



Regulation on protection of adults

European Disability Forum
October 2023

**Proposed amendments to the Regulation on Protection
of Adults**

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the granting authority can be held responsible for them



Table of Contents

Table of Contents	2
Introduction.....	2
Executive Summary	3
Proposed amendments to articles of the Regulation	4
Article 2: Scope	4
Article 3: Definitions	8
Article 13: No review as to the substance	9
Article 21: Placement	9
Proposed amendments to the recitals.....	11
Document credits	16

Introduction

This document presents amendments to the [proposed Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults 2023/0169 \(COD\)](#).

It was prepared with the support and input of [Mental Health Europe](#), and reviewed and approved by EDF Board.

The document should be read along with [EDF position paper on disability rights in civil judicial cooperation](#) that was submitted to the consultation by the European Commission on the topic, as well as the UN Convention on the Rights of Persons with Disabilities.

This document also takes into consideration the [joint submission](#) of the UN Special Rapporteur on the rights of persons with disabilities and the Independent Expert on the enjoyment of all human rights by older persons which [criticises the proposed Regulation](#).

The European Disability Forum

The European Disability Forum is an independent NGO that represents the interests of 100 million Europeans with disabilities. EDF is a unique platform which brings together representative organisation of persons with disabilities from across Europe. EDF is run by persons with disabilities and their families. We are a strong, united voice of persons with disabilities in Europe.

Mental Health Europe

Mental Health Europe is the largest independent network organisation representing mental health users, professionals and service providers across Europe.

Mental Health Europe is committed to the promotion of positive mental health, the prevention of mental distress, the improvement of care, advocacy for social inclusion and the protection of the rights of (ex)users of mental health services, persons with psychosocial disabilities, their families and carers.

Executive Summary

While we recognise the importance of conflict of laws legislation as a means to provide legal certainty, avoid gaps and promote the uniform application of substantive international law including in the EU, **we deeply regret that the proposed Regulation includes provisions which do not align with international human rights law and would lead to violations of the rights of persons with disabilities.**

The EU and all its Member States ratified the UN Convention on the Rights of Persons with Disabilities (CRPD).

Despite the CRPD being mentioned in the recital of the proposed regulation, **several binding provisions are not in line with the obligations set by the Convention.**

To ensure that the EU and all the Member States comply with the CRPD – including through its progressive realisation which is taking place through legal reform of decision-making regimes in several Member States – we proposed amendments to the following articles:

- Amend **article 2 on the scope** to avoid legitimisation of legal incapacitation and take into account the evolution of legislation and policy on legal capacity in EU Member States
- Amend **article 3 on definition** to include the concept of will and preferences of the person
- Amend **article 13 on no review as to the substance** to ensure the highest level of protection of the autonomy of adults
- Delete **article 21 on placement** which violate the fundamental rights of persons with disabilities

We also propose amendments to the recitals based on the CRPD and how it should be interpreted in relation to the 2000 Convention on the international protection of adults and the Regulation.

If proposed amendments are accepted, adjustments will be necessary in the remaining provisions of the Regulation, so that for example, the European Certificate of Representation may apply to the supported decision-making regimes. EDF can support the adjustments by providing additional proposals.

We call on the EU institutions and all EU Member States to promote and protect the rights of all in line with the CRPD, recalling their commitments made in the [Council Conclusions on the Protection of Vulnerable Adults across the European Union](#) adopted in 2021.

Proposed amendments to articles of the Regulation

Article 2: Scope

Commission proposal	Proposed amendments
<p>1. This 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.</p> <p>2. This Regulation shall also apply to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.</p> <p>3. The matters referred to in paragraph (1) may, in particular, include:</p> <p>(a) the determination of the incapacity of an adult and the institution of a protective regime;</p> <p>(b) the placing of the adult under the protection of a judicial or administrative authority;</p> <p>(c) guardianship, curatorship and analogous institutions;</p> <p>(d) the designation and functions of any person or body having charge of the adult's person or property, representing, or assisting the adult;</p>	<p>1. This 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 require support in decision making.</p> <p>2. This Regulation shall also apply to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.</p> <p>3. The matters referred to in paragraph (1) and (2) may, in particular, include:</p> <p>(a) the determination of the incapacity of an adult and the institution of a protective regime Any form of supported decision making regime, including more intensive form of support;</p> <p>(b) the placing of the adult under the protection of a judicial or administrative authority Powers of representation granted by an adult to be exercised when that adult is not in the position to protect his or her interests;</p> <p>(c) guardianship, curatorship and analogous institutions;</p>

- (e) decisions concerning the placement of the adult in an establishment or other place where protection can be provided;
- (f) the administration, conservation or disposal of the adult's property;
- (g) the authorisation of a specific intervention for the protection of the person or property of the adult.

4. This Regulation does not apply to:

- (a) maintenance obligations;
- (b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;
- (c) property regimes in respect of marriage or any similar relationship;
- (d) trusts or succession;
- (e) social security;
- (f) public measures of a general nature in matters of health;
- (g) measures taken in respect of a person as a result of penal offences committed by that person;
- (h) decisions on the right of asylum and on immigration;
- (i) measures directed solely to public safety.

5. Paragraph (4) does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult.

- (d) the designation and functions of any person or body ~~having charge of the adult's person or property, representing, or assisting the adult providing a support in decision making to an adult in regard to property, representation or other forms of assistance;~~

~~(e) decisions concerning the placement of the adult in an establishment or other place where protection can be provided~~
the designation and functions of any person or body that is granted the powers of representation;

~~(f) the administration, conservation or disposal of the adult's property;~~

~~(g) the authorisation of a specific intervention for the protection of the person or property of the adult.~~

4. In the transition from substituted decision-making to supported decision-making regimes, this Regulation may also apply to guardianship, curatorship and analogous institutions.

45. This Regulation does not apply to:

- (a) maintenance obligations;
- (b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;
- (c) property regimes in respect of marriage or any similar relationship;
- (d) trusts or succession;
- (e) social security;
- (f) public measures of a general nature in matters of health;
- (g) measures taken in respect of a person as a result of penal offences committed by that person;
- (h) decisions on the right of asylum and on immigration;
- (i) measures directed solely to public safety;

(j) decisions concerning the placement of the adult in an establishment or other place.

56. Paragraph ~~(4)~~(5) does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult to act as the one providing the adult support in decision making or executing powers of representation.

Justification:

The proposed amendments reflect the requirements for the implementation of Article 12 CRPD and [General Comment no. 1. to the CRPD](#).

Paragraph 1

Article 12 CRPD recognises that all persons with disabilities have legal capacity on an equal basis with others. The existence of legal capacity is, therefore, presumed. In order to align the present draft Regulation with these requirements, the notion that adults are not in the position to protect their interests should be erased. Instead, and with the purpose of determining the scope of the draft Regulation, the words “require support in decision making.”

Paragraph 3

It is proposed that this paragraph be amended so that it is applied equally for measures both in conjunction with the paragraph 1 and 2 of this Section. This is because there shall be no difference in applying supported decision making regimes to adults and to minors when this is required, especially taking into account that in different EUMS minors can reach emancipation for certain decisions (usually on medical treatment) or be judicially granted full emancipation before reaching age of maturity (usually connected with marriage and parenthood) and they should also enjoy right to enjoy supported decision-making mechanisms when required.

Sub-paragraph (a) shall be completely replaced with the new text to include any form of supported decision-making regime, including more intensive forms of support. The explanation on what these forms of support entail, the Preamble with new paragraphs 4 and 5 should be read.

Sub-paragraph (b) shall be completely replaced with the new text. As people cannot be placed under guardianship of natural persons, their legal capacity cannot be denied by placing them under the protection of any judicial or administrative body. The new text includes advance directives. Removing “judicial or administrative body” from this provision does not imply that EUMS cannot regulate by national legislation that there are safeguards in implementing advanced directives that can be of judicial or administrative nature.

Sub-paragraph (c) shall be completely erased as incompatible with the Article 12 CRPD.

In the sub-paragraph (d) “having charge of the adult’s person or property, representing or assisting the adult” should be replaced with the new text to ensure that the designation or functions of any person or body should involve only supported decision-making regimes. Supported decision-making should not be mixed with guardianship, custodianship or other analogous institutes, because there is a clear distinction between a person or a body of a “guardian”, “custodian” or “tutor” and the “supporter”, “aide”, “advisor”. The distinction is made by its function and the way how the supported decision-making regime is implemented; that it always must give a precedence to the will and preferences of the person concerned and never be based on the assumption of the best interests or the concept of dangerousness. The person or a body (e.g. an organisation that provides services of assisting in decision-making) therefore does not exercise its own volition, but the will and preferences of the person concerned in any legal matter.

Sub-paragraph (e) shall be completely replaced with the new text that refers to advance directives.

Sub paragraphs (f) and (g) shall be completely erased as incompatible with the Article 12 CRPD.

Paragraph 4

Being aware that EU Member States are transitioning from substituted to supported decision-making systems and that they may be in different stages until the full implementation of the CRPD it is proposed that this Regulation may also be within that context applied to guardianship, curatorship and analogous institutions.

Paragraph 5

In line with Article 19 CRPD it is proposed that this Regulation does not apply to the decisions concerning the placement of the adult in an establishment or other place on the

basis of arguments provided for erasing Paragraph 33 from Preamble and Article 21 of the draft Regulation.

Paragraph 6

It is proposed that the provision of non-application on certain matters does not exclude the possibility of providing support in decision making on these matters.

Article 3: Definitions

Commission proposal	Proposed amendments
<p>For the purposes of this Regulation, the following definitions apply:</p> <p>(...)</p> <p>(3) ‘powers of representation’ means powers granted by an adult, either under an agreement or by a unilateral act, to be exercised when that adult is not in a position to protect his or her interests;</p>	<p>For the purposes of this Regulation, the following definitions apply:</p> <p>(...)</p> <p>(3) ‘powers of representation’ means powers granted by an adult, either under an agreement or by a unilateral act, to be exercised when that adult is not in a position to protect his or her interests <i>in respect of his or her will and preferences;</i></p>

Justification:

It is proposed that the notion of “in respect of his or her will and preferences” is added to the provision in order to emphasise the requirements of Article 12 CRPD and General Comment no. 1. to the CRPD. “Will and preferences” or the “best interpretation of the will and preferences” of the person (para. 21 of General Comment no. 1 to the CRPD) are also applicable to cases where the person cannot provide direct free and informed consent (for example in the case of a person in the coma).

On the other hand, Member States should refrain from referring to the “best interest of the person”. The CRPD Committee explains that “The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”

Article 13: No review as to the substance

Commission proposal	Proposed amendments
<p>Under no circumstances may a measure taken by the authorities of a Member State be reviewed as to its substance.</p>	<p>1. Under no circumstances may a measure taken by the authorities of a Member State be reviewed as to its substance.</p> <p>2. <i>Notwithstanding the rule in paragraph (1) a measure taken by the authorities of a Member State of origin may be replaced with another measure that better protects autonomy of an adult concerned.</i></p>
<p>Justification:</p>	
<p>It is proposed that another paragraph is added to this provision to enable the receiving Member State to amend the existing measure with a more appropriate one that will better protect the autonomy of the adults concerned. This is necessary especially because there will be differences between the Member States on how far they have transitioned from substituted to supported decision-making systems. While in the Member State of origin still the guardianship may be a dominant form of protection, in the receiving Member State there may be more supported decision-making regimes that may better suit the needs of the person concerned. Therefore, the receiving Member State should have an option to replace the existing measure with a more appropriate one.</p>	

Article 21: Placement

Commission proposal	Proposed amendments
<p>1. If an authority of a Member State contemplates the placement of the adult in another Member State in an establishment or other institution where protection can be provided, it shall first obtain the consent of a Central Authority of that other Member State. To that effect, it shall transmit to the Central Authority of the requested Member State a report on the adult together with the reasons for the proposed measure, using the form set out in Annex VI.</p> <p>2. Paragraph (1) shall not apply where the placement is contemplated with a private person.</p>	<p>1. If an authority of a Member State contemplates the placement of the adult in another Member State in an establishment or other institution where protection can be provided, it shall first obtain the consent of a Central Authority of that other Member State. To that effect, it shall transmit to the Central Authority of the requested Member State a report on the adult together with the reasons for the proposed measure, using the form set out in Annex VI.</p> <p>2. Paragraph (1) shall not apply where the placement is contemplated with a private person.</p>

3. Except where exceptional circumstances make this impossible, the decision granting or refusing consent shall be transmitted to the requesting authority no later than six weeks following the receipt of the request.

4. Paragraphs (1), (2) and (3) shall not preclude Central Authorities or competent authorities from entering or maintaining existing agreements or arrangements with Central Authorities or competent authorities of one or more other Member States simplifying the consultation procedure for obtaining consent in their mutual relations.

~~3. Except where exceptional circumstances make this impossible, the decision granting or refusing consent shall be transmitted to the requesting authority no later than six weeks following the receipt of the request.~~

~~4. Paragraphs (1), (2) and (3) shall not preclude Central Authorities or competent authorities from entering or maintaining existing agreements or arrangements with Central Authorities or competent authorities of one or more other Member States simplifying the consultation procedure for obtaining consent in their mutual relations.~~

Justification:

In its [General Comment no. 5 on the Article 19 CRPD](#), the CRPD Committee recognised that persons with disabilities have historically been denied their personal and individual choice and control across all areas of their lives, while many of them have been presumed to be unable to live independently in self-chosen communities. Thus the resources have been invested in institutions instead of in developing possibilities for persons with disabilities to live independently in the community, leading to abandonment, dependence on family, institutionalisation, isolation and segregation. This Committee also noted that the denial of legal capacity, either through formal laws and practices or *de facto* by substituted decision-making about living arrangements, represents the barrier between full implementation of Article 19 CRPD. Further General Comment no. 5 explains that all people with disabilities have the right to independent living in community. Neither the full or partial deprivation of any “degree” of legal capacity nor the level of support required may be invoked to deny or limit the right to independence and independent living in the community to persons with disabilities.

This provision also goes against efforts of deinstitutionalisation covered under the EU Strategy on the rights of persons with disabilities and by the policies of several EU Member States. Establishing such a procedure would lead to facilitating placement through this Regulation in contradiction to the existing EU policies on deinstitutionalization and the obligations the EU took itself by ratifying the CRPD.

This provision must be deleted.

Proposed amendments to the recitals

Commission proposal	Proposed amendments
<p>Whereas:</p> <p>(1) The purpose of this Regulation is to lay down rules, in cross-border cases, for the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. In particular, this Regulation lays down rules on jurisdiction, applicable law, recognition and enforcement of measures, acceptance of authentic instruments and cooperation between Member States' competent authorities and Central Authorities.</p>	<p>Whereas:</p> <p>(1) The purpose of this Regulation is to lay down rules, in cross-border cases, for the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests and require support in decision making. In particular, this Regulation lays down rules on jurisdiction, applicable law, recognition and enforcement of measures, acceptance of authentic instruments and cooperation between Member States' competent authorities and Central Authorities.</p> <p><i>NEW (2) The Union concluded the United Nations Convention on Rights of Persons with Disabilities (hereinafter referred to as "UNCRPD") on 22 January 2011 to take a regional leadership and support Member States in the implementation of said Convention to the extent of its competencies.</i></p> <p><i>NEW (3) Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of civil, political, economic, social and cultural rights. Every natural person has the right to respect for their inherent dignity, individual autonomy, including the freedom to make their own choices independently of other people; therefore, to fully enjoy their legal capacity. Legal capacity acquires a special significance for persons with disabilities when they have to make fundamental decisions about their health, education and work. In many cases, the denial of legal capacity to persons with disabilities has led to them being</i></p>

deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty. While all persons with disabilities can be affected by denial of legal capacity and substitute decision-making, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by such regimes and denial of their legal capacity.

NEW (4) Full recognition of right to legal capacity requires reframing the principle of protection. Instead of placing persons into regimes of protection that restrict their legal capacity, protection within the UNCRPD is understood as a principle that is achieved by the provision of a range of support to people who require assistance in decision making about the exercise of their individual rights. Instead of focusing protection to measures that restrict them in exercising legal capacity, the protection is understood as a principle that inherently respects the will and preferences of the person concerned. Therefore, the person concerned instead of being protected by another person or a body, is protected by ensuring that their will and preferences are respected in the decision making, with which they retain full control over their own lives.

Supported decision-making may take many forms. For example, persons concerned may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decision, or may call for other forms of support, such a peer support, advocacy and self-advocacy support, or assistance with communication.

Supported decision-making regimes might include measures relating to universal design and accessibility by

obtaining information in an understandable format or getting professional sign language interpretation. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. Advance planning mechanisms, when a person concerned may in advance plan how their will and preferences shall be addressed in times of certain decision-making, also contribute to the full respect of legal capacity.

NEW (5) Sometimes the more intensive forms of support may be necessary, but even when they may technically look like a substitute, for example that another person signs off a necessary legal form, the decision-making must be done on the basis of respect for will and preferences of the person concerned. That may especially apply for persons in coma or other similar conditions where communication with a person cannot be established with any other form of support. In these situations, a person designated to provide support might make inquiries in the concerned person's social circle, family or conduct other activities in order to ascertain what would be the wishes and preferences of that person in a certain legal situation. The decision-making in such situations must not be based on the perceived best interest but on the will and preferences of the person concerned, similarly to how advance planning mechanisms are implemented.

NEW (6) This Regulation designates the progressive interpretation of the interconnection between the Hague Convention on the Protection of Adults 2000 and UN CRPD. Recognising the

	<p><i>open-ended nature of the Article 3 of the Hague Convention on the Protection of Adults 2000 and that the mechanisms of protection are not limited only to the institutes of protection that deny legal capacity, this Regulation aims at modernising implementation of this Convention with progressive human rights standards that are focused on full respect of autonomy of persons concerned. As a source of private international law, this Regulation encourages state parties to embrace supported decision-making regimes and advance planning in their domestic systems.</i></p>
--	--

Justification:

The proposed new recitals align with the proposals made in articles of the regulation to comply with, and promote the CRPD. New (3) focuses on the principle of equality before the law and right to legal capacity as enshrined in article 12 CRPD and its interdependence with other human rights covered by the Convention. New (4) gives more details on how to understand legal capacity moving from substituted to support decision-making regimes, while also introducing the notion of “will and preferences” (over the concept of “best interest of the person” which may apply to minors but shall not apply to adults). New (5) gives guidance on more intensive forms of support in line with the CRPD. Finally new (6) covers the relationship and interpretation between the CRPD and the 2000 Hague Convention on international protection of adults.

Commission proposal	Proposed amendments
<p>(33) According to Article 19 of the UNCRPD, persons with disabilities are to have the opportunity to choose their place of residence and where and with whom they live, on an equal basis as others, and not to be obliged to live in a particular living arrangement. For the purposes of this Regulation, situations may arise where the authorities of a Member State need to take a measure concerning the place of residence or temporary placement of an adult. Examples of such situations are cases where</p>	<p><i>(33) According to Article 19 of the UNCRPD, persons with disabilities are to have the opportunity to choose their place of residence and where and with whom they live, on an equal basis as others, and not to be obliged to live in a particular living arrangement. For the purposes of this Regulation, situations may arise where the authorities of a Member State need to take a measure concerning the place of residence or temporary placement of an adult.</i></p>

authorities provide assistance to the adult in making a decision on his or her place of residence or where an adult is not in a position to express his or her views and has not granted powers to make a decision concerning his or her place of residence to a representative, and an admission to a care facility is required. Where such placement is to be implemented in another Member State, a consultation procedure for obtaining consent of the Central Authority of the Member State of implementation should be carried out prior to taking that measure. The request for consent made by the authority of origin should include the reasons for the proposed measure, and the views expressed by the adult concerned where possible, in light of Article 19 of the UNCRPD. The Central Authority of the Member State of implementation should be able to decide promptly whether to grant the consent or to refuse it. The absence of a reply within six weeks should not be understood as consent and without consent the measure should not be implemented. The consultation should not be carried out when the placement is with an individual and does not require the supervision of any public authority of the Member State of implementation.

~~**Examples of such situations are cases where authorities provide assistance to the adult in making a decision on his or her place of residence or where an adult is not in a position to express his or her views and has not granted powers to make a decision concerning his or her place of residence to a representative, and an admission to a care facility is required. Where such placement is to be implemented in another Member State, a consultation procedure for obtaining consent of the Central Authority of the Member State of implementation should be carried out prior to taking that measure. The request for consent made by the authority of origin should include the reasons for the proposed measure, and the views expressed by the adult concerned where possible, in light of Article 19 of the UNCRPD. The Central Authority of the Member State of implementation should be able to decide promptly whether to grant the consent or to refuse it. The absence of a reply within six weeks should not be understood as consent and without consent the measure should not be implemented. The consultation should not be carried out when the placement is with an individual and does not require the supervision of any public authority of the Member State of implementation.**~~

Justification:

See the arguments provided in the justification for deleting Article 21 of the draft Regulation. Here in the Preamble is the Article 19 of the CRPD interpreted contrary to the authoritative interpretation made by the CRPD Committee in the General Comment no. 5.

Document credits

This document was prepared by Marine Uldry, EDF Human Rights Policy Coordinator (marine.uldry@edf-feph.org), with the support and expertise of Kristijan Grdan, Vice-President of Mental Health Europe.



The European Disability Forum
Mundo Madou
Avenue des Arts 7-8
1210 Brussels, Belgium.

www.edf-feph.org

info@edf-feph.org

This publication has received financial support from the European Union. The information contained in this publication does not necessarily reflect the official position of the European Commission.

