency proceedings)



### **3. Would the Registries use a tool to access foreign registers?**

All answers are positive and the MS are open to use friendly tools to access foreign registers.

Lithuania and Italy (Libro Fondiario) are not accessing foreign registers, but consider using it, depending on its purposes, convenience and terms.

## CLOSING REMARKS

**Voluntary measures** are the ones more effective in ensuring **self-determination**, and mechanisms to implement them whether at national and at European level, are most welcome.

A **tool to easily access such measures**, like a **register for private mandates**, power or representation, anticipatory measures, living wills or the expected new European standard form – the proposed European Certificate of Powers of Representation - is crucial.

**Private mandates, to come to force upon incapacitation**, should not be exercised unless registered along with the evidence that disability has occurred.

The challenge that national Registries will face is, precisely, as regards immovable properties, the **acceptance of a private mandate of a vulnerable adult** coming from another MS and where could they, **efficiently, confirm if the said mandate complies with the rules of the applicable law, usually from the place where it has been issued.**

A **Registry of the Private Mandates** would also **prevent** situations arising from a possible **conflict between ex-ant measures and ex-post measures**, that might occur in case the court is not aware of the previous ones, or in other words, would allow to determine the priority between different measures, **ensuring, therefore, legal certainty.**



*"It's your mother. She's floated back."*



Voluntary measures for vulnerable adults protection occur when they are drafted and enacted prior to the vulnerable person being unable to determine his or her own will, respecting self-determination. They are named as private mandate, lasting power of attorney, power of representation, etc, and should come into force upon the incapacity of the granter and should survive the said incapacity.

## QUESTION

- Do lasting power of attorneys, **as regards patrimonial and financial issues**, to be exercised in the event of an adult disability exist in your national legal system?
- If yes, how would one know if they have been issued and how would one be sure (or proof) that the disability has occurred and, therefore, that the private mandate is in force? Are they registered in any specific Registry?



# Thank you for your attention!

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May 2023



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